IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Jun 08 2022 02:40 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

JASON BOLDEN, A/K/A JASON JEROME BOLEN, Appellant, vs. THE STATE OF NEVADA, Respondent	**Docket No. 79715**

APPELLANT'S SUPPLEMENTAL BRIEF

ATTORNEY FOR APPELLANT
BEN NADIG, ESQ.
Nevada State Bar No. 9876
Law Offices of Benjamin Nadig, Chtd.
228 South Fourth Street, 3rd Floor
Las Vegas, NV 89101
P: (702) 545-7592
F: (702) 382-6903
Counsel for Appellant

Docket 79715 Document 2022-18281

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. PROCEDURAL BACKGROUND.

This Court, upon granting the Petition for Rehearing En Banc, simultaneously ordered supplemental briefing. This Court directed briefing on: (1) the proper interpretation of the affidavit requirement in NRS 173.035 and whether it permits the state to proceed using the certified preliminary hearing transcript; and (2) whether Bolden forfeited this argument under *Jeremias v. State*, 134 Nev. 46, 412 P.3d 43 (2018). This Supplemental Brief addressing those issues now follows.

II. SUPPLEMENTAL AUTHORITY.

A. NRS 173.035's affidavit requirement does not permit the state to proceed using the certified preliminary hearing transcript.

i. *NRS 173.035(2) unambiguously requires an Affidavit.*

When the language of a statute is plain and unambiguous, a court should give that language its ordinary meaning and not go beyond it. *Coast Hotels v. State, Labor Comm'n*, 117 Nev. 835, 840 (Nev. 2001). Under established principles of statutory construction, when a statute is susceptible to but one natural or honest construction, that alone is the construction that can be given. *Id.* "The Courts must construe statutes to give meaning to all of their parts and language, and this court will read each sentence, phrase, and word to render it meaningful within the context of the purpose of the legislation." *Id* at 840-841.

NRS 173.035 provides, in full, that:

> **"NRS 173.035** Information may be filed following preliminary examination when accused is bound over or when preliminary examination is waived; when information is filed on affidavit; limitation of time; amended information may include additional charges if plea agreement is rejected or withdrawn.
>
> 1. An information may be filed against any person for any offense when the person:
>
> (a) Has had a preliminary examination as provided by law before a justice of the peace, or other examining officer or magistrate, and has been bound over to appear at the court having jurisdiction; or
>
> (b) Has waived the right to a preliminary examination.
>
> 2. If, however, upon the preliminary examination the accused has been discharged, or the affidavit or complaint upon which the examination has been held has not been delivered to the clerk of the proper court, the Attorney General when acting pursuant to a specific statute or **the district attorney may, upon affidavit of any person who has knowledge of the commission of an offense,**

and who is a competent witness to testify in the case, setting forth the offense and the name of the person or persons charged with the commission thereof, upon being furnished with the names of the witnesses for the prosecution, by leave of the court first had, file an information, and process must forthwith be issued thereon. **The affidavit need not be filed in cases where the defendant has waived a preliminary examination, or upon a preliminary examination has been bound over to appear at the court having jurisdiction**.

3. The information must be filed within 15 days after the holding or waiver of the preliminary examination. Each information must set forth the crime committed according to the facts.

4. If, with the consent of the prosecuting attorney, a defendant waives the right to a preliminary examination in accordance with an agreement by the defendant to plead guilty, guilty but mentally ill or nolo contendere to a lesser charge or to at least one, but not all, of the initial charges, the information filed against the defendant pursuant to this section may contain only the offense or offenses to which the defendant has agreed to enter a plea of guilty, guilty but mentally ill or nolo contendere. If, for any reason, the agreement is rejected by the district court or withdrawn by the defendant, the prosecuting attorney may file an amended information charging all of the offenses which were in the criminal complaint upon which the preliminary examination was waived. The defendant must then be arraigned in accordance with the amended information."

NRS 173.035 (Emphasis added).

