

PET

Michael D. Pariente

Bar No. 9469

The Pariente Law Firm, P.C.

John G. Watkins, Of Counsel

Bar No. 1574

3800 Howard Hughes Parkway

Suite 620

Las Vegas, NV 89169

(702) 966-5310

Attorneys for Petitioner

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Elizabeth A. Brown
Clerk of Supreme Court

**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.:

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

**PETITION FOR WRIT OF HABEAS CORPUS OR IN THE
ALTERNATIVE A WRIT OF MANDAMUS**

COMES NOW Petitioner, JESUS NAJERA, through his counsel,

MICHAEL D. PARIENTE, ESQ. and JOHN G. WATKINS, ESQ., Of Counsel,

(being in constructive custody and unlawfully restrained by his liberty by Sheriff Kevin McMahon), and petitions this Court for an Order granting the Writ of Habeas Corpus¹, or in the alternative the Writ of Mandamus on the grounds that Judge Eller's denial of Najera's habeas petition: (1) was contrary to law, thus an abuse of discretion and (2) there was a lack of probable cause to find constructive possession for Count 8 of the Indictment.

DATED this 21st day of April, 2023.

Respectfully submitted,

THE PARIENTE LAW FIRM, P.C.



MICHAEL D. PARIENTE, ESQ.
JOHN G. WATKINS, ESQ. OF COUNSEL
3800 Howard Hughes Parkway
Suite 620
Las Vegas, Nevada 89169
Attorneys for Petitioner

1. "Every person unlawfully committed, detained, confined or restrained of his or her liberty, **under any pretense whatever**, may prosecute a writ of habeas corpus to inquire into the cause of such imprisonment or restraint." NRS 34.360. (emphasis added.)

NRAP 26.1 DISCLOSURE STATEMENTS

The attorneys representing Petitioner Jesus Najera herein state, “there is no such corporation” referred to in NRAP 26.1.

ROUTING STATEMENT

Petitioner Jesus Najera (“Najera”) believes his case is presumptively assigned to the Nevada Court of Appeals.

**VERIFICATION IN SUPPORT OF PETITION FOR WRIT OF HABEAS
CORPUS / WRIT OF MANDAMUS**

I, MICHAEL D. PARIENTE, ESQUIRE makes the following Declaration under the penalty of perjury and declares as follows:

1. Your Declarant is a duly licensed Attorney at Law in the State of Nevada;
2. Your Declarant represents JESUS NAJERA on his Petition for Writ of Habeas Corpus / Mandamus;
3. Your Declarant verifies that the facts for the Petition is within the knowledge of your Declarant;
4. Your Declarant believes that Judge Crystal Eller’s finding of probable cause where there was no probable cause is an abuse of discretion as a matter of law.

5. Your Declarant on the authority of Mr. Najera requests that this Court
issue a Writ of Habeas Corpus / Mandamus.

FURTHER YOUR DECLARANT SAYETH NAUGHT

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on this 21st day of April, 2023.


MICHAEL D. PARIENTE, ESQ.

JURISDICTION

This Court has jurisdiction to grant a writ of habeas corpus. Nevada
Constitution, Article 6 § 4; NRS 34.360 *et. seq.*

The Supreme Court has the “power to issue writs of mandamus.” Nev.
Const., art 6 § 4; NRS 34.160. (A writ of mandamus will issue “. . . to compel
the admission of a party to the use and enjoyment of a right . . . to which he is
entitled and from which he is unlawfully precluded by such inferior tribunal...”

ISSUES PRESENTED

1. THE DISTRICT COURT’S DECISION THAT NAJERA’S
POSSESSORY INTREST IN HIS APARTMENT ESTABLISHED
CONSTRUCTIVE POSSESSION OF THE CONTROLLED
SUBSTANCE IN COUNT 8 OF THE INDICTMENT WAS
CONTRARY TO LAW, THUS AN ABUSE OF DISCRETION.
2. EVIDENCE THAT THE CONTROLLED SUBSTANCE WAS
FOUND SOMEWHERE IN NAJERA’S RESIDENCE IS

1
2 INSUFFICIENT TO ESTABLISH PROBABLE CAUSE THAT
3 NAJERA HAD CONSTRUCTIVE POSSESSION OF THE
4 CONTROLLED SUBSTANCE.

5
6 **RELIEF SOUGHT**

7 Najera requests that this Court reverse the district court's decision
8 denying Najera's petition for a writ of habeas corpus, on the following grounds,
9 to wit: (1) a possessory interest in a residence is insufficient to establish
10 constructive possession and (2) evidence limited to the controlled substance
11 being found somewhere in Najera's residence is insufficient to establish
12 probable cause that Najera had constructive possession of the controlled
13 substance.
14

15 **STATEMENT OF THE CASE**

16 The district court abused its discretion finding probable cause on the
17 element of possession – i.e., there was no evidence that Najera had actual or
18 constructive possession of the alleged controlled substance found.
19

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21 **THE LEGAL REMEDY OF HABEAS CORPUS IS WARRANTED TO**
22 **CHALLENGE THE UNLAWFUL RESTRAINT OF NAJERA'S**
23 **LIBERTY**

24 Writs of habeas corpus are legal remedies in the ordinary course of law.
25 *Shelby v. Sixth Jud. Dist. Ct.*, 82 Nev. 204, 414 P.2d 942 (1996) (“ . . . The writ
26 of habeas corpus is the plain, speedy and adequate remedy. . . .”) in law. *Id.*, 82
27
28

Nev. at 207. A defendant’s right to prosecute a writ of Habeas Corpus in this Court “shall not be suspended unless. . . .” The “unless” exclusion is inapplicable in Najera’s case.

Najera challenges the unlawful restraint of his liberty because Judge Eller abused her discretion in finding he had constructively possessed the alleged controlled substance found.

NRS 34.500(7) states in pertinent part: “. . . the petitioner may be discharged in any one of the following cases:

7. Where the petitioner has been committed or indicted on a criminal charge, including a misdemeanor, except misdemeanor violations of chapters 484A to 484E, inclusive, of NRS or any ordinance adopted by a city or county to regulate traffic, **without reasonable or probable cause.**

(emphasis added.)

Since Mandamus is an extraordinary remedy, relief is most often denied procedurally if the person had a legal remedy. Najera seeks relief through habeas corpus as well as mandamus out of an abundance of caution.

EXTRAORDINARY RELIEF BY MANDAMUS IS WARRANTED FOR MISAPPLICATION OF LAW

A writ of mandamus is available “. . . to control a manifest abuse or arbitrary or capricious exercise of discretion. . . .” *State v. Dist. Ct. (Armstrong)*² (citing *Round Hill Gen. Imp. Dist. v. Newman*³, 97 Nev. at 603-604), 127 Nev. at 931. An exercise of discretion is considered arbitrary if it is “founded on prejudice or preference rather than on reason” and capricious if it is “**contrary to the evidence or established rules of law.**” *State v. Dist. Ct. (Armstrong)*, 127 Nev. at 931-932 (quoting definitions of Arbitrary and Capricious, *Black’s Law Dictionary* 119 (9th ed. 2009) (emphasis added). A manifest abuse of discretion is “[a] clearly erroneous interpretation of law or a clearly erroneous application of law or rule.” *State v. Dist. Ct. (Armstrong)*, 127 Nev. at 931-932. (cites omitted.). In Najera’s case, Judge Eller’s finding there was probable cause that Najera had constructive possession of the alleged controlled substance found was contrary to the evidence *and* established rules of law.⁴

2. 127 Nev. 927, 267 P.3d 777 (2011).

3. 97 Nev. 601, 637 P.2d 534 (1981).

4. Actual possession is not at issue in this case.

I.

LAW AND ARGUMENT

A.

**THE DISTRICT COURT’S FINDING THAT NAJERA HAD
CONSTRUCTIVE POSSESSION OF THE CONTROLLED SUBSTANCE
CHARGED IN COUNT 8 OF THE INDICTMENT WAS AN ABUSE OF
DISCRETION**

**A Possessory Interest In A Residence Is Insufficient To Establish
Constructive Possession:**

The basis for the district court’s finding of constructive possession was Najera’s possessory interest in the property where the controlled substance was allegedly found. The district court held,

Circumstantial evidence properly established constructive possession. Petitioner misstates the *Glispey* holding. *Glispey v. Sheriff, Carson City*, 89 Nev. 221, 223, 510 P.2d 623, 624 (1973). The State established the location of Petitioner Najera’s “residence” and ownership of the residence, which allowed for the inference that Najera maintained control of that residence. This establishes constructive possession of the ODV positive cocaine. The cases cited by Petitioner are not analogous to the instant matter.

Order Denying Najera’s Petition, PA 215.⁵

5. The district court erroneously claims Najera misstated the holding in *Glispey*. The district court does not explain how Najera misquoted *Glispey*. Further, the district court claimed, without citation to any legal authority, that “the State established the location of Petitioner Najera’s ‘residence’ and ownership of the

A possessory interest in the premises where narcotics are found is not enough to infer possession of these drugs. *See Watson v. State*, 88 Nev. 196, 198, 495 P.2d 365, 366 (1972). *See also, Konold v. Sheriff*, 94 Nev. 289, 579 P.2d 768 (1978) (“In a sense it can be said that one has possession of everything that is contained in the home or apartment in which he lives but this is not the sense in which ‘possession’ is used in the penal statute.”)(quoting *People v. Antista*, 129 Cal.App.2d 47, 276 P.2d 177, 179 (Cal.Ct.App.1954))); *Konold v. Sheriff*, 94 Nev. 289, 290, 579 P.2d 768, 769 (1978) (“ ‘[M]ere association with ... the property where it is located, is insufficient to support a finding of possession [of narcotics].’ “(quoting *United States v. Stephenson*, 474 F.2d 1353, 1355 (5th Cir.1973), *abrogation on other grounds recognized by Gibson v. Collins*, 947 F.2d 780, 782–83 (5th Cir.1991)).

More evidence than a proprietary interest is needed to establish a connection between the defendant and a drug. *See Charles H. Whitehead & Ronald Stevens*, “*Constructive Possession in Narcotics cases: To Have and Have Not*,” 58 Va. L. Rev. 751, 763-64 (1972).

residence, which allowed for the inference that Najera maintained control of that residence.

The State failed to establish that Najera had constructive possession of the alleged controlled substance. The district judge abused her discretion in finding that because the apartment belonged to Najera, proof of possession of the alleged contraband could be inferred from this fact. That's not the law.

There Is Insufficient Evidence Of Constructive Possession Under Count 8 Of The Indictment:

The only "evidence" of possession presented to the Grand Jury of the alleged cocaine found in Najera's residence is as follows:

Q: Did in fact you recover items that you believed to be cocaine from Mr. Najera's residence?

Yes.

GJ, V-1, P. 67. ll. 2-4. (PA 67.)

No evidence regarding the location, other than testimony that it was recovered "from [the Petitioner's] residence", was presented. No photographs were offered showing the alleged controlled substance inside or outside the residence, how it was discovered, where it was it discovered, etc. The testimony presented to the grand jury was insufficient for the district court to have found "possession".

Equally true there was NO evidence presented that Najera was the sole occupant of the home or that he didn't share the home with other persons. The

Court in *Glispey v. Sheriff, Carson City*, 89 Nev. 221, 223, 510 P.2d 623, 624 (1973) stated,

Possession may be actual or constructive. The accused has constructive possession only if she maintains control or a right to control the contraband. For instance, possession may be imputed when the contraband is found in a location which is immediately and exclusively accessible to the accused and subject to her dominion and control.

There is nothing in the Grand Jury record to establish that Najera's residence was "immediately and exclusively accessible" to Najera alone. Equally true, absent where in the residence the controlled substance was found, it cannot be held that Najera "maintains[ed] control or a right to control the contraband".

CONCLUSION

The district court erroneously concluded that Najera possessed the alleged cocaine solely due to the fact the alleged cocaine was found in his apartment. This finding is contrary to this Court's precedents. *See, Watson, supra; Konold, supra.*

The district court erred in finding probable cause to indict Najera on Count 8. The only evidence regarding the controlled substance in Count 8 of the Indictment is that it was recovered from Najera's residence. This barren testimony fails to establish that Najera had constructive possession of the

1
2 controlled substance.

3 DATED this 21st day of April, 2023.

4 Respectfully submitted,

5
6 THE PARIENTE LAW FIRM, P.C.

7 

8 MICHAEL D. PARIENTE, ESQ.
9 JOHN G. WATKINS, ESQ. OF COUNSEL
10 3800 Howard Hughes Parkway
11 Suite 620
12 Las Vegas, Nevada 89169
13 Attorneys for Petitioner
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VERIFICATION

Under penalty of perjury, the undersigned declares that in the foregoing Petition and knows the contents thereof; that Petition 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 21st day of April, 2023.

Respectfully submitted,



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

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Petition 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 2,441 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

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

Dated this 21st day of April, 2023.



Michael D. Pariente, Esquire

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the law firm of THE PARIENTE LAW FIRM, P.C., and that on the date shown below, I caused service to be completed by:

personally delivering

delivery via Las Vegas Messenger Service

sending via Federal Express or other overnight delivery service

X

depositing for mailing in the U.S. mail with sufficient postage affixed thereto

delivery via facsimile machine to fax no. [fax number]

a true and correct copy of the attached document addressed to:

Steven Wolfson.
District Attorney
Clark County District
Attorney's Office
200 Lewis Ave.
Las Vegas, NV 89101

Judge Crystal Eller
District Court Judge Dept. 19
200 Lewis Ave.
Las Vegas, NV 89101

DATED this 21st day of April, 2023.



Chris Barden, Paralegal