



SUPREME COURT OF NEVADA

OFFICE OF THE CLERK

ELIZABETH A. BROWN, CLERK

201 SOUTH CARSON STREET, SUITE 201

CARSON CITY, NEVADA 89701-4702

Telephone  
(775) 684-1600

December 19, 2018

Barry Harris  
Inmate ID: 95363  
P.O. Box 650  
Indian Springs, NV 89070

Re: Harris vs. State, No. 76774

Dear Mr. Harris:

We are returning, unfiled, the "Appellants Informal Supplemental Brief" received in this office on December 19, 2018 in the above-entitled matter.

You are represented by counsel in this appeal. Please contact your attorney with any further questions or concerns you may have regarding your appeal.

Sincerely,

A handwritten signature in cursive script, appearing to read "D. Richards".

D. Richards  
Deputy Clerk

Enclosures

18-909527

CASE No. 76774

D.C. CASE No. C326569  
Nevada, Clark County

THE SUPREME COURT OF NEVADA

BARRY HARRIS,  
Appellant,  
v.  
THE STATE,  
Appellees.

**RETURNED  
UNFILED**

DEC 19 2018

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT

BY DEPUTY CLERK

ON Appeal from the Eighth Judicial District  
for the State of Nevada

APPELLANT'S INFORMAL SUPPLEMENTAL BRIEF

BARRY HARRIS

P.O. Box 650

INDIAN SPRINGS,

NEVADA 89070

**RECEIVED**

DEC 19 2018

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
DEPUTY CLERK

Appellant ("Mr. Harris"), in pro-per,  
respectfully request to be allowed to  
proceed and file this brief pursuant to  
Nev. R. A. P. 46(b).

## I. Statement of the issue presented

The sole issue presented by Mr.  
Harris is whether the district court  
abused its discretion in not granting  
his writ of mandamus.

## II. Statement of the Case

Mr. Harris's preliminary hearing had  
been delay'd numerous times giving  
the state ample opportunities to

procure witness attendance, yet failed to do so, at the time of the actual hearing. The alleged victim specifically told the State that she would not appear — ahead of time. See Reporter's Transcript, 3:6-13, attached hereto.

On October 13, 2017, the State requested a continuance and a Material Witness Warrant for the victim. See Transcript, 2:6-7.

Mr. Harris objected and moved to dismiss the case. He argued that where only minimal effort was made to procure a witness's attendance,

and those minimal efforts are unreasonable, the case must be dismissed.

The justice court essentially said that although it had no jurisdiction, it would continue the case regardless of Mr. Harris's procedural rights; the willful failure of the State to comply with important procedural rules; the requirements of Hill and Bustos . . . because it could! see Transcript, 5:10-21.

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### III. ARGUMENT

Under usual circumstances, the State's failure to meet its due diligence to serve their witness a Subpoena, knowing that the witness was refusing to appear, would result in a dismissal.

But, departing from what was expected under the law, the two lower courts' judges essentially ruled that Mr. Harris had no rights they were bound to respect. Dred Scott v. Sandford, 19 U.S.

(How) 393 at 407, 15 L. Ed 691 (1859). And in turn, allowed the State to by-pass all safe-guards concerning Mr. Harris's

due process rights — in violation of the 5th and 14th Amendment to the U.S. Constitution. See attached Writ of Mandamus and the District Court's denial. Taken together, these facts exhibit a conscious indifference to Mr. Harris's Constitutional rights. Id.

The district court was to determine whether the facts of Mr. Harris's case support the justice court's finding that the prosecution had demonstrated "good cause" for the continuance of Mr. Harris's preliminary hearing. NRS 171.196, Hill and Bustos.

Although the Justice Court departed from the Nevada Supreme Court and its prophylactic doctrines such as Hill and Bustos, the District Court found that the Justice Court, did in fact, find, under the law, that the State had shown good cause. See Reporter's Transcript, 5:10-21: This statement by the Justice Court contradicts the District Court's findings.

Therefore, these blatant disregards for Mr. Harris's Constitutional rights are more than atrocious and should come to an end. See Farnow v.



District Court, 64 Nev 109, 126, 178 P.2d 371 at 379 (1947).

#### IV. CONCLUSION

Based upon the foregoing, Mr. Harris seeks a review of the District Court's findings as a violation of State law and an abuse of discretion. And as such, Mr. Harris respectfully request that the case be dismissed.

Respectfully submitted this 12 day  
of DECEMBER, 2018.

By BARRY HARRIS #95363  
P.O. BOX 650  
INDIAN SPRINGS, NV 89070

## Certificate of Service

I served a true and correct copy of the foregoing brief to the State by first-class mail, postage prepaid to:

STEVEN WOLFSON  
200 LEWIS AVENUE, 3rd floor  
LAS VEGAS, NEVADA 89155-1160

DATED this 17 day of DECEMBER, 2018

By BARRY HARRIS  
P.O. Box 650  
INDIAN SPRINGS,  
NEVADA 89070

# EXHIBIT

Reporter's Transcript

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TRAN

IN THE JUSTICE'S COURT OF LAS VEGAS TOWNSHIP  
COUNTY OF CLARK, STATE OF NEVADA

STATE OF NEVADA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	JC CASE NO. 17F15265X
	)	
BARRY HARRIS,	)	
	)	
Defendant.	)	
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REPORTER'S TRANSCRIPT  
OF  
STATE'S MOTION TO CONTINUE PRELIMINARY HEARING  
BEFORE THE HONORABLE MELANIE ANDRESS-TOBIASSON  
JUSTICE OF THE PEACE  
THURSDAY, OCTOBER 26, 2017

**APPEARANCES:**

For the State:	GENEVIEVE CRAGGS Deputy District Attorney
For the Defendant:	SCOTT RAMSEY Deputy Public Defender

**Reported by: Donna J. McCord, CCR #337**

1 LAS VEGAS, NEVADA, OCTOBER 26, 2017, 12:04 P.M.

2  
3 \* \* \* \* \*

4  
5 THE COURT: Barry Harris.

6 MS. CRAGGS: I'm making a motion, your  
7 Honor, to continue. We're going to be requesting a  
8 material witness warrant for your Honor if you're so  
9 inclined after I speak with my team chief.

10 Essentially what happened is we were  
11 in contact with her. She did, Nicole Dotson, the  
12 named victim, she did identify herself. She was  
13 informed of the date of court, we did text message  
14 her a copy of the subpoena and she verified the  
15 address that we mailed the subpoena to as well and  
16 then she refused to promise to appear and we lost  
17 contact with her and we weren't able to get ahold of  
18 her again. So we were able to verify that we know  
19 where she lives, we did mail her a subpoena, we did  
20 text her a subpoena, we did speak with her. And  
21 part of the reason obviously we're requesting this  
22 is that it is a very serious case and we do know  
23 where she is.

24 THE COURT: I'm just waiting for the file.

25 Well, I know where you're going so

1 ~~that~~ let you make your record.

2 MR. RAMSEY: And, your Honor, we would  
3 object to any continuance at this point and move to  
4 dismiss. The State hasn't met their due diligence  
5 to serve her with a subpoena. There is no personal  
6 service. I'm not aware of anything in the Nevada  
7 Revised Statutes that allows the State to serve a  
8 subpoena via text message. There is, you know, some  
9 language about an oral promise to appear, but if  
10 she's saying she's not showing up to court or she's  
11 not promising to appear, that does not meet the  
12 statutory requirements, your Honor. There is no  
13 basis for a continuance here and we would be moving  
14 to dismiss.

15 MS. CRAGGS: And, your Honor, obviously  
16 our request is that the basis for the continuance is  
17 our own due diligence. We do know where she is. We  
18 do know that we're sending it to the right address.  
19 We do know that we texted a subpoena to the correct  
20 phone number and now she's simply refusing to  
21 appear.

22 THE COURT: Let me address this after we  
23 take a break. I have a bunch of motions in my file  
24 that your client sent to me.

25 MR. RAMSEY: I'm aware.

1 MS. CRAGGS: Oh, I just saw that, yes.

2 THE COURT: And I haven't really reviewed  
3 them in detail because he is represented by counsel,  
4 but I will look at them. So let me look at these  
5 and I'll make a ruling when I come back.

6 MR. RAMSEY: All right. Thank you.

7 MS. CRAGGS: Thank you.

8 (Recess.)

9 THE COURT: Barry Harris. All right. So  
10 let's address first, I have a bunch of motions. I'm  
11 not going to address those motions. If your client  
12 feels the need to file motions he can talk to you  
13 about that.

14 With regard to the State's request  
15 for a continuance, the representations were made  
16 that they made contact with her, she verified that  
17 the address was correct where they sent the  
18 subpoena, they texted her another copy of the  
19 subpoena and spoke to her, she indicated she was  
20 aware of the date, yes?

21 MS. CRAGGS: Yes.

22 THE COURT: Okay.

23 MS. CRAGGS: I believe she was told the  
24 date over the phone by the process server.

25 THE COURT: Okay.

1 MR. RAMSEY: And I would just want to — I  
2 mean, it's not an oral promise to appear as required  
3 by the statute.

4 THE COURT: It's not and I don't think she  
5 was basing it — it wasn't technically a Bustos or a  
6 Hill. The representations are that they made  
7 contact with her, she indicated she was aware of the  
8 court date, she indicated that the address was  
9 correct where they sent the subpoena, they texted  
10 her a copy of the subpoena. Although I understand  
11 it doesn't technically fit under Hill or Bustos,  
12 I've always kind of taken the position, and we've  
13 talked about this, where if a witness is advised of  
14 the date and is aware of the date and has received a  
15 subpoena, even if technically it's not service as  
16 defined by the statute I don't think that it's —  
17 now, believe me, differing minds differ, but it's  
18 always been my position that if you have those  
19 representations a witness knows they have to come to  
20 court. And I think that it's rarely the appropriate  
21 avenue to dismiss the charges as a result of that.  
22 If they had not made any contact with her or if they  
23 could not verify any of this or if they had contact  
24 with her and she said I'm not coming to court  
25 without receiving a subpoena, that would be a



1 different situation.

2 Under these circumstances I am going  
3 to grant the State's motion for a continuance. I'm  
4 going to reset in 15 days, November 9th at  
5 10:00 a.m.

6 State, I know you were requesting a  
7 warrant. What I'm going to do first is I'm going to  
8 set an order to show cause hearing for November 2nd  
9 at 8:30. If we have the same situation on that date  
10 then I will address the request for a warrant, okay?

11 MR. RAMSEY: What was the preliminary  
12 hearing date?

13 THE COURT: The 9th at 10:00 a.m.

14 MR. RAMSEY: And I would like to —

15 THE COURT: November 9th. Order to show  
16 cause November 2nd.

17 MR. RAMSEY: And I would like to request  
18 my client's release based on the State's failure to  
19 procure their witness for the preliminary hearing.  
20 He's prejudiced because he's still in custody on  
21 this case based on the State's —

22 THE COURT: Based on the representations  
23 that were made, the serious nature of the charges,  
24 the fact he does have another felony case in the  
25 system, he's got a prior for battery with deadly

1 weapon with substantial bodily harm, I'm going to  
2 deny that motion at this time. Of course at the  
3 November 9th hearing we can readdress that if we're  
4 in the same situation.

5 THE DEFENDANT: Please, your Honor, I've  
6 been incarcerated for 60 days. It's been an ongoing  
7 thing.

8 THE COURT: I understand.

9 THE DEFENDANT: Please, your Honor. I got  
10 family out there. These are serious charges. If  
11 they was against me I would show up in court —

12 THE COURT: No.

13 THE DEFENDANT: — and testify against  
14 somebody if it was their case.

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16 \* \* \* \* \*

17 Attest: Full, true, accurate transcript of  
18 proceedings.

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20       /S/Donna J. McCord        
DONNA J. McCORD CCR #337

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EXHIBIT

Writ OF MANDAMUS

# 2

1 PHILIP J. KOHN, PUBLIC DEFENDER  
2 NEVADA BAR NO. 0556  
3 SCOTT A. RAMSEY, DEPUTY PUBLIC DEFENDER  
4 NEVADA BAR NO. 13941  
5 **PUBLIC DEFENDERS OFFICE**  
6 309 South Third Street, Suite 226  
7 Las Vegas, Nevada 89155  
8 Telephone: (702) 455-4685  
9 Facsimile: (702) 455-5112  
10 *Attorneys for Defendant*

11 **JUSTICE COURT, LAS VEGAS**

12 **CLARK COUNTY, NEVADA**

13 THE STATE OF NEVADA,

14 Plaintiff,

15 v.

16 BARRY HARRIS,

17 Defendant.

CASE NO. 17F15265X

DEPT. NO. 10

DATE: November 2, 2017

TIME: 8:30 a.m.

18 **WRIT OF MANDAMUS/PROHIBITION**

19 COMES NOW, the Defendant, BARRY HARRIS, by and through SCOTT A.  
20 RAMSEY, Deputy Public Defender and respectfully petitions this Honorable Court for a Writ of  
21 Mandamus ordering the Justice Court to dismiss the case against Mr. Harris.

22 This Motion is made and based upon the following declaration, Memorandum of  
23 Points and Authorities, and the transcript of Justice Court 10 proceedings on October 26, 2017,  
24 which are attached.

25 DATED this 29th day of October, 2017.

26 PHILIP J. KOHN  
27 CLARK COUNTY PUBLIC DEFENDER

28 By: /s/Scott A. Ramsey  
SCOTT A. RAMSEY, #13941  
Deputy Public Defender

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## DECLARATION

SCOTT A. RAMSEY makes the following declaration:

1. I am an attorney duly licensed to practice law in the State of Nevada; I am a Deputy Public Defender for the Clark County Public Defender's Office appointed to represent Defendant Barry Harris in the present matter.
2. That I am the attorney of record for Defendant in the above matter; that I have read the foregoing Petition, know the contents thereof, and that the same is true of my own knowledge, except for those matters therein stated on information and belief, and as to those matters, I believe them to be true; that Defendant, BARRY HARRIS (hereinafter "Mr. Harris"), personally authorizes me to commence this Writ of Mandamus action.
3. That the instant petition springs from the Justice Court granting the State's motion for a continuance of Mr. Harris's preliminary hearing. On October 26, 2017, the Defendant was set for a preliminary hearing. The State failed to procure the presence of the alleged victim and moved the Court to continue the hearing. The Court granted the Motion over Mr. Harris's objection despite the State's failure to demonstrate good cause for the continuance as required by statute.
4. I am more than 18 years of age and am competent to testify as to the matters stated herein. I am familiar with the procedural history of the case and the substantive allegations made by The State of Nevada. I also have personal knowledge of the facts stated herein or I have been informed of these facts and believe them to be true.
5. I declare under penalty of perjury that the foregoing is true and correct. (NRS 53.045).

EXECUTED this 29th day of October, 2017.

/s/Scott A. Ramsey  
SCOTT A. RAMSEY

1                   **IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS/PROHIBITION**

2           COMES NOW the Defendant, BARRY HARRIS, by and through his counsel, SCOTT  
3   RAMSEY, the Clark County Public Defender's Office, and submits the following Points and  
4   Authorities in Support of Defendant's Petition for a Writ of Mandamus.

5                   **POINTS AND AUTHORITIES**

6                   **STATEMENT OF THE ISSUES**

7           Did the Justice Court violate Mr. Harris' Due Process rights when it granted the State's  
8   motion for a continuance despite the State's failure to establish good cause or meet the legal  
9   standards established in Hill and Bustos?

10                   **STATEMENT OF FACTS AND PROCEDURAL HISTORY**

11           Mr. Harris first appeared in Justice Court 10 on August 31, 2017 for his initial  
12   arraignment. The Court set a preliminary hearing for September 15, 2017. The day prior to Mr.  
13   Harris's preliminary hearing he was referred to Competency Court in case 17F15787X, so the  
14   Court referred the instant case to Competency Court. After a finding of competency, Mr. Harris  
15   again appeared in Justice Court on October 13, 2017. The Court set a preliminary hearing date  
16   for October 26, 2017.

17           On that date, Mr. Harris was present and ready to proceed with his preliminary hearing,  
18   but the alleged victim failed to appear. Unable to proceed with the hearing, the State moved to  
19   continue the case and requested a material witness warrant for the named victim. *See* attached  
20   Reporter's Transcript of State's Motion to Continue Preliminary Hearing (hereinafter  
21   "Transcript"), 2:6-7. In support of the Motion, the State made the following representations:

22           "Essentially what happened is we were in contact with her. She did, Nicole  
23   Dotson, the named victim, she did identify herself. She was informed of the court  
24   date, we did text her a copy of the subpoena and she verified the address that we  
25   mailed the subpoena to as well and then she refused to promise to appear and we  
26   lost contact with her and we weren't able to get a hold of her again."  
27  
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1 Transcript, 2:10-18.

2 At no point was the prosecutor under oath. *See generally* Transcript. Additionally, the prosecutor  
3 neither previously submitted an affidavit pursuant to Hill nor did the Defendant stipulate to an  
4 oral motion for a continuance pursuant to Bustos. *See generally* Transcript.

5 The defense objected and moved to dismiss the case. In support of the Motion to dismiss,  
6 defense counsel argued that “[t]he State hasn’t met their due diligence to serve her with a  
7 subpoena. There is no personal service.” Transcript, 3:2-6. Defense counsel also argued that  
8 Nevada law does not support serving a subpoena via text message, and while there is some  
9 language in support of oral promises to appear, the alleged victim specifically told the State she  
10 would not appear. Transcript, 3:6-13. Despite failing to submit a written affidavit pursuant to  
11 Hill, or being sworn under oath pursuant to Bustos, and over Mr. Harris’s objection, the Court  
12 granted the continuance, set an Order to Show Cause hearing for November 2, and reset the  
13 preliminary hearing for November 9, 2017. Transcript, 6:2-9. The Court acknowledged that the  
14 State’s motion did not comply with Hill nor Bustos, nor did the State’s attempts to serve the  
15 alleged victim constitute service as defined by statute.<sup>1</sup> Based on the Court’s denial of Mr.  
16 Harris’s Motion to dismiss despite the State’s failure to comply with Nevada Supreme Court  
17 precedent, Mr. Harris submits the instant Writ requesting this Court order the Justice Court  
18 dismiss the charges against Mr. Harris.  
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25 <sup>1</sup> The court stated, “Although I understand it doesn’t technically fit under Hill or Bustos, I’ve always kind of taken  
26 the position, and we’ve talked about this, where if a witness is advised of the date and is aware of the date and has  
27 received a subpoena, even if technically it’s not service as defined by the statute, I don’t think that it’s – now,  
28 believe me, differing minds differ, but it’s always been my position that if you have those representations a witness  
knows they have to come to court. And I think it’s rarely the appropriate avenue to dismiss the charges as a result of  
that.” Transcript, 5:10-21.

## LEGAL ARGUMENT

### I. A Writ of Mandamus/Prohibition is the Proper Remedy

Pursuant to N.R.S. 33.170, “a writ of mandamus shall issue in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law.” A writ of mandamus is available to compel the performance of an act which the law requires as a duty resulting from an office, trust or station<sup>2</sup> or to control an arbitrary or capricious exercise of discretion.<sup>3</sup> A defendant must raise issues regarding improper Hill or Bustos motions before the new preliminary hearing date. *See Stockton v. Sheriff*, 87 Nev. 94 (1971). This Honorable Court’s intervention is necessary because the Justice Court exceeded its jurisdiction and acted arbitrarily and capriciously by granting the State’s continuance over defense objection. As the new preliminary hearing is set for November 9, 2017, Mr. Harris respectfully asks this Court to order the Justice Court to dismiss his case as the State failed to show good cause for its continuance.

### II. The State failed to demonstrate good cause for a continuance.

The State has the burden of procuring its necessary witnesses for preliminary hearing. If the State fails to do so, it must show good cause to continue the hearing or the case must be dismissed. *See* N.R.S. 171.196. According to the Nevada Supreme Court:

“A prosecutor should be prepared to present his case to the magistrate at the time scheduled or show good cause for his inability to do so. This is not an unfair burden. The business of processing criminal cases will be frustrated if continuances are granted without good cause.” Bustos v. Sheriff, Clark Cty., 87 Nev. 622, 624, 491 P.2d 1279, 1280 (1971).

A court must look at the totality of the circumstances when determining if “good cause” exists to grant a continuance. *See Sheriff, Clark County v. Terpstra*, 111 Nev. 860, 863 (1995). Granting a continuance without good cause gives the State leave to “frustrate the judicial system.” *See*

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<sup>2</sup> *See* N.R.S. 34.160

<sup>3</sup> *See Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 637 P.2d 534 (1981).



1 Bustos, 87 Nev. at 624. There is no presumption that good cause exists when requesting a  
2 continuance. Ex Parte Morris, 78 Nev. 123, 125 (1962). “[O]ur criminal justice system can ill  
3 afford to bestow on prosecutors, or on defense counsel, largesse through continuances for which  
4 no cause is shown.” See McNair v. Sheriff, Clark County, 89 Nev. 434, 436-37, 514 P.2d 1175,  
5 1176 (1973). No legal principle requires a judge to “grant a continuance on the hope that a  
6 recalcitrant witness will later agree to testify.” See McCabe v. State, 98 Nev. 604, 606-07 (1982);  
7 see also Zessman v. State, 94 Nev. 28, 31 (1978).

8  
9 **a. The State was not entitled to a continuance as it did not have good cause for  
10 its failure to meet the criteria set forth in Hill and Bustos.**

11 The State has the burden of proving good cause if its witnesses are missing at the time set  
12 for the preliminary hearing. See generally Bustos, 87 Nev. 622; see also Hill v. Sheriff of Clark  
13 County, 85 Nev. 234 (1969). “Good cause” is shown through filing a written Hill motion or  
14 orally requesting a Bustos motion be granted. See generally Bustos, 87 Nev. 622; see also Hill v.  
15 Sheriff of Clark County, 85 Nev. 234 (1969). In Hill, the Nevada Supreme Court held the State  
16 acts in good faith when it asks for a continuance based on a missing essential witness as long as  
17 the State timely files an affidavit outlining:

- 18  
19
  1. the identity of the missing witness,
  2. the diligence used to procure the witness’ presence,
  - 20 3. a summary of the expected testimony of the witness and whether there are other
  - 21 witnesses who could testify to the same information,
  - 22 4. when the State learned the witness would not be present, and
  5. the motion was made in good faith and not for purposes of delay.

23 Hill, 85 Nev. at 235-36.

24 The Court warned prosecutors that “they must either proceed to a preliminary hearing at the  
25 appointed time, or show good cause for a continuance by affidavit.” See McNair v. Sheriff, Clark  
26 County, 89 Nev. 434, 437, 514 P.2d 1175, 1176 (1973). In Bustos, the Supreme Court held there  
27 are circumstances in which there is no time for the State to file a written affidavit, and therefore,  
28

1 would be permitted to make the motion orally while sworn under oath. *See Bustos*, 87 Nev. at  
2 623.<sup>4</sup> The Supreme Court explained there are two exceptions to the Hill rule that the good cause  
3 must be established through a written affidavit: 1. defense counsel stipulates to an oral argument  
4 or 2. the State was “surprised” by the witness’ nonappearance. *Id.* In that case, the Court held  
5 there was “surprise” as the State had valid subpoena returns and did not know the witness would  
6 be absent until the time of the hearing. *Id.* at 624.

7  
8 Condoning the State’s willful failure to comply with the directives of Hill would  
9 effectively make the Supreme Court’s precedent meaningless. *See Maes v. Sheriff, Clark*  
10 *County*, 86 Nev. 317, 318-19 (1970). “Willful” is not only intentional derelictions but also a  
11 conscious indifference on behalf of the State toward important procedural rules that affect a  
12 defendant’s rights. *See State v. Austin*, 87 Nev. 81, 82-83 (1971). In cases where the State  
13 neither submitted a written affidavit nor provided sworn testimony in support of its motion to  
14 continue, the Supreme Court held the appropriate response was to deny the State’s motion and  
15 dismiss the case against the defendant. *See Clark v. Sheriff, Clark County*, 94 Nev. 364 (1978)  
16 (reversing the denial of the defendant’s habeas petition for failure to submit an affidavit or be  
17 sworn under oath); *see also Reason v. Sheriff, Clark County*, 94 Nev. 300 (1978) (reversing the  
18 denial of the defendant’s habeas petition based on the State’s failure to submit an affidavit or be  
19 sworn under oath); *compare with State v. Nelson*, 118 Nev. 399 (2002) (holding there was  
20 sufficient evidence based on the prosecutor’s sworn testimony that the State was surprised by the  
21 witness’ nonappearance); *compare with Terpstra*, 111 Nev. at 860 (holding the written affidavit  
22 outlining all of the Hill factors supported the trial court’s finding of good cause).

23  
24 While the State did identify the named witness, and there is no dispute that said witness  
25 would be necessary as she is the named victim, the State failed to meet the other four  
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27  
28 <sup>4</sup> The State would still be required to outline all of the factors as delineated in Hill. *Id.*

1 requirements outlined in Hill. *See* Transcript, 2:10-23. At no point during the State's motion was  
2 it indicated the expected testimony of the missing witness. *See* Transcript. At the time of the  
3 motion, the State argued it had previously had contact with the missing witness and knew of her  
4 current address but had since lost contact. Transcript, 2:10-17. Despite knowing the witness'  
5 address, the State never attempted to personally serve the missing witness. *See* Transcript.  
6 Additionally, the State never informed defense counsel nor the court of the date in which it last  
7 had contact with the missing witness or when the State learned the missing witness would be  
8 absent from the preliminary hearing. *See* Transcript. Finally, the State never argued that the  
9 motion for a continuance was made in good faith and not for the purpose of delay. *See*  
10 Transcript.  
11

12         The State also failed to meet the standard required for "good cause" under Bustos. The  
13 State would have needed to show it was "surprised" by the missing witness' nonappearance;  
14 however, the State did not and could not argue it was surprised as the missing victim had  
15 previously informed the State she "refused to promise to appear." *See* Transcript, 2:16. Unlike  
16 Bustos where the prosecutor had valid subpoena returns, the State made no representations  
17 indicating it received any confirmation that the missing witness ever received the subpoena sent  
18 via the mail. *See generally* Transcript. Most importantly, the Court stated it was not granting the  
19 State's motion under Hill or Bustos. *See* Transcript, 5:4-11 ("it wasn't technically a Bustos or a  
20 Hill ... Although I understand it doesn't technically fit under Hill or Bustos..."). As the State's  
21 request failed to meet the standards outlined in Hill and Bustos, the State should not have  
22 received a continuance and the case against Mr. Harris should have been dismissed.  
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1           **b. The State's failure to either submit a written affidavit or give sworn**  
2           **testimony prohibits the State from receiving a continuance and requires a**  
3           **dismissal of the charges against Mr. Harris.**

4           While the evidence is clear that the State's motion in this case was insufficient under Hill  
5           and Bustos and its progeny, Nevada law requires that either an affidavit or sworn testimony  
6           support the State's motion for a continuance. *See* Clark, 94 Nev. at 364; *see also* Reason, 94  
7           Nev. at 300. In both of those cases, the Nevada Supreme Court held that the State's failure to  
8           submit an affidavit or provide sworn testimony required a denial of the State's motion for a  
9           continuance. *See* Clark, 94 Nev. at 364; *see also* Reason, 94 Nev. at 300. While the State did  
10          make representations on the record, at no point during this motion was the prosecutor under oath.  
11          *See* Transcript. In any of the above cited cases where "good cause" was found, the prosecutors  
12          had at least submitted an affidavit or swore under oath as to the requisite "surprise."<sup>5</sup> In this  
13          case, as the State failed to comply with either of these requirements, they were not entitled to a  
14          continuance and the case against Mr. Harris should be dismissed.

15  
16           **c. The State did not otherwise demonstrate "good cause" to continue the**  
17           **preliminary hearing.**

18          The State did not comply with the requirements of Hill and Bustos, so it must  
19          demonstrate good cause through other means for the Court to grant a continuance. "What  
20          constitutes 'good cause' is not amenable to a bright-line rule. The justice's court must review the  
21          totality of the circumstances to determine whether 'good cause' has been shown." Terpstra, 111  
22          Nev. at 863, 899 P.2d at 550. Under the totality of the circumstances, the State did not  
23          demonstrate good cause to continue Mr. Harris's preliminary hearing.

24  
25          In Ormound v. Sherriff, Clark County the Nevada Supreme Court reversed a district  
26          court's denial of a petition for a writ of habeas corpus based on the improper continuance of a  
27

28          <sup>5</sup> *See* Nelson, 118 Nev. at 399; *see also* Terpstra, 111 Nev. at 863.

1 preliminary hearing. 95 Nev. 173, 591 P.2d 258 (1979). In that case, the prosecutor mailed a  
2 subpoena to an out-of-state witness, but did not utilize the Uniform Act to Secure the Attendance  
3 of Witnesses From Without a State in Criminal Proceeding. Id. The Court found the failure to  
4 use the Uniform Act was a willful disregard of procedural rules, and ordered the case to be  
5 dismissed. Id.

6 The Court reconsidered this issue in Terpstra, and overruled the finding in Ormound that  
7 a prosecutor must utilize the Uniform Act “before a justice’s court can find ‘good cause’ for a  
8 continuance based on the absence of an out-of-state witness.” Terpstra, 111 Nev. at 863, 899  
9 P.2d at 550-551. Instead, the use of a legal means to compel the attendance of a witness is a  
10 significant factor to consider when determining if good cause exists to continue the hearing. “It is  
11 not, however, a dispositive factor; it merely goes to ‘the diligence used by the prosecutor to  
12 procure the witness’ attendance.’” Id. at 863, 550 (1995) (quoting Bustos, 87 Nev. at 622, 491  
13 P.2d at 1279).

14 In this case, the State had a legal means available to compel the attendance of the witness,  
15 and failed to use it. NRS 174.315(2) permits a prosecutor to issue a subpoena to compel the  
16 attendance of a witness at a preliminary hearing. NRS 174.345 mandates that “service of a  
17 subpoena *must* be made by delivering a copy thereof to the person named” (emphasis added)  
18 unless an exception applies. The only exception applicable to the witness in this case is NRS  
19 174.315(3), which states that a “witness may accept delivery of a subpoena in lieu of service, by  
20 a written or oral promise to appear given by the witness.”

21 In this case, there is no indication that the State even attempted to make personal service  
22 upon the witness. *See* Transcript. Furthermore, the witness actually “refused to promise to  
23 appear.” *See* Transcript, 2:16-17. As the witness did not accept the mailed subpoena by oral  
24 promise to appear, the exception to personal service in NRS 174.315(3) does not apply in this  
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28

1 case. The State argued at the date of preliminary hearing that it sent the witness a subpoena via  
2 text, but no statute permits service by text message; to the contrary, the statute specifies that  
3 personal service is required.

4 Under the holding in Terpsta, the State's failure to even attempt to properly serve the  
5 witness requires dismissal of the case. Although not dispositive, the State's failure to personally  
6 serve the missing witness, *despite knowing where she lived*, is significant and shows a willful  
7 disregard for important procedures. In Bustos, the prosecutor had properly subpoenaed the  
8 missing witness and was truly surprised the witness' nonappearance;<sup>6</sup> in comparison, in Salas v.  
9 State, the prosecutor had not even issued a subpoena.<sup>7</sup> In that case, the court held that failing to  
10 issue a subpoena was not good cause for a continuance. *See Salas*, 91 Nev. at 802. In this case,  
11 the State did not even attempt proper service. While the State did mail a subpoena to the witness,  
12 without an oral promise to appear, simply mailing a subpoena is not proper service. The State  
13 had various opportunities and methods in which it could have attempted to guarantee the missing  
14 witness's presence, yet failed to do so. As such, the State did not have good cause to request a  
15 continuance and Mr. Harris's case should be dismissed with prejudice.

16  
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18  
19 **d. The State's conscious indifference to important procedures requires Mr.  
Harris' case to be dismissed with prejudice.**

20 "A new proceeding for the same offense (whether by complaint, indictment or  
21 information) is not allowable when the original proceeding has been dismissed due to the willful  
22 failure of the prosecutor to comply with important procedural rules." *See Maes*, 86 Nev. at 319,  
23 468 P.2d at 333. The Nevada Supreme Court continues to strictly adhere to the important  
24 procedural rules regarding continuances. The State had a duty to prepare for the preliminary  
25 hearing, and had a legal means to compel the presence of the witness, but failed to do so. The

26  
27 <sup>6</sup> Bustos, 87 Nev. at 623.

28 <sup>7</sup> 91 Nev. 802 (1975).

1 State failed to follow the statutory requirements in serving a subpoena, and failed to follow the  
2 basic procedural precepts by submitting a written affidavit or sworn testimony supporting its  
3 request for the continuance. As such, Mr. Harris is requesting that this Honorable Court dismiss  
4 the instant case against him with prejudice, based upon the State's willful disregard of his  
5 constitutional right to Due Process under the 5<sup>th</sup> and 14<sup>th</sup> Amendments to the United States  
6 Constitution.  
7

### 8 CONCLUSION

9 Hill, Bustos, and their progeny are not mere suggestions; they are legal requirements.  
10 Good cause must not be set aside for a missing witness who had no contact with the State. This  
11 Honorable Court must not condone the State's abject failure to comply with basic rules  
12 governing requests to continue trials. In order to allow the State's continuance to stand, this  
13 Honorable Court must not only set aside Mr. Harris' Constitutional rights, but also those of Ms.  
14 Dotson, a person who has never been accused of wrongdoing in this matter. Therefore, and  
15 based on the foregoing, Petitioner respectfully requests that this Honorable Court issue the writ  
16 of mandamus/prohibition ordering the Justice Court to dismiss the charges against Mr. Harris in  
17 this matter with extreme prejudice.  
18

19 DATED this 29th of October, 2017.

20  
21 PHILIP J. KOHN  
22 CLARK COUNTY PUBLIC DEFENDER

23 By: \_\_\_\_\_  
24 SCOTT A. RAMSEY, #13941  
25 Deputy Public Defender  
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**NOTICE OF MOTION**

TO: CLARK COUNTY DISTRICT ATTORNEY, Attorney for Plaintiff:

YOU WILL PLEASE TAKE NOTICE that the Public Defender's Office will bring the above and foregoing MOTION on for hearing before the Court on the 2nd day of November, 2017, at 8:30 a.m.

DATED this 29th day of October, 2017.

PHILIP J. KOHN  
CLARK COUNTY PUBLIC DEFENDER

By: /s/Scott A. Ramsey  
SCOTT A. RAMSEY, #13941  
Deputy Public Defender

**RECEIPT OF COPY**

RECEIPT OF COPY of the above and foregoing MOTION is hereby acknowledged this \_\_\_\_\_ day of October, 2017.

CLARK COUNTY DISTRICT ATTORNEY

By: \_\_\_\_\_



# EXHIBIT

District Court's

Findings Facts AND Conclusion of

Law

#3.

1 FCL  
2 Judge Douglas E. Smith  
3 Eighth Judicial District Court  
4 Department VIII  
5 Regional Justice Center  
6 200 Lewis Avenue  
7 Las Vegas, Nevada 89155  
8 (702)671-4338

DISTRICT COURT  
CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,  
10 Plaintiff,

11 -vs-

12 BARRY HARRIS,  
13 #1946231

Defendant.

CASE NO: A-17-764110-W

DEPT NO: VIII

14 FINDINGS OF FACT, CONCLUSIONS OF  
15 LAW AND ORDER DENYING DEFENDANT'S PETITION FOR WRIT OF  
16 MANDAMUS/PROHIBITION

17 DATE OF HEARING: SEPTEMBER 21, 2017  
18 TIME OF HEARING: 8:00 AM

19 THIS CAUSE having come on for hearing before the Honorable DOUGLAS E.  
20 SMITH, District Judge, on the 21st day of September 2017, the Petitioner not being  
21 present, begin represented by PHILLIP KOHN, Clark County Public Defender, by and  
22 through SCOTT RAMSEY, Deputy Public Defender, the Respondent being  
23 represented by STEVEN B. WOLFSON, Clark County District Attorney, by and  
24 through GENEVIEVE CRAGGS, Deputy District Attorney, and the Court having  
25 considered the matter, including briefs, transcripts, and documents on file herein, now  
26 therefore, the Court makes the following findings of fact and conclusions of law:

27 FINDINGS OF FACT, CONCLUSIONS OF LAW

28 On August 21, 2017, Barry Harris (hereinafter "Defendant") was charged by  
way of criminal complaint with the following: BURGLARY (Category B Felony -  
NRS 205.060 - NOC 50424); FIRST DEGREE KIDNAPPING (Category A Felony -

1 NRS 200.310, 200.320 - NOC 50051); BATTERY WITH USE OF A DEADLY  
2 WEAPON CONSTITUTING DOMESTIC VIOLENCE (Category B Felony - NRS  
3 200.481; 200.485; 33.018 - NOC 57935); BATTERY CONSTITUTING DOMESTIC  
4 VIOLENCE - STRANGULATION (Category C Felony - NRS 200.481; 200.485;  
5 33.018 - NOC 54740); OWNERSHIP OR POSSESSION OF FIREARM BY  
6 PROHIBITED PERSON (Category B Felony - NRS 202.360 - NOC 51460); and  
7 CARRYING CONCEALED FIREARM OR OTHER DEADLY WEAPON (Category  
8 C Felony - NRS 202.350 (1)(d)(3) - NOC 51459). On August 31, 2017, Defendant was  
9 arraigned on the aforementioned charges and pleaded not guilty.

10 On September 15, 2017, Defendant was sent for a competency evaluation. On  
11 October 13, 2017, Defendant was scheduled to return for competency proceedings.  
12 However, he was combative with officers so was not present. His preliminary hearing  
13 was set for October 26, 2017.

14 On October 26, 2017, the State requested a continuance based on the due  
15 diligence of the State and the evidence presented that the victim in the case knew of  
16 the court date but chose not to appear. The Honorable Judge Tobiasson granted the  
17 States' continuance over the Defendant's objection. An Order to Show Cause Hearing  
18 for the victim was scheduled for November 2, 2017, and a preliminary hearing was  
19 scheduled for November 9, 2017.

20 On November 3, 2017, Defendant filed an Emergency Motion for Stay of  
21 Justice Court Proceedings and the instant Writ was filed. The preliminary hearing date  
22 of November 9, 2017 was vacated. The State filed its Response on November 21,  
23 2017.

24 The writ of mandamus is an extraordinary writ. State v. Dist. Ct. (Riker), 121  
25 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). The purpose of such a writ is to compel  
26 the performance of an act which the law requires as part of the duties arising from an  
27 office, trust, or station. Id. The purpose is not to act as an assignment of error, and it  
28 may not be used to correct errors by inferior tribunals, though it may be used to rectify

1 a manifest abuse of discretion. Id.; State v. Dist. Ct. (Hedland), 116 Nev. 127, 133,  
2 994 P.2d 692, 696 (2000) (“[A] writ of mandamus does not lie to correct errors where  
3 action has been taken by the inferior tribunal.” ~~State v. Weber~~ Weber v. McFadden,  
4 46 Nev. 1, 6, 250 P.2d 594, 595 (1922) (holding that mandamus is not to be used to  
5 control judicial discretion or alter judicial action). A writ of mandamus will not issue  
6 where the “petitioner has a plain, speedy and adequate remedy in the ordinary course  
7 of law.” Hedland, 116 Nev. at 133, 994 P.2d at 696; See NRS 34.170. A justice  
8 court’s granting of a continuance is generally a discretionary ruling... Sheriff, Clark  
9 County v. Blackmore, 99 Nev. 827, 830, 673 P.2d 137, 138 (1983).

10 NRS 171.196 provides that the magistrate shall hear the evidence within 15  
11 days, unless for good cause shown. NRS 171.196(2). Indeed, a magistrate may set a  
12 preliminary hearing beyond the statutory 15 day period when necessary. See  
13 Stevenson v. Sheriff, 92 Nev. 525 (1975). Factors constituting good cause include: the  
14 condition of the calendar, the pendency of other cases, public expense, the health of  
15 the judge, and even the convenience of the court. See Shelton v. Lamb, 85 Nev. 618  
16 (1969).

17 This Court must be cautious in reviewing the lower court’s rulings. This Court  
18 must truly look to see if the lower court judge abused their discretion and must not  
19 decide the factual issues of the case. This Court’s decision must look to the totality of  
20 the circumstances to determine whether or not the decision of the Justice of the Peace  
21 was an abuse of discretion.

22 The State must demonstrate good cause for securing a continuance of a  
23 preliminary examination. See Sheriff, Nye County v. Davis, 106 Nev. 145, 787 P.2d  
24 1241 (1990); see also McNair v. Sheriff, Clark County, 89 Nev. 434, 514 P.2d 1175  
25 (1973). The requirements outlined in Bustos v. Sheriff, Clark County, 87 Nev. 622,  
26 624 (1971) and Hill v. Sheriff of Clark County, 85 Nev. 234 (1969), are avenues in  
27 which the State may demonstrate good cause in order to receive a continuance.  
28 However, these avenues are sufficient to demonstrate good cause, but not necessary.

1 The basis for the continuance and the basis for the State's request come from  
2 NRS 171.196(2). NRS 171.196(2) states in pertinent part, "[i]f the defendant does not  
3 waive examination, the magistrate shall hear the evidence within 15 days, *unless for*  
4 *good cause shown* the magistrate extends such time."

5 A motion to continue a preliminary hearing is not limited solely to the narrow  
6 factual confines of either Hill or Bustos; the justice's court must review the totality of  
7 the circumstances to determine whether 'good cause' has been shown." Sheriff, Clark  
8 Cty. v. Terpstra, 111 Nev. 860, 863, 899 P.2d 548, 551 (1995). "Good cause is not  
9 amenable to a bright-line rule." Id. at 862. In Hernandez v. State, the Nevada Supreme  
10 Court found that, "[i]n determining whether the proponent of preliminary hearing  
11 testimony has met its burden of proving that a witness is constitutionally unavailable,  
12 the touchstone of the analysis is the reasonableness of the efforts." 124 Nev. 639, 651,  
13 188 P.3d 1126, 1134 (2008).

14 It is not necessary for a witness to be personally served in order for the State to  
15 show good cause for a continuance. Terpstra, 111 Nev. at 863.

16 In State v. Nelson, 118 Nev. 399, 401, 46 P.3d 1232, 1233 (2002), the Nevada  
17 Supreme Court made clear that the granting of a continuance was a totality of the  
18 circumstances review. The defendant in Nelson filed a Writ arguing that the State's  
19 continuance did not conform to the specific requirements of Hill or Bustos and thus the  
20 Writ should be granted. Id. at 403. The District Court dismissed the case based on the  
21 rationale that the continuance did not conform to either Hill or Bustos. Under a totality  
22 of circumstances analysis, the District Court's decision was reversed by the Nevada  
23 Supreme Court. Id. at 404-05.

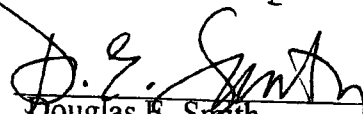
24 The Justice Court did not manifestly abuse its discretion by finding that the  
25 State showed good cause through due diligence to procure the named victim in the  
26 instant case. The State clearly laid out for the court that the witness was in fact the  
27 named victim in the case. Additionally, the State explained that the witness knew of  
28 the court date, and yet purposefully did not show up. The State knew she received the

1 subpoena as she verified the phone number to which the subpoena was texted, and also  
2 verified the address where the subpoena was sent. The State's process server told the  
3 named victim of the date, and she specifically refused to promise to appear. The  
4 intentional and deliberate actions of the witness not to come to court coupled with the  
5 State's due diligence to procure her presence shows through the totality of the  
6 circumstances that good cause was presented to the court.

7  
8 **ORDER**

9 THEREFORE, IT IS HEREBY ORDERED that the Petition for  
10 Mandamus/Prohibition shall be, and it is, hereby denied.


11 DATED this 27th day of November, 2017

12   
13 Douglas E. Smith  
14 DISTRICT COURT JUDGE *JS*

15 **CERTIFICATE OF SERVICE**

16 I hereby certify that on the 27th day of November 2017, a copy of this Order  
17 was electronically served to all registered parties in the Eighth Judicial District  
18 Court Electronic Filing Program and/or placed in the attorney's folder maintained  
19 by the Clerk of the Court and/or transmitted via facsimile and/or mailed, postage  
20 prepaid, by United States mail to the proper parties or per the attached list as  
21 follows:

22 Genevieve Craggs, [Genevieve.craggs@clarkcountyda.com](mailto:Genevieve.craggs@clarkcountyda.com)  
23 Scott Ramsey, [Scott.ramsey@clarkcountynv.gov](mailto:Scott.ramsey@clarkcountynv.gov)

24   
25 Jill Jacoby, Judicial Executive Assistant