IN THE SUPREME COURT OF THE STATE OF NEVADA

CITY OF HENDERSON, Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE KATHLEEN DELANEY, DISTRICT COURT JUDGE , Respondent, and GIANO AMADO, aka BRANDON WELCH, Real Party in Interest.	)	Case No.: D.C. No.: C-16-312757-W Dept. No.: XXV H.M.C. No.: 14CR011381, 15CR000859 Dept. No.: 1

PETITION FOR WRIT OF MANDAMUS

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PETITION FOR WRIT OF MANDAMUS

COMES NOW, Petitioner, THE CITY OF HENDERSON, by and through its counsel of record, JOSH M. REID, City Attorney, and LAURIE A. ISCAN, Assistant City Attorney, and submits this Petition for Writ of Mandamus. This

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Petition is made and based upon the papers, pleadings, and memoranda on file herein.

Dated this 1st day of June, 2016.

CITY OF HENDERSON
JOSH M. REID, City Attorney

/s/ Laurie A. Iscan
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MEMORANDUM OF
POINTS AND AUTHORITIES

I. ISSUE PRESENTED.

Should a Writ of Mandamus issue when a district court: 1) inserts new language into N.R.S. § 174.085(5) and (6), and then 2) finds that the Henderson Municipal Court ("HMC" or "Municipal Court") and City of Henderson ("City") have not complied with the new statutory language the court has created and dismisses the City's criminal complaints.

II. PROCEDURAL AND RELEVANT FACTUAL HISTORY.

Factual summary of the underlying criminal charges.[1]

On August 4, 2014, Real Party in Interest, Giano Amado, an adult, aka Brandon Welch (hereinafter "Amado"), attacked Domenic Ochoa, a minor (hereinafter referred to as "the minor" or "the minor victim") punching the minor in the face several times and injuring his arm while throwing the minor victim to the ground.[2] Amado also battered Irene Fleming, his aunt (hereinafter referred to

[1] The complete dockets from Municipal Court criminal cases 14CR011371 and 15CR000859, PA pp. 005 - 023.

[2] Original Complaint corresponding to the minor victim: 15CR000859, Petitioner's Appendix ("PA") p. 002.

as "Fleming" or "victim Fleming") when she attempted to protect the minor.[3] Amado then attempted to abduct the minor by placing him in his vehicle, but fled the scene once Fleming called 911 for help.

The Henderson Police Department (hereinafter "HPD") responded to the call and ultimately issued an arrest warrant and request for prosecution.[4] On October 28, 2014, Amado was arraigned on the domestic battery charge regarding Fleming under case number 14CR011381.[5] On February 24, 2015, Amado was arraigned on the domestic battery charge regarding the minor under case number 15CR000859.[6] Amado pleaded not guilty to both charges.[7]

Procedural history – Henderson Municipal Court.

From the date of the first arraignment on November 3, 2014, through July 29, 2015, this matter was set for trial three separate times.[8] At each of the three trial settings, the victims, Fleming and her minor son, were properly subpoenaed

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[3] Original Complaint corresponding to victim Fleming: 14CR011381, PA p. 001.

[4] PA p. 005.

[5] PA p. 006.

[6] PA p. 015.

[7] PA p. 006, 015.

[8] PA p. 006, 007, 015, 016.

for trial, but failed to appear.[9] As a result of the non-appearances, at the first two trial settings, the City requested trial continuances and orders to show cause for Fleming.[10] After each of the subject trial settings, Fleming appeared for the show cause hearings, apologized and proffered excuses for her failure to appear. Fleming also promised to appear at the next trial setting.[11]

On July 29, 2015, the third trial setting, Fleming and the minor victim again failed to appear. Pursuant to N.R.S. § 174.085(5), the City voluntarily dismissed the criminal complaints captioned as 14CR011381 and 15CR000859 (hereinafter collectively referred to as the "Original Complaints") without prejudice.[12]

On July 30, 2015, pursuant to N.R.S. 174.085(5), the City re-filed the domestic battery cases against Amado.[13] The following was the procedure utilized by the Municipal Court when it re-filed a case after voluntary dismissal[14]:

1. The City filed a Notice of Case Status with the Municipal Court under the original case number advising the court of the

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[9] PA p. 006, 007, 015, 016.

[10] PA p. 006, 007, 015, 016.

[11] PA p. 006, 007, 015, 016.

[12] PA pp. 007, 008, 016, 017.

[13] PA pp. 008, 017.

[14] PA pp. 061, 062, 094.

City's refiling of the case;[15]

2. The City submitted a Request for Summons to bring the defendant back before the court for arraignment on the re-filed case;[16]

3. If there were any amendments to the complaint, an "amended" complaint was filed under the original case number;[17]

4. The summons was issued and a new arraignment hearing was scheduled;[18]

5. A new arraignment hearing was conducted. The defendant was notified at such hearing that the case has been re-filed, and the defendant was arraigned on the "original" complaint, or on an "amended" complaint under the same case number.[19]

The following was the procedure that was actually utilized by the City and the Municipal Court in Amado's case:

1. The City filed a notice of re-filing with respect to both domestic battery cases after voluntary dismissal with the Municipal Court, under the original case numbers.[20]

2. The City filed a Request for Summons which served to bring Amado back before the Municipal Court to be arraigned on the

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[15] PA pp. 061.

[16] PA pp. 062.

[17] PA pp. 062.

[18] PA pp. 062.

[19] PA pp. 062.

[20] PA pp. 008, 017.

re-filed cases.[21]

3. The City filed an "Amended" Complaint corresponding to the original case numbers that included Amado's then known aliases.[22,23]

4. A summons was then properly executed and served upon Amado, and Arraignment was held on September 17, 2015, regarding the Amended Complaints wherein Amado again pleaded not guilty to both charges. Trial was set for December 7, 2015.[24]

On December 7, 2015, Fleming and the minor victim again failed to appear for trial.[25] In light of their non-appearance, the City requested a continuance pursuant to Bustos v. Sheriff, Clark County, 87 Nev. 622, 491 P.2d 1279 (1971), over defense counsel's objection.[26] The City also requested a material witness warrant for Fleming as a result of her failure to appear.[27] The Municipal Court granted the City's requests. Trial was then continued to Monday, January 11,

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[21] PA p. 008, 017.

[22] The inclusion of aliases was the sole amendment to the original complaint prompting the City to style the document "Amended" to comply with HMC protocol. PA pp. 001 - 004.

[23] Amended Complaints 14CR011381, 15CR000859, PA pp. 003, 004, 008, 017.

[24] PA p. 008, 009, 017, 018.

[25] PA p. 009, 018.

[26] PA p. 009, 018.

[27] PA p. 009, 018.

2016.[28]

On December 30, 2015, eleven days before trial, Fleming was arrested on the material witness warrant.[29] She was arraigned on December 31, 2015.[30] At her attorney's request, the arraignment was continued to Monday, January 4, 2016.[31]

On Monday, January 4, 2016, Fleming's attorney again asked to continue the arraignment to Wednesday, January 6, 2016.[32] Fleming's attorney advised that he was privy to information that Amado was attempting to hire new legal counsel. Fleming's attorney indicated that his client wanted Amado's attorney to be present to handle any issues that might arise; namely if Amado were to request a trial continuance, Fleming did not want to continue to be held in custody on a material witness warrant.[33] Fleming's material witness warrant arraignment was continued to Wednesday, January 6, 2016.[34]

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[28] PA p. 009, 018.

[29] PA pp. 023D.

[30] PA pp. 023D.

[31] PA pp. 023D.

[32] PA pp. 023D, E.

[33] PA pp. 023D, E.

[34] PA pp. 023D, E..

Out of concern that a new defense attorney would possibly try to substitute in and request another trial continuance, the City filed a motion on order shortening time requesting to take Fleming's deposition while she was still in custody.[35] The motion was scheduled for hearing on Wednesday, January 6, 2016.[36]

On January 6, 2016, neither Amado nor his counsel appeared at the hearing.[37] As such, the hearing was continued to Thursday, January 7, 2016.[38] On January 7, 2016, Amado's newly retained defense counsel appeared, and formally requested to substitute in. Amado's counsel also requested a trial date continuance.[39] The City opposed both the substitution and continuance as such was the fifth trial setting, the victim was in custody on a material witness warrant, and Amado had not shown good cause for a continuance and/or for substituting in new counsel one judicial day before trial.[40] All outstanding motions were then set

[35] PA pp. 009, 018, 166-172.

[36] PA pp. 009, 018.

[37] PA pp. 009, 018, 023D.

[38] PA pp. 010, 011, 019, 023F.

[39] PA pp. 010, 019.

[40] PA pp. 010, 019.

to be heard on January 11, 2016, at the same time as the trial.[41]

On January 11, 2016, Municipal Court denied the City's request for deposition, granted Amado's request to continue the trial, and also granted his request to substitute in new counsel.[42] The Municipal Court also proceeded to release Fleming with an admonishment and order that she return for trial, the date of which was then set for February 29, 2016.[43]

Procedural history – Amado's First Writ in District Court.

On January 13, 2016, Amado filed his first petition for writ of mandamus or prohibition with the District Court.[44] The first writ hearing was conducted on February 2, 2016.[45] At the writ hearing on February 2, 2016, Amado's counsel argued it was error for the Municipal Court to permit the City to proceed on

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[41] PA pp. 010, 011, 019.

[42] PA pp. 011, 019, 020, 023F.

[43] PA pp. 023F.

[44] Amado's first petition to the District Court: Petition for Writ of Mandamus or, in the Alternative, Writ of Prohibition, Request for Order Shortening Time & For Stay of Henderson Municipal Court Proceedings, in the Eighth Judicial District Court, Clark County, Nevada, Case No. C-16-311953, Dept. No. II, filed January 13, 2016. PA pp. 024 – 054.

[45] Recorder's Transcript of: first Argument/Decision, re Giano Amado v. City of Henderson and The Honorable Judge Mark Stevens, in the Eighth Judicial District Court, Clark County, Nevada, Case No. C-16-312757-W, Dept. No. 2, PA pp. 089-101.

"amended" complaints filed under the same case number after the original complaints had been voluntarily dismissed.[46] Amado's counsel went on to assert that N.R.S. § 174.085(5) and (6) required "new" complaints to be filed under new case numbers.[47] While arguing the same, Amado's counsel did not argue that proceeding on the "amended" complaints prejudiced his client's due process rights; instead, counsel just believed it was procedural error to include the word "amended" in the charging document after the complaints were re-filed.[48]

During the writ hearing on February 2, 2016, the City asserted that N.R.S. § 174.085 provides in pertinent part that: (5) The prosecuting attorney, in a case that the prosecuting attorney has initiated, may voluntarily dismiss a complaint...(b) Before trial if the crime which the defendant is charged is a misdemeanor, without prejudice to the right to file **another complaint**…," and goes on to state in subsection (6) of the same statute: "If a prosecuting attorney files **a subsequent complaint** after a complaint concerning the same matter has been filed and dismissed against the defendant…the case must be assigned to the same judge to

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[46] PA p. 090 - 092.

[47] Id.

[48] Id.

whom the initial complaint was assigned."[49] Clearly, NRS 174.085(5) and (6) permit a prosecutor to re-file a case after voluntary dismissal. While the plain language of the statute uses the words "another" and "subsequent" when referring to complaints, the statute does not mention or even remotely state what form the complaint that is re-filed after voluntary dismissal must take.[50] In fact, nowhere in the statute does it say that a "new" complaint must be filed and/or that an "amended" complaint under the same case number cannot be filed.[51] During the same writ hearing, the City also argued that the Municipal Court has the right and authority to determine its internal case management procedures.[52] Finally, and equally important to the other arguments asserted by the City, the City argued that the Municipal Court purposely re-files cases under the original case number so that the court can ensure it is in strict compliance with N.R.S. § 174.085(5), which expressly requires a re-filed case to be set before the same judge as the original case.[53]

District Court Judge Richard Scotti presided over this first writ hearing.

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[49] PA p. 061, 094-095.

[50] PA p. 095.

[51] Id.

[52] PA pp. 094.

Judge Scotti advised that he was not persuaded by Amado's counsel's arguments:

> "An amended complaint that comes after the original complaint is subsequent in time. So I'm having trouble understanding your argument that a document denominated an amended complaint is not a subsequent complaint…I do see this as, at least initially, as elevating form over substance and not prejudicing your client…I do see an amended complaint is a subsequent other complaint. So I'm having trouble with your argument to be honest with you…Mr. Terry, I'm not persuaded by the substance of your argument."[54]

Judge Scotti ultimately held that while he was not persuaded by Amado's arguments, he would not rule on the merits of the argument because Amado had never presented the issue to the Municipal Court.[55] Judge Scotti denied Amado's first writ petition.[56]

Procedural history – motion in Henderson Municipal Court.

On February 4, 2016, Amado filed a Motion to Dismiss Amended Complaints with the HMC raising the same arguments.[57] The Municipal Court

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[53] PA pp. 092, 094, 095, 096.

[54] PA pp. 092, 097.

[55] PA p. 097.

[56] PA pp. 099 - 102.

[57] Amado's Motion to Dismiss Amended Complaints, in the Henderson Municipal Court, Case No. 15CR000859 and 14 CR011381, PA pp. 103 – 117.

heard argument on February 11, 2016 and denied his motion to dismiss.[58]

Procedural history – Amado's Second Writ in District Court.

On February 19, 2016, Amado filed a second petition for writ of mandamus or prohibition with the District Court.[59] The second petition was heard in Department 25 by District Court Judge Kathleen Delaney ("Respondent").[60] Amado raised the same issues again.[61]

Respondent heard argument and found:

> "[T]he statute does **seem to** very clearly require that there be no amended complaint filing after the dismissal of an original complaint. It does **seem to contemplate, when you look at the plain language and any fair reading** of the statute, that it requires a new complaint."[62]

Respondent further found that while the City "has the right to implement

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[58] PA pp. 011 – 012, 020 – 021.

[59] Amado's second petition to the District Court: Petition for Writ of Mandamus or, in the Alternative, Request for Order Shortening Time & for Stay of Henderson Municipal Court Proceedings, in the Eighth Judicial District Court, Clark County, Nevada, Case No. C-16-312757-W, Dept. No. XXV, filed February 17, 2016. PA pp. 144-174.

[60] PA p. 205.

[61] Recorder's Transcript of: second Argument/Decision, re In the Matter of the Petition of Giano Amado v. The City of Henderson, in the Eighth Judicial District Court, Clark County, Nevada, Case No. C-16-312757-W, Dept. No. 25, PA pp. 206 – 220.

[62] PA p. 217. (emphasis added).

procedures to make their process work to ensure compliance with the statute…that doesn't give them the right to create a procedure that…flies in the face of what the statute ***appears*** to require…The City of Henderson's procedures cannot trump what the statute requires."[63] Respondent then granted the writ holding that when a prosecuting agency voluntarily dismisses a complaint and refiles the complaint, N.R.S. § 174.085(5) and (6) require that a "new" complaint must be filed.[64]

Respondent then ordered that the remedy would be to dismiss the criminal complaints.[65] The City proceeded to ask District Judge Delaney to consider a less harsh remedy to cure any error she believed existed.[66] The City asked Judge Delaney to consider permitting the City to remove the word "amended" from the complaints and to order the Municipal Court to issue new case numbers.[67] The City made such request because there was no prejudice to the defendant, and the City and Municipal Court had not acted in a manner that was negligent or malicious in any way.[68] In light of the totality of circumstances, Judge Delaney's

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[63] Id. (Emphasis added.)

[64] PA pp. 217-218.

[65] PA p. 219.

[66] PA pp. 218, 219.

[67] PA pp. 218, 219.

[68] Id.

remedy was an extremely harsh penalty. Despite the City's asserted position, Judge Delaney denied City's request, stating:

> "I don't think we're in the posture, Counsel, in terms of looking at sort of a gradient of how severe the punishment is – how severe the remedy is because the circumstances are simply a faulty amended complaint. I think in certain circumstances, depending on use of discretion and what has occurred, then you look at what is the appropriate remedy. We simply have a procedural fault here. And in this procedural fault dismissal is appropriate. What the consequences and impacts are to Mr. Amado, still, obviously remain to be seen.
>
> I can't look at this from the actual procedural posture of this matter and say, well, that's too harsh a remedy. Let's do something less severe than that. This is a procedural situation, not a substantive equitable review. I do believe dismissal is appropriate."[69]

In light of the foregoing, the City had no choice, but to proceed to request transcripts and file the instant Petition for Writ of Mandamus with the Nevada Supreme Court.

III. EXTRAORDINARY RELIEF IS WARRANTED.

This Court possesses both the discretion to entertain a petition for Writ of Mandamus, and the original jurisdiction to issue one. State ex. Rel. Dept. Transp. V. Thompson, 99 Nev. 358, 360, 662 P.2d 1338, 1339 (1983), Nev. Const. Art. 6,

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[69] PA p. 219.

§ 4. While district courts retain final appellate jurisdiction in Justice and Municipal court cases, this court may entertain a Writ petition to review a district court's appellate decision under certain circumstances, for example, to control a manifest abuse or an arbitrary or capricious exercise of discretion. Nev. Const. Art. 6, § 6, City of Las Vegas v. Carver, 92 Nev. 198, 547 P.2d 688 (1976), ***See*** State v. Eighth Judicial Dist. Court (Hedland), 116 Nev. 127, 134, 994 P.2d 692 (2000), State v. Eighth Judicial Dist. Court (Armstrong), 127 Nev. Adv. Op. 84, 267 P.3d 777, 779-80 (2011), This Court will only issue a writ, however, if the petitioner has no other plain, speedy, and adequate remedy in the ordinary course of law. Mineral Cnty. V. State, 117 Nev. 235, 243, 20 P.3d 800, 805 (2001).

This Court has held that writ review is appropriate when the issue involves interpretation of a statute with important policy concerns, Garcia v. Dist. Ct., 117 Nev. 697, 700-01, 30 P.3d 1110, 1112 (2001), that writ review is ***necessary*** to resolve a split of authority at the Justice or District Court level, State of Nevada v. District Court, 116 Nev. 127, 134, 994 P.2d 692, 697 (2000), and it is appropriate where circumstances establish urgency or strong necessity, or an important issue of law requires clarification and public policy is served by this court's exercise of its original jurisdiction. Schuster v. Eighth Judicial Dist. Court ex rel. County of Clark, 160 P.3d 873, 875, 123 Nev. 187, 190 (Nev. 2007).

Writ review in this case would control a manifest abuse or an arbitrary or

capricious exercise of discretion. In this case, Respondent erroneously interpreted N.R.S. § 174.085(5) and (6) by ignoring the plain language and adding words to the statute, and then Respondent declared the Henderson Municipal Court and City Attorney's office's collective internal process invalid for failing to comply with N.R.S. § 174.085(5) and (6) as she erroneously interpreted it. Respondent's statutory interpretation was contrary to the prior findings of District Court Judge Scotti, creating a split of authority on this issue at the district court level.

Further, the City is asking this Court to entertain this Petition for Writ of Mandamus to reverse what amounts to a travesty of justice. The criminal complaints against a violent criminal who attacked a child were dismissed on the basis of what could, at most, be described as a technicality. The United States Supreme court has long cautioned the judiciary to avoid unjust outcomes on the basis of technicalities. As a matter of public policy, the City respectfully asks this Court to intervene.

The City has no other plain, speedy, or adequate remedy at law. No direct appeal may be taken by City as this case originated in the Municipal Court and the statute of limitations has now expired for re-filing the instant complaints. The only remedy available to challenge Respondent's erroneous order is extraordinary writ.

The City is requesting this Court to entertain the instant Petition for Writ of

Mandamus because interpretation of a statute with important policy concerns is at issue, writ review will resolve a split of authority at the district court level, and the circumstances involved in this case establish strong necessity and public policy would be served by this Court's exercise of its original jurisdiction.

IV. ARGUMENT

A. Respondent Exercised a Manifest Abuse of Discretion and Acted in an Arbitrary and Capricious Manner Contrary to the Rules of Law.

This Court should issue a Writ of Mandamus because Respondent demonstrated a manifest abuse or an arbitrary or capricious exercise of discretion when she added words to the plain language of N.R.S. § 174.085(5) and (6), found that the Municipal Court and Henderson City Attorney's Office did not comply with the language she created, then dismissed the City's criminal complaints for failure to comply with this invented language. Further, Respondent ignored other provisions of N.R.S. § 173.075 which lay out what must be contained in a criminal complaint, and she disregarded the Municipal Court's authority to administer its own procedures.

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1. Respondent demonstrated a manifest abuse of discretion or acted arbitrarily and capriciously when she held that N.R.S. § 174.085(5) and (6) require a refiled complaint to be filed under a "new" case number with a "new" complaint. The plain language of N.R.S. § 174.085(5) and (6) only require "another" or a "subsequent" complaint.

The Nevada Supreme Court has held that: "[s]tatutory construction involves a question of law, and this court reviews the statute under scrutiny de novo, without deference to the district court's conclusions. In construing a statute, our primary goal is to ascertain the Legislature's intent in enacting it, and we presume that the statute's language reflects the Legislature's intent. Generally, when the words in a statute are clear on their face, they should be given their plain meaning unless such a reading violates the spirit of the act." Schuster v. Eighth Judicial Dist. Court of Nev., 160 P.3d 873, 875-876 (Nev. 2007). "To determine the Legislature's intent, this court will not look beyond the statute's plain language when a statute is clear on its face." Barrett v. Eighth J. Dist. Ct., 331 P.3d 892, 894 (Nev. 2014) *citing* Wheble v. Eighth Judicial Dist. Court, 272 P.3d 134, 136 (Nev. 2012). "The preference for plain meaning is based on the constitutional separation of powers—Congress makes the law and the judiciary interprets it. In doing so we generally assume that the best evidence of Congress's intent is what it says in the texts of the statutes." Pope v. Motel 6, 114 P.3d 277, 282, 121 Nev. 307, 314 (Nev. 2005)

When considering statutory interpretation, the court always begins with the plain language of the statute, giving effect to the Legislature's intent. John v. Douglas County School District, 125 Nev. 746, 761, 219 P.3d 1276, 1286 (2009). The statutes at issue in this case are N.R.S. § 174.085(5) and (6). The plain language of each separate subsection is as follows.

N.R.S. § 174.085(5) provides:

> The prosecuting attorney, in a case that the prosecuting attorney has initiated, may voluntarily dismiss a complaint:
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> ***
>
> (b) Before trial if the crime with which the defendant is charged is a misdemeanor, without prejudice to the right to file **another complaint**, unless the State of Nevada has previously filed a complaint against the defendant which was dismissed at the request of the prosecuting attorney. After the dismissal, the court shall order the defendant released from custody or, if the defendant is released on bail, exonerate the obligors and release any bail.

N.R.S. § 174.085(6) provides:

> If a prosecuting attorney files a **subsequent complaint** after a complaint concerning the same matter has been filed and dismissed against the defendant:
>
> (a) The case must be assigned to the same judge to whom the initial complaint was assigned; and
>
> (b) A court shall not issue a warrant for the arrest of a defendant who was released from custody pursuant to subsection 5 or require a defendant whose bail has been exonerated pursuant to subsection 5 to give bail unless

> the defendant does not appear in court in response to a properly issued summons in connection with the complaint.

(emphasis added).

N.R.S. § 174.085(5) and (6) clearly refer to "another" complaint and a "subsequent" complaint. Neither section says that there must be a "new" complaint. Neither section says that "another" or "subsequent" complaint cannot be an "amended" complaint. Moreover, the subject NRS provisions do not state that a new case number must be generated when a case is voluntarily dismissed and re-filed.

The language set forth in N.R.S. § 174.085 was carefully selected by the Legislature. During the drafting process, "there was argument by the public defender, there were several amendments and negotiations involved, and the public defender offices of both Washoe and Clark counties appeared to approve the statute's current wording." Sheriff, Washoe County v. Marcus, 116 Nev. 188, 193 (Nev. 2000). It would require an unreasonable stretch to assume and then conclude that the statute's drafters inadvertently left out necessary words and duties and despite doing so accidentally stated that a "subsequent" or "another" complaint needed to be filed when they really meant or intended a "new" complaint with a "new" case number. If the Legislature intended to require that a re-filed complaint be filed in the form of a "new" complaint, assigned a unique

case number, then it would have clearly stated such in the statute.

In this case, the City voluntarily dismissed the criminal complaints against Amado, and then refiled those cases by filing "amended" complaints under the original case numbers which contained Amado's then known aliases. Respondent dismissed those criminal complaints and held that when a prosecutor voluntarily dismisses a case and re-files it, N.R.S. § 174.085(5) and (6) require a "new" complaint to be filed under a "new" case number. Particularly, the lower court stated that N.R.S. § 174.085(5) and (6) "seem to very clearly require that there be no "amended" complaint filing after the dismissal of an original complaint. It does ***seem to contemplate***, when you look at the plain language ***and any fair reading*** of the statute, that it requires a new complaint."[70] (emphasis added).

Petitioner respectfully disagrees with this ruling. Through the lens of basic statutory construction principals, it is clear that the legislature only required that "another" or "subsequent" complaint be filed. Respondent's interpretation of N.R.S. § 174.085(5) and (6) adds language and duties that are clearly not in the plain language of the statute. As such, Respondent's order should be vacated.

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[70] PA p. 217.

2. Respondent exercised a manifest abuse of discretion and acted arbitrarily and capriciously when she added language to N.R.S. § 174.085(5) and (6) without providing a source of law to support that interpretation.

If a party is advocating an interpretation that adds language or a duty to a statute, then the party must point to a source, such as legislative intent, history, or another statutory provision, as the source for its interpretation. Schuster v. Dist. Ct., 123 Nev. 187, 181-192, 160 P.3d 873, 876-77 (2007). In Schuster, the Nevada Supreme Court was presented with the issue of "whether the duty imposed upon the State under N.R.S. § 172.145(2) to present known exculpatory evidence to the grand jury also requires the State to instruct the grand jury on the law relating to self-defense." After reviewing the plain language of the statute, the court held: "Although such instructions would not necessarily be inconsistent with N.R.S. § 172.145(2), because the plain language of the statute does not expressly impose such a duty on the State, Schuster must demonstrate that the duty arises from some other source." Id. Schuster was unable to point to any other source to support its position. The Supreme Court held that it would not add duties to the State that were not in the plain language of the statute, and Schuster's petition was denied.

Similar to Schuster, Amado petitioned the District Court twice asking the District court to add language to N.R.S. § 174.085(5) and (6), and to dismiss the

City's cases for failing to comply with this newly created language. Amado's interpretation of these statutes adds language to the statute and places further duties upon the City and the Municipal Court. Amado cited no legal authorities whatsoever to support this interpretation of the statutes. At the first writ hearing, Judge Scotti was not persuaded by Amado's arguments.[71] At the second writ hearing, however, Respondent agreed with Amado. Respondent did not cite any source for this interpretation of the statutes. Respondent instead merely stated that the statutes "***seem to contemplate***, when you look at the plain language ***and any fair reading of the statute***, that it requires a new complaint."[72] The analysis applied by this Court in Schuster should apply here. While Respondent's interpretation of NRS 174.085(5) and (6) may not necessarily be inconsistent with the statute, the plain language does not expressly impose a duty upon the City or the Municipal Court to re-file cases under new cases numbers with new complaints. Respondent's order should be reversed.

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[71] PA p. 100.

[72] PA p. 217.

3. The Legislature and the United States Supreme Court have defined what information a criminal complaint must contain and chose not to dictate the exact form it must take.

a. *The Nevada Legislature and the United States Supreme Court have defined what information a criminal complaint must contain.*

In order to properly safeguard a criminal defendant's due process rights, an "indictment ... must be a plain, concise and definite written statement of the essential facts constituting the offense charged." An indictment, standing alone, must contain: (1) each and every element of the crime charged and (2) the facts showing how the defendant allegedly committed each element of the crime charged. United States v. Hooker, 841 F.2d 1225, 1230 (4th Cir .1988). Further, an indictment is deficient unless it "sufficiently apprises the defendant of what he must be prepared to meet." Russell v. United States, 369 U.S. 749, 763, 82 S.Ct. 1038, 1047, 8 L.Ed.2d 240 (1962).

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Nevada codified what form and content a criminal complaint must take in N.R.S. § 173.075, which is derived from Fed.R.Crim.P. 7(c). N.R.S. § 173.075 provides in pertinent part:

FORM AND AMENDMENT

N.R.S. § 173.075 Nature and contents generally.

1. The indictment or the information must be a plain, concise and definite written statement of the essential facts constituting the offense charged. It must be signed by the Attorney General acting pursuant to a specific statute or the district attorney. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to the statement.

2. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means.

3. The indictment or information must state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission is not a ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to the defendant's prejudice.

When reviewing N.R.S. § 173.075, it is apparent that the Legislature took every precaution to safeguard a defendant's due process rights when stating what ***substantive information*** must be included in a charging document. The

Legislature, however, chose not to further dictate what exact ***form*** the complaint must take.

b. *The Legislature knows how to particularly prescribe the form of a pleading or document when it chooses to do so.*

When the Legislature desires a pleading to take a particular form, it specifically enumerates the form that must be used. For example, when a petition for writ of habeas corpus is filed, it must be as follows:

> **N.R.S. § 34.735 Petition: Form. A petition must be in substantially the following form**, with appropriate modifications if the petition is filed in the Court of Appeals or the Supreme Court:
>
> Case No. .....
> Dept. No. .....
>
> IN THE ..... JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF.....
>
> .....
> Petitioner,
>
> v. PETITION FOR WRIT OF HABEAS CORPUS (POSTCONVICTION)
>
> .....
> Respondent.

(emphasis added).

The Legislature clearly knows how to specifically dictate the exact form a pleading must take when it chooses to do so. The Legislature chose not to dictate

the exact form a charging document must take. Instead, the Legislature has only enumerated what substantive information must be included to protect a defendant's due process rights.

As has been discussed above, the Legislature carefully drafted N.R.S. § 174.085(5) and (6). It is clear, when reading all of the statutes regarding criminal charging documents, that the Legislature only intended to dictate what the substance of a refiled criminal complaint must contain, not the exact form that it must take. Respondent manifestly abused her discretion or acted arbitrarily and capriciously when she construed N.R.S. § 174.085 (5) and (6) to require that a re-filed complaint must take a specific form.

4. The Judiciary has long been recognized to have inherent authority to administer is own procedures.

The Nevada Supreme Court has long recognized that the judiciary has the inherent authority to administer its own procedures and to manage its own affairs; it may make rules and carry out other incidental powers when reasonable and necessary for the administration of justice. Halverson v. Hardcastle, 123 Nev. 245 (2007). Court administration rules and the centralized power to implement them are reasonable, proper, and necessary to the accomplishment of judicial functions. Id.

As noted above, the procedure that was employed by the Henderson

Municipal Court upon the refiling of a case was: 1) the City Attorney filed a Notice of Case Status with the Court advising the Court the City was re-filing a case after voluntary dismissal without prejudice under the original case number, 2) the City then filed an ”amended” criminal complaint under the original case number in cases where filing an amended complaint was appropriate, 3) the City submitted a request for summons to bring the defendant back before the court, 4) a new arraignment hearing was conducted and the defendant was notified that the case has been re-filed, and 5) the defendant was then arraigned on the complaint and a new trial date was set.

The City Attorney's office spoke with Henderson Municipal Court Administrator, Bill Zihlman about this process.[73] Mr. Zihlman confirmed that court administration used such system and re-filed cases under the original case number because it allowed court administration to maintain track of cases that were re-filed, and such system permitted court administration to ensure that a case was re-set before the same judge as was required by N.R.S. § 174.085(5).[74] HMC processed approximately 38,600 cases in 2015. The Municipal Court was clearly

[73] PA p. 094

[74] Id.

employing this system to manage its docket and records at the time the Municipal Court cases were re-filed in this case.

5. The court may permit an amended complaint to be filed at any time before verdict.

It is anticipated that Amado will argue that the City should not have been permitted to proceed on an "amended" complaint after the original case was dismissed because the City did not request permission from the court first. It should be noted that N.R.S. § 173.095 provides that the court may permit an indictment or information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced. In this case, the Municipal Court clearly permitted the City to proceed on a complaint that was amended prior to verdict, and no additional or different offenses were charged. In fact, the only amendment was the inclusion of Amado's known aliases.

6. City was required to file an amended complaint once it discovered Amado had aliases.

"When a defendant is charged by a fictitious or erroneous name, and in any stage of the proceedings the defendant's true name is discovered, it must be inserted in the subsequent proceedings referring to the fact of the defendant's being charged by the name mentioned in the indictment or information." N.R.S. § 173.105. In the instant case, the City discovered Amado's true name at the time

the original complaint was voluntarily dismissed and was required to insert defendant's true name once it became known to City.

7. Amado has never argued that any of his rights were violated by the process used by the Henderson Municipal Court and the City Attorney's Office.

Amado has ***never*** argued at any of the eight (8) Municipal Court hearings, nor at the three (3) District Court hearings that any of his rights were prejudiced by the "amended" complaints. Amado has only argued that he believed it was procedurally improper.

As District Judge Scotti observed, an "amended" complaint is clearly "another" or a "subsequent" complaint.[75] In contrast, Respondent arbitrarily and capriciously violated the rules of statutory interpretation by holding otherwise, resulting in a travesty of justice. Respondent's order should be vacated.

B. <u>Alternatively, should this Court find that the pleadings were erroneous, the City still asks that Respondent's order be vacated. The remedy imposed by Respondent was arbitrary and unduly harsh, and intervention would correct an unjust outcome.</u>

1. Respondent's order dismissing City's criminal complaints was arbitrary and capricious.

"An arbitrary or capricious exercise of discretion is one founded on prejudice or preference rather than on reason…or contrary to the evidence or established rules of law. S*ee generally*, <u>City Council v. Irvine</u>, 102 Nev. 277, 279,

721 P.2d 371, 372 (1986) (concluding that **"[a] city board acts arbitrarily and capriciously when it denies a license without any reason for doing so**"). A manifest abuse of discretion is "[a] clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule." Steward v. McDonald, 330 Ark. 837, 958 S.W.2d 297, 300 (1997); *see* Jones Rigging and Heavy Hauling v. Parker, 347 Ark. 628, 66 S.W.3d 599, 602 (2002) (stating that a manifest abuse of discretion "**is one exercised improvidently or thoughtlessly and without due consideration**"); Blair v. Zoning Hearing Bd. of Tp. of Pike, 676 A.2d 760, 761 (Pa.Commw.Ct.1996)." State v. Dist. Ct. (Armstrong), 267 P.3d 777, 780 (Nev. 2011) (internal citations omitted) (emphasis added).

In the instant case, Respondent held that the Henderson Municipal Court and the City Attorney's office failed to comply with N.R.S. § 174.085 (5) and (6) because a new case number was not generated upon refiling the case and "amended" complaints were filed. After holding that the City and Municipal Court were in error, Respondent advised that she was dismissing the criminal complaints. The City asked Respondent to consider a less harsh remedy – namely to 1) order the Henderson Municipal Court to issue new case numbers and, 2) strike the word "amended" from the refiled complaints. City argued that the

[75] PA p. 92.

HMC/CAO had not proceeded in a malicious or negligent way, that Amado had never cited nor argued there was any prejudice to his rights by the process that was used, and that the HMC was merely using this process to manage its cases. Respondent denied City's request, stating that Respondent "can't look at this from the procedural posture of this matter and say, well, that's too harsh a remedy. Let's do something less severe than that. This is a procedural situation, not a substantive equitable review. I do believe dismissal is appropriate." PA p. 62.

Respondent abdicated her duty as a judge by refusing to even consider or weigh the impact of her decision. Respondent acted arbitrarily and capriciously when she dismissed City's criminal complaints without giving any legal reason for doing so. Respondent's order was issued improvidently and thoughtlessly without due consideration for the weight of the order. Respondent's order should be vacated as the decision was a manifest abuse of discretion and was arbitrary and capricious.

2. Respondent's order dismissing City's criminal complaints with prejudice was unduly harsh.

In Nevada, a "dismissal with prejudice is a harsh remedy to be utilized only in extreme situations." Moore v. Cherry, 90 Nev. 390, 393, 528 P.2d 1018, 1021. "It must be weighed against the policy of law favoring the disposition of cases on their merits." Id. "Because dismissal with prejudice is the most severe sanction

that a court may apply ... its use must be tempered by a *careful* exercise of judicial discretion." Id. at 394, 528 P.2d at 1021 (alteration in original) (internal quotation marks omitted).

In the instant case, Respondent granted Amado's second writ in District Court and dismissed City's criminal complaints. The statute of limitations had already expired and City is unable to refile those complaints. The District Court effectively dismissed the complaints with prejudice.

The City begged Respondent to consider a less harsh remedy so that the criminal cases could proceed on the merits. The City pointed out that there was no lack of diligence or malfeasance by the City or the Municipal Court. Respondent denied City's request and merely stated "we are not in that posture." Respondent gave no legal reason for reaching this conclusion. Respondent's order was the most severe sanction that a court may apply. Respondent ordered this sanction without weighing the policy of law favoring the disposition of cases on the merits. Respondent issued this sanction without tempering it with a careful exercise of judicial discretion. As was stated above, Respondent issued this sanction improvidently and thoughtlessly.

The City asks that Respondent's order be vacated and that the cases be remanded to the Municipal Court to proceed on the merits.

3. Respondent's order should be vacated as a matter of public policy to correct an unjust outcome.

The United States Supreme Court has expressed concern that the judiciary should seek to avoid unjust outcomes on the basis of technicalities because "[r]eversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." Johnson v. United States, 520 U.S. 461, 470, 117 S.Ct. 1544, 1550 (1997) (quoting, R. Thompson, The Riddle of Harmless Error, 50 (1970)).

In this case, the criminal complaints have been dismissed, the victim of domestic violence served 12 days in jail on a material witness warrant because she was too afraid to come to court, and the defendant who violently attacked a child walks free without any consequence for his actions or an adjudication on the merits. Truly, the result of Respondent's order is a quintessential unjust outcome on the basis of a technicality. This outcome certainly encourages litigants to abuse the judicial process. It would be surprising if the victim, her friends, or her family, have any faith left in the criminal justice system.

The City asks this Court to vacate the District Court order as a matter of public policy, and to correct an unjust outcome so that a trial can proceed on the merits.

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V. CONCLUSION

For the reasons set forth above, the City asks this Court to grant the Petition for Writ of Mandamus to avoid a manifest abuse of discretion that has resulted from Respondent's arbitrary and capricious exercise of discretion. The City is seeking this Court's review to resolve a split of authority at the District Court level. Further, and most importantly, the City asks this Court to grant its Petition to correct an unjust outcome and reverse an unduly harsh sanction.

The City respectfully requests that this Court direct the Clerk to issue a Writ of Mandamus instructing the District Court to rescind its order filed on March 2, 201 dismissing the City's criminal complaints, and to remand the cases back to the Municipal Court for trial on the merits.

DATED this 1st day of June, 2016

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IN THE SUPREME COURT OF THE STATE OF NEVADA

CITY OF HENDERSON, Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE KATHLEEN DELANEY, DISTRICT COURT JUDGE , Respondent, and GIANO AMADO, aka BRANDON WELCH, Real Party in Interest.	)	Case No.: D.C. No.: C-16-312757-W Dept. No.: XXV H.M.C. No.: 14CR011381, 15CR000859 Dept. No.: 1

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this writ 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 2010 in 14 point Times New Roman font.

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

Proportionately spaced, has a typeface of 14 points or more, and contains 6,759 words.

3. Finally, I hereby certify that I have read this writ, 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 writ 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 is 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 Rules of Appellate Procedure.

DATED this 1st day of June, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that service of the CITY OF HENDERSON'S PETITION FOR WRIT OF MANDAMUS was made this 1st day of June, 2016, via United States mail, facsimile and electronic mail transmission to:

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_____
City of Henderson Employee