

IN THE SUPREME COURT OF NEVADA
STATE OF NEVADA

JESUS NAJERA,

Petitioner,

vs.

THE EIGHTH JUDICIAL
DISTRICT COURT; THE
HONORABLE CRYSTAL
ELLER,

Respondents,

STATE OF NEVADA,

Real Party in Interest.

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S. Ct. No.: 83923

DIST. CT. NO. C-21-356361-1

REPLY TO STATE'S ANSWER TO PETITION FOR WRIT OF
MANDAMUS

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IN THE SUPREME COURT OF NEVADA

STATE OF NEVADA

JESUS NAJERA,

Petitioner,

vs.

THE HONORABLE CRYSTAL

ELLER, EIGHTH JUDICIAL

DISTRICT COURT JUDGE,

DEPT. NO. 19,

Respondent,

STATE OF NEVADA,

Real Party in Interest.

S. Ct. No.: 83923

DIST. CT. NO. C-21-356361-1

REPLY TO STATE'S ANSWER FOR PETITION FOR WRIT OF

MANDAMUS

NOW COMES Defendant, JESUS NAJERA, through his attorney of

1
2 record, MICHAEL D. PARIENTE, ESQ. and JOHN G. WATKINS, ESQ., Of
3 Counsel, and files the instant Reply to the State's Answer pursuant to this
4 Court's Order dated January 12, 2022.

5
6 DATED this 30th day of January, 2022.

7 Respectfully submitted,

8 THE PARIENTE LAW FIRM, P.C.

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I.

LAW AND ARGUMENT

A.

The State ignores N.R.Cr.P. Rule 11 which requires the late filing party to seek permission of the district court before the date the brief is due.

Writs of habeas corpus can be civil or criminal and is unclear when it becomes civil as opposed to criminal. See, *Mazzan v. State*, 109 Nev. 1067, 1070, 863 P.2d 1035, 1036 (1993) (“[H]abeas corpus is a proceeding which should be characterized as neither civil nor criminal for all purposes.”) *Id.*, (cites omitted.) Najera believed proceedings related to a habeas corpus proceeding such as a motion to strike the State’s untimely filing of its answer to the habeas petition are characterized as civil in nature. Since the State did not object to Najera’s application of EDCR Rule 2.25, apparently the State was of the same belief that the motion was civil in nature. Clearly, if the State believed the EDCR Rule 2.25 did not apply to Najera’s Motion to Strike, it would have raised that concern with the lower court. Most importantly, the district court itself did not disagree with the use of EDCR 2.25.

If this Court finds that proceedings related to writs of habeas corpus are criminal and not civil, then the newly enacted Nevada Rules of Criminal

Procedure control. Extensions of time are controlled by N.R.Cr.P. 11(1), which states:

Rule 11. Extending or Shortening Time

1. When an act must be done at or within a specified time, the court may extend or shorten the time period by its own discretion, or by oral or written motion for good cause. **A request to extend *must* be made *before* the time period would have originally expired.**

(Boldness and italics added.)

It is uncontroverted that the State violated N.R.Cr.P. Rule 11(1). The State *never* requested an extension, either orally or written, at any time. The district court never required the State to comply with N.R.Cr.P. Rule 11(1). The sole basis for the district court's¹ denial of Najera's Motion to Strike the State's untimely Answer was the lack of prejudice. N.R.Cr.P. Rule 11 is not dependent on prejudice or the lack thereof.

The State violated Rule 11 – its Return was due September 20, 2021 but was filed November 3, 2021 *after* the State's deadline had passed. The State

1. Judge Thompson was sitting for Judge Eller and he made it clear that his decision was what Judge Eller instructed him on how to rule on Najera's Motion to Strike. Judge Thompson stated, "Well, I can tell you that it's Judge Eller's position and which I'm going to adopt that excusable neglect in filing the motion late if there's no prejudice to the Defendants would justify her filing those late, so I'm going to deny the motion to strike." PA 77, ls. 8-11.

1 *never* sought permission to file its brief late required by Rule 11. There is
2
3 nothing discretionary in Rule 11’s specific language: “A request to extend must
4 be made before the time period would have originally expired.” *Id.*

5
6 Here, the State never even filed a request to extend the time period. It was
7 required by N.R.Cr.P. Rule 11 to do so and this request would have had to be
8 made *before* the State’s deadline of September 20, 2021 to file its Return. No
9 request to extend the time period was made and the State, without any authority
10 to do so, filed its Return 44 days after it was due on November 3, 2021. Since
11 the State violated N.R.Cr.P. Rule 11(1), the State’s 44-day late filing cannot be
12 condoned and his request for relief in this Court must be granted.

13 CONCLUSION

14
15 The State’s return was 44 days late and the State never requested to extend
16 the deadline to file its Return *before* its deadline of September 20, 2021. The
17 State’s abject failure to comply with N.R.Cr.P. Rule 11(1) warrants this Court’s
18 granting Najera’s Petition.²

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21 DATED this 30th day of January, 2022.

22
23 Respectfully submitted,

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27 2. EDCR 2.25, EDCR Rule 3.50 (superseded by Nevada Rules of Criminal
28 Procedure – March 25, 2021), and N.R.Cr.P. Rule 11(1) are substantially similar
requirements for extensions of time.

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Attorneys for Petitioner

VERIFICATION

Under penalty of perjury, the undersigned declares that in the foregoing Reply and knows the contents thereof; that Reply is true of the undersigned's own knowledge, except as to those matters stated on information and belief, and as to such matters the undersigned believes them to be true.

DATED this 30th day of January, 2022.

Respectfully submitted,



MICHAEL D. PARIENTE, ESQ.
Attorney for Petitioner
JOHN G. WATKINS, ESQ.
OF COUNSEL

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Reply complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

☐ This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 with Times Roman 14 font style

2. I further certify that this brief complies with the page – or type - volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

☐ Proportionally spaced, has a typeface of 14 points or more, and contains 1,389 words; or

☐ Monospaced, has 10.5 or fewer characters per inch, and contains ----- words or ----- lines of text, or

☐ Does not exceed 51 pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP

1
2 28(e)(1), which requires every assertion in the brief regarding
3
4 matters in the record to be supported by a reference to the page
5
6 and volume number, if any, of the transcript or appendix where
7
8 the matter relied on it to be found. I understand that I may be
9
10 subject to sanctions in the event that the accompanying brief
11
12 is not in conformity with the requirements of the Nevada Rule
13
14 of Appellant Procedure.
15

16 Dated this 30th day of January, 2022.
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Michael D. Pariente, Esquire

CERTIFICATE OF SERVICE

I, Christopher Barden, hereby certify and affirm that this document was filed electronically with the Court of Appeals on January 30, 2022. Electronic Service of the foregoing Petition for rehearing shall be made in accordance with the Master Service List as follows:

STEVEN WOLFSON,
DISTRICT ATTORNEY,

DEPARTMENT 19,
DISTRICT COURT JUDGE ,

DATED this 30th day of January, 2022.



Chris Barden, Paralegal