NRS 173.035(2) thus provides a method by which the prosecution can attempt, by motion, to circumvent the dismissal of charges against a defendant by a justice court.

"An affidavit is a written statement "sworn to by the declarant before an officer authorized to administer oaths." Black's Law Dictionary 66 (9th ed. 2009)." *Buckwalter v. Eighth Ju., 126 Nev. Adv. Op. No. 21, 55133 (2010)*, 234 P.3d 920, 3 (Nev. 2010). The statute, in two places, unambiguously declares the requirement of an "affidavit." The statute goes on to specify the required contents of the affidavit, including that the affidavit must be from "a person who has knowledge of the commission of an offense" and "who is competent to testify as a witness" in the case. *Id.* The statute goes further in describing this affidavit requirement by identifying those circumstances *is not to be required*, specifically, "cases where the defendant has waived a preliminary examination, or upon a preliminary examination has been bound over to appear at the court having jurisdiction." *Id.*

In 1995 this Court expressly recognized what is plainly stated by this statutory language. In *Cipriano v. State*, this Court recognized that:

> "The statute specifically requires that the information be supported by an affidavit of a person who has knowledge of the commission of an offense, and who is a competent witness to testify in the case. Cipriano points out that the prosecutor did not comply with this language, but simply attached his own affidavit to support the information. [...] NRS 173.035(2) clearly requires that the prosecutor attach an affidavit of a competent witness with knowledge of the commission of the offense and who is competent to testify at trial. Contrary to the State's assertions, this does not include the prosecutor, who only had knowledge of the alleged

> crimes because of his fortuitous presence at the preliminary hearing." *Cipriano v. State*, 111 Nev. 534, 540 (Nev. 1995)(overruled, in part, on other grounds by *State v. District Court*, 114 Nev. 739, 743 (Nev. 1998)).

If NRS 173.035(2)'s affidavit requirement was to be ignored by the Courts, this Court presumably would have indicated as much in *Cipriano* but chose instead to enforce the statutory directives as to the subsidiary content of the required affidavit. Logically, if the statute's unambiguous requirement as to the *content* of an affidavit has full force in Nevada, the very *requirement* of the existence of the affidavit is likewise effective.

In other contexts, this Court has had no qualms about recognizing the total lack of statutory ambiguity where statutory schemes require the filing of an affidavit. *Leven v. Frey*, 123 Nev. 399, 403 (Nev. 2007)("In particular, NRS 17.214(1)(a)'s requirement, that an affidavit of renewal be filed with the court clerk within 90 days before the judgment expires by limitation, is unambiguous."). The legislature has seen fit to require, and this Court has routinely enforced, the unambiguous requirement of an Affidavit in support of certain forms of civil and malpractice litigation, and the consequent dismissal of actions which fail to adhere to this affidavit requirement. *See Otak Nevada, LLC v. Eighth Judicial District Court ex rel. County of Clark*, 260 P.3d 408, 411 (Nev. 2011)(discussing the affidavit requirement pertaining to construction malpractice under NRS

11.258-11.259); *Szydel v. Markman*, 121 Nev. 453, 461 (Nev. 2005)(HARDESTY, J., dissenting, criticizing an exception to the statutory affidavit requirement in medical malpractice cases, recognizing that "the affidavit requirement of NRS 41A.071 is jurisdictional[...].").

NRS 173.035 has itself been the subject of some commentary as to the appropriate manner of statutory interpretation. Judge Jerome T. Tao, writing a concurring opinion before the Court of Appeals, has opined on the interpretation of NRS 173.035(2)'s fifteen-day requirement in *Moultrie v. State*, 364 P.3d 606, 616 (Nev. App. 2015). Noting that NRS 173.035(3) unambiguously requires that a district attorney filing an Information in District Court by affidavit must do so within fifteen (15) days, Judge Tao writes:

> "Consequently, I would conclude that neither the Legislature nor the Nevada Supreme Court have created any discretion for a district court to ignore or waive the deadline of NRS 173.035(3) in the filing of an information by affidavit after a defendant's discharge. Thus, when confronted by a motion seeking leave to file an information by affidavit following discharge, a district court cannot grant leave to the State when more than 15 days have elapsed since the preliminary hearing." *Moultrie v. State*, 364 P.3d 606, 616 (Nev. App. 2015)

Furthermore, although Judge Tao recognized that such strict requirements for Information-by-Affidavit filings may have questionable merit when weighing

competing public policy interests, such questions of public policy are for the legislature alone to weigh:

> "When the State seeks to file an information by affidavit after a defendant has already been discharged from custody, it effectively seeks to have one judicial officer overrule another and reinstate charges that have already been dismissed.
>
> On its merits the State's request might be warranted; after all, overworked judges do sometimes commit "egregious error" and charges might be erroneously dismissed when they should not have been. But it would not be utterly illogical for the Legislature to have decided that there ought to be a very tight, nondiscretionary deadline for the State to make this request and thereby force the defendant to again face charges that were already dismissed. At the very least, the Legislature would have been well within its constitutional powers in making that decision and purposefully depriving us of the discretion to second-guess it." *Moultrie v. State*, 364 P.3d 606, 616-17 (Nev. App. 2015).

The same logic applies when considering the legislature's unambiguous choice to limit NRS 173.035(2) filings to those being supported by an affidavit. Where a Justice of the Peace has already dismissed a case for lack of probable cause, quite often those dismissals will rest (at least in part) upon the missing or recanted testimony of an accusing witness. If the State seeks to circumvent this dismissal by a Justice of the Peace, it is within the scope of rational legislative reason that the legislature may choose to require a subsequent NRS 173.035(2) Information-by-Affidavit to be supported by an affidavit of the accusing witnesses.

To remove any doubt as to the actuality of this affidavit requirement, a review of the legislative history is informative. NRS 173.035 is not a new law. This Court (in the panel decision in this case) identified that the statute was "[e]nacted in 1913 and amended in 1915, the text of NRS 173.035(2) has changed little over the years." *Bolden v. State*, 137 Nev. Adv. Op. 28, 4 (Nev. 2021). The legislature elected by the people of Nevada has had no shortage of opportunities to re-evaluate the affidavit requirement prior to 2022 and has simply chosen to repeatedly reaffirm the existing statutory language.

During this century-long reign of NRS 173.035(2)'s affidavit requirement, this Court has repeatedly discussed the existence of this affidavit procedure, which again served to inform the legislature that this requirement was not some dormant and ineffectual statutory anomaly, but rather, continued to hold force. The legislature has never taken steps to override this affidavit requirement.

ii. ***Public Policy does not justify departing from the plain language of NRS 173.035(2).***

When presented with a question of statutory interpretation, the intent of the legislature is the controlling factor and, if the statute under consideration is clear on its face, a court cannot go beyond the statute in determining legislative intent. *White v. Warden*, 96 Nev. 634, 636, 614 P.2d 536, 537 (1980). If, however,

the statute is ambiguous it can be construed "in line with what reason and public policy would indicate the legislature intended." *Cannon v. Taylor*, 87 Nev. 285, 288, 486 P.2d 493, 495 (1971), *adhered to, withdrawn in part*, 88 Nev. 89, 493 P.2d 1313 (1972). *See generally* White, *supra.* "A statute or portion thereof is ambiguous when it is capable of being understood by reasonably well-informed persons in either of two or more senses." *Madison Met. Sewer Dist. v. Dep't of Nat. Res.*, 216 N.W.2d 533, 535 (Wis. 1974).

To reiterate: there is no reading of NRS 173.035(2) which renders the requirement of an affidavit "ambiguous." There is only one way to read the statute. However, if this Court is inclined to consider public policy, it should still be led to uphold the existence of the affidavit requirement.

First, the legislature is the branch of the government that is called to balance competing public interests, and as such, the affidavit requirement (and its policy merit) should be presumed to be controlling, by deference to the legislature's assessment of the value of the requirement. Second, the State has been provided *several different* avenues to charge a citizen with criminal conduct, including multiple bites at the same apple, and it is reasonable to counterbalance the broad power to charge citizens with crimes with formal statutory requirements. Third, judicially circumventing the plain statutory requirements would subject the

citizenry to a persistent state of uncertainty as to their security under the law. Fourth, this persistent uncertainty would, worst of all, be on the very issue of criminal jeopardy, which directly implicates the most central liberty interest imaginable, the personal bodily autonomy and freedom of the citizen.

The State is provided numerous statutory tools with which it can bring an accused individual to justice. The plethora of tools provided to any prosecutor, by the State legislature, is more than sufficient to promote the public policy of enabling the prosecution of persons suspected of having committed a criminal offense within this State. The State may bring a Complaint before a Justice Court. If that fails, the State can summon a Grand Jury. Even where the Justice Court finds a lack of evidence to support probable cause, the legislature has designed an escape hatch under NRS 173.035(2) for a Motion to file charges pursuant to witness affidavit.

This is all to say: the legislature has already provided any prosecutor numerous bites at the procedural apple. The present case asks whether the Courts should also, to excuse the prosecution's failure to comply with unambiguous statutory requirements, engage in a judicial revision of the plain meaning of the statutory scheme.

No principle of statutory construction warrants alleviating the prosecution's undemanding obligation to comply with the plain meaning of statutes which govern the bringing of charges against a defendant. The legislature has seen fit to require an "affidavit" to bring charges under NRS 173.035(2). It has done so unambiguously. Any re-evaluation of the wisdom of the affidavit requirement rests solely with the legislature, and they are free to amend the statute.

It is clearly within the legislative prerogative to carefully circumscribe the ways in which a defendant can be held to answer for a criminal offense where (at least) one judge has already deemed that the evidence is so deficient as to require a dismissal. Just as our society has an interest in criminals being brought to justice, it likewise has just as substantial interest in preventing the successive re-filing of accusations of criminal conduct.

This is the genesis behind, among other things, the Double Jeopardy clause of the United States Constitution. With this same dilemma in mind, the legislature has, by its plain meaning, crafted NRS 173.035 to *grant* a *limited right* of re-prosecution to the State. It creates a "safeguard" against egregious error by a lower court, but because it simultaneously sets loose the beguiling specter of successive re-filings of the same subject matter against an accused individual, even after a dismissal upon insufficient evidence, the legislature has seen fit to grant

only a *limited and carefully circumscribed* right of prosecution to the State: file within 15 days and support your filing by an affidavit by a competent witness with personal knowledge.

The citizens of this State are entitled to rely upon legislatively codified procedures for bringing criminal charges, and to rest assured they will not be held to answer for any criminal allegation where the State and its prosecutors willfully chooses not to abide by those statutory requirements. This especially the case here, where NRS 173.035(2) *only ever applies* where a judge has already once dismissed those criminal charges. The citizens of Nevada must rest assured they do not face successive re-filings of the same criminal accusations unless such re-filings are properly made within the carefully circumscribed limitations the legislature has seen fit to enact.

Furthermore, a balancing of the competing public interests supports the Appellant's argument. On the one hand, if the State is free to re-filed dismissed criminal actions without following the statutory requirements, based upon judicially created exceptions which can be announced at any point in the future, the citizenry cannot rest assured of how the criminal law is to be applied, and thus finds itself subject to an uneasy perpetual legal seasickness. Should the Courts ask

the citizenry to live under that type of persistent uncertainty as to the security of their personal bodily freedom?

On the other hand, in contrast, so little is being asked here of the State's prosecutors: simply follow unambiguous statutory requirements when bringing criminal charges. The State can either present the evidence persuasively before the Justice Court (only needing to present slight or marginal evidence), or failing that, it can seek leave to file the Information by affidavit (a second bite at the apple) or seek to empanel a grand jury (a third bite at the apple). Requiring the State to do one of these three things by the letter of the law is not an unreasonable burden to place upon the State when compared to the calamity of legal uncertainty the State now asks the citizenry to undertake, where they can be charged even in disregard of the statutory law governing the prosecution.

In sum, even if this Court is to evaluate the affidavit requirement from a public policy perspective, public policy does not justify departing from the plain meaning of the statute, and in fact, disregarding that plain meaning would result in grave public policy imbalances, especially as it relates to the relative power of the State prosecutors and the relative security of the citizenry of this State.

iii. The Panel's reasoning must be rejected.

The panel decision in this case reached the opposite conclusion, however the reasoning stated therein should be rejected, and the cases relied upon must be distinguished. *see Bolden v. State*, 137 Nev. Adv. Op. 28 (Nev. 2021).

Literalism and NRS 53.045

First, the panel unceremoniously (and without adequate justification) departed from Nevada law requiring that the unambiguous meaning of statutes control the law. The panel characterized this deference to the plain meaning of the statutory law as the "literalist approach." *Bolden v. State*, 137 Nev. Adv. Op. 28, 5-6 (Nev. 2021). The panel nevertheless acknowledged that "[g]ranted, NRS 173.035(2) refers only to an affidavit and does not expressly provide for affidavit equivalents." *Id.* As noted above, "when presented with a question of statutory interpretation, the intent of the legislature is the controlling factor and, "if the statute under consideration is clear on its face, a court cannot go beyond the statute in determining legislative intent." *White v. Warden*, 96 Nev. 634, 636, 614 P.2d 536, 537 (1980).

The panel rested its departure from the "literal" plain meaning of the statute upon NRS 53.045, which essentially created a statutory rule where any unsworn

declaration which conforms to that statute's formal requirements will be treated as if it was an affidavit by the courts. That statute provides in full that:

> "Any matter whose existence or truth may be established by an affidavit or other sworn declaration may be established with the same effect by an unsworn declaration of its existence or truth signed by the declarant under penalty of perjury, and dated, in substantially the following form:
>
> **1.** If executed in this State: "I declare under penalty of perjury that the foregoing is true and correct."
> Executed on.....
>
> (date) (signature)
>
> **2.** Except as otherwise provided in NRS 53.250 to 53.390, inclusive, if executed outside this State: "I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct."
> Executed on.....
>
> (date) (signature)" Nev. Rev. Stat. § 53.045.

The panel further cited to *Buckwalter v. Eighth Ju., 126 Nev. Adv. Op. No. 21, 55133 (2010)*, 234 P.3d 920, 2 (Nev. 2010), arguing that *Buckwalter* supported the proposition that an affidavit-analog could satisfy a statutory requirement for an affidavit.

Buckwalter considered the Affidavit requirement of NRS 41A.071 in light of NRS 53.034's provision for an unsworn declaration acting in place of an affidavit. This Court held that:

> "Statutes must be construed together so as to avoid rendering any portion of a statute immaterial or superfluous. Albios v. Horizon Communities, Inc., 122 Nev. 409, 418, 132 P.3d 1022, 1028 (2006). NRS 41A.071 imposes an affidavit requirement, which NRS 53.045 permits a litigant to meet either by sworn affidavit or unsworn declaration made under penalty of perjury. See State, Dep't Mtr. Veh. v. Bremer, 113 Nev. 805, 813, 942 P.2d 145, 150 (1997) (concluding that a declaration under NRS 53.045 met the affidavit requirement of the breathalyzer statute, even though the statute's language required an affidavit). To hold otherwise would make NRS 53.045 meaningless because it would require every statute imposing an affidavit requirement to state when a declaration may be used instead of an affidavit. Interpreting the two statutes so as to give meaning to both, we conclude that a declaration that complies with NRS 53.045 can fulfill NRS 41A.071's affidavit requirement. Because the district court properly refused dismissal, we deny the petition for extraordinary writ relief." *Buckwalter v. Eighth Ju., 126 Nev. Adv. Op. No. 21, 55133 (2010)*, 234 P.3d 920, 3-4 (Nev. 2010),

The panel also relied upon, *State, Dep't Mtr. Veh. v. Bremer*, 113 Nev. 805, 811 (Nev. 1997), which again approved using NRS 53.045 to permit courts to accept an unsworn declaration which conforms to NRS 53.045 to satisfy a separate statute's affidavit requirement:

> "At the administrative hearing, the hearing officer allowed the DMV to lay a foundation for the results of Sanders' breath test to be presented in the form of unsworn declarations. The district court concluded that NRS 50.315 required the submission of documents in affidavit form. While a strict reading of the statute supports this ruling, for the reasons set forth below, we hold that the distinctions between the declarations utilized in this case and a formal sworn affidavit are not such as to render the information contained therein inadmissible in the context of administrative proceedings to revoke driving privileges."

State, Dep't Mtr. Veh. v. Bremer, 113 Nev. 805, 811 (Nev. 1997)

The panel also relied upon *Mountainview Hosp., Inc. v. Eighth Judicial Dist. Court of Nevada*, 273 P.3d 861, 865 (Nev. 2012), where a medical malpractice case was allowed to proceed, despite the existence of an affidavit requirement, where a Plaintiff was permitted to establish the existence of an "unsworn declaration" pursuant to NRS 53.045 by extrinsic evidence.

This line of cases must be distinguished from the present case. These cases are specifically limited to instances where the moving party did not comply with a statutory affidavit requirement, *but did* submit an unsworn declaration pursuant to NRS 53.045, which, by the operation of that statute, is to be treated *as if it were* an affidavit. There is an obvious problem: the State in Bolden's case *did not*, and does not claim to have, submitted an unsworn affidavit to NRS 53.045.

Buckwalter, Bremer, and *Mountainview* did not judicially circumvent statutory affidavit requirements because the judges in those cases spontaneously reasoned that unsworn declarations had similar qualities to affidavits, and such should be treated as affidavits. The Courts in those cases ruled as they did because *the legislature itself* had decided that unsworn declarations which comply with NRS 53.045 are to be treated, as a matter of statutory law, as if they were affidavits.

In other words, it was the *legislature*, and not the judiciary, that proclaimed the interchangeability of NRS 53.045 unsworn declarations and affidavits. And the legislature stopped at making those formal unsworn declarations equivalent to affidavits. The statute did not extend to *any possible* writing which shares similar qualities to an affidavit.

The panel in this case seeks to leap a great deal beyond the NRS 53.045 line of cases, and now create a judicial principle that *any evidentiary medium* which shares sufficient characteristics with the affidavit, as evaluated by the Court, can meet any other statute's literal requirement of an affidavit. The line of NRS 53.045 cases – carefully limited to the legislature's elevation of the unsworn declaration to the status of affidavit equivalent – does not come close to suggesting that the judiciary should step in and create a whole *class* of affidavit substitutes by reason of analogy. If the legislature sees fit, it certainly can expand NRS 53.045's scope to permit testimonial transcripts (such as preliminary hearing transcripts) to be treated as-if they were affidavits for the purposes of other statutes, but the legislature has not chosen to do so. This Court should not (and under Nevada law governing statutory interpretation, *cannot*) go so far beyond the scope of NRS 53.045 on its own accord.

Substantial Compliance

Next, the panel invoked the doctrine of "substantial compliance" to justify departing from the plain meaning of the statute. *Bolden v. State*, 137 Nev. Adv. Op. 28, 8 (Nev. 2021). The only case cited by the panel as it relates to substantial compliance was *Leyva v. Nat'l Default Servicing Corp.*, 127 Nev. 470, 476, 255 P.3d 1275, 1278 (2011).

Leyva dealt specifically with dispute over banking documents pertaining to a mortgage note and deed of trust. *Leyva v. Natl. Default Serv., 125 Nev. Adv. Op. No. 40, 55216 (2011)*, 255 P.3d 1275, 6 (Nev. 2011). Specifically, it dealt with whether Wells Fargo should have been sanctioned for failing to "bring actual copies of any assignments" as was required by statute. *Id* at 7. Notably, the Court in *Leyva* ultimately *rejected* the Appellant's "substantial compliance" argument, holding that:

> "Here, both the statutory language and that of the FMRs provide that the beneficiary "shall" bring the enumerated documents, and we have previously recognized that "`shall' is mandatory unless the statute demands a different construction to carry out the clear intent of the legislature." S.N.E.A. v. Daines, 108 Nev. 15, 19, 824 P.2d 276, 278 (1992); see also Pasillas, 127 Nev. at ___, ___ P.3d at ___. The legislative intent behind requiring a party to produce the assignments of the deed of trust and mortgage note is to ensure that whoever is foreclosing "actually owns the note" and has authority to modify the loan. See Hearing on A.B. 149 Before the Joint Comm. on Commerce and Labor, 75th Leg. (Nev., February 11, 2009) (testimony of

> Assemblywoman Barbara Buckley). Thus, we determine that NRS 107.086 and the FMRs necessitate strict compliance. *Leyva v. Natl. Default Serv., 125 Nev. Adv. Op. No. 40, 55216 (2011)*, 255 P.3d 1275, 7-8 (Nev. 2011).

Although NRS 173.035(2) does not use the word "shall" it is just as direct and unambiguous in imposing the affidavit requirement.

First, it must be noted that in the absence of a statutory authorization, the State may not compel a citizen to answer to an accusation of criminal conduct. This is guaranteed by the constitutions of the State of Nevada and the United States, and those associated protections of due process. In other words, we start from the position that a man or woman cannot be hauled into court and have his or her life and liberty be subjected to jeopardy without the prosecution adhering to statutory process.

Second, where the legislature does permit prosecution, and proscribes statutory avenues for prosecution, those procedures, where unambiguous, must be followed by the prosecution. NRS 173.035(2) directly requires an affidavit: "or the district attorney may, upon affidavit". It then goes on to describe the required contents of that affidavit: "of any person who has knowledge of the commission of an offense, and who is a competent witness to testify in the case, setting forth the offense and the name of the person or persons charged with the commission thereof." It then goes on to describe those instances where an affidavit is **not** to be

required: "The affidavit need not be filed in cases where the defendant has waived a preliminary examination, or upon a preliminary examination has been bound over to appear at the court having jurisdiction." The effect of these unambiguous and direct declarations is just as controlling as the word "shall," and in their cumulative effect, are an even stronger directive than the mere use of the word "shall."

Third, the panel did not identify, and Appellant is unaware, of any history of case law where the "substantial compliance" doctrine was utilized to *erode* the rights of criminal defendants to statutory due process under the plain meaning of statutes which govern criminal procedure by relieving prosecutors of their duties to abide by procedural formalities when bringing charges.

The "substantial compliance" comes into play when patently absurd and unfair results would obtain because a party has failed to comply with complex formalities, where those formalities are not strictly necessary to advance the purpose of the underlying statute. *Leven v. Frey* indicates that: "[g]enerally, in determining whether strict or substantial compliance is required, courts examine the statute's provisions, as well as policy and equity considerations. Substantial compliance may be sufficient' `to avoid harsh, unfair or absurd consequences."" *Leven v. Frey*, 123 Nev. 399, 406-07 (Nev. 2007). The panel has not identified any "unfair or absurd" consequence which would have resulted in

this case (or any other criminal case) by requiring the State's prosecutor to adhere to the affidavit requirement.

Indeed, the affidavit requirement only arises once the State has filed a case and had it dismissed in Justice Court, providing an "escape hatch" second bite at the apple for the prosecution. This type of "second bite" provision, if it requires formal adherence to the statute, cannot be said to produce "unfair or absurd" results since we are already starting from a place where the prosecution is being given a second chance. It cannot be "unfair or absurd" to require adherence to the plain language of a "second bite" statute like NRS 173.035(2), as the very existence of the statute is an act of legislative leniency to the prosecution's initial failure to properly prosecute the case in the Justice Court.

Furthermore, the affidavit requirement is easy to comply with. It is simple rather than complicated. It does not require compliance with a set of overly-complicated evidentiary or procedural rules (such as those at issue in *Leyva* or *Leven* – where, in any event, substantial compliance was rejected). It is a short statement of requirements: submit an affidavit, from a witness with personal knowledge, attesting to certain facts. It is not "unfair or absurd" to require compliance with simple rules of criminal procedure which circumscribe otherwise

exceptionally broad prosecutorial authority, where the legislature has seen fit to impose those requirements upon the State's prosecutors.

For all these reasons, the panel decision's reasoning must be rejected. This Court should not greatly expand NRS 53.045 to apply to all other affidavit-adjacent documents merely because the legislature saw fit to render unsworn declarations statutorily equivalent to affidavits. Substantial compliance doctrine must not be applied because there is no history of applying that doctrine to relieve criminal prosecutors from the plain requirements of rules of statutory criminal procedure. Doing so would trample upon the due process rights of the accused. Finally, it is not necessary to relieve the prosecutors of their statutory obligations to prevent "unfair and absurd" results where, as here, all the prosecutor had to do was either (1) prevail in Justice Court upon slight or marginal evidence; or else (2) comply with the simple statutory requirements of NRS 173.035(2) to get the "second bite" at the prosecutorial apple, and indeed, relieving them of these simple statutory constraints itself would produce the "unfair and absurd" results substantial compliance doctrine was meant to avoid.

B. Bolden did not forfeit this argument under *Jeremias*.

Jeremias v. State provides a discussion of the circumstances under which waiver and forfeiture might apply to bar otherwise-applicable relief on appeal.

Before this court will correct a forfeited error, "an appellant must demonstrate that: (1) there was an 'error'; (2) the error is 'plain,' meaning that it is clear under current law from a casual inspection of the record; and (3) the error affected the defendant's substantial rights." *Jeremias v. State,* 134 Nev. 46, 50, 412 P.3d 43, 48 (2018).

Here, the panel correctly found that the error at issue goes to the substantial rights of the defendant: "this court has reversed a defendant's conviction upon finding that the district court erred in allowing the State to proceed by information after the justice court dismissed the charges. *See, e.g., Parsons v. State,* 116 Nev. 928, 938, 10 P.3d 836, 842 (2000); *Feole v. State,* 113 Nev. 628, 632, 939 P.2d 1061, 1064 (1997), *overruled on other groundsby State v. Sixth Judicial Dist. Court (Warren),* 114 Nev. 739, 743, 964 P.2d 48, 50-51 (1998).

In *Jeremias*, this Court held that:

> "Even assuming otherwise, the decision whether to correct a forfeited error is discretionary, *City of Las Vegas v. Eighth Judicial Dist. Court* , 133 Nev. ——, ——, 405 P.3d 110, 112 (2017), and we decline to exercise that discretion here. Considered in context, Jeremias seeks a new trial because members of his family were not able to observe jury selection for a brief period of time (the record suggests a few hours), despite the strong evidence against him and the fact that there is no serious suggestion that their absence had any effect on the proceeding. We are bound by authority which holds that these facts constitute a violation of Jeremias' right to a public trial. *But see Weaver,* 582 U.S. at ——, 137 S.Ct. at 1914 (Thomas, J., concurring) (expressing willingness to reconsider

> that the right to a public trial extends to jury selection, as held in *Presley)*. And the closure should have been avoided, particularly given that members of the public had a right to be present during the jury selection process. *Press-Enter. Co. v. Superior Court of Cal., Riverside Cty.*,464 U.S. 501, 508-10, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984). Nevertheless, the violation of Jeremias' right to a public trial was unquestionably trivial under the circumstances." *Jeremias v. State*, 412 P.3d 43, 49-50 (Nev. 2018)

This case must be contrasted from *Jeremias*. Here, the motion before the district court was inadvertently not opposed by the Defendant, after the case had been dismissed by the Justice Court. In *Jeremias*, defense counsel was present, and the record reflected that there was some discussion between the attorneys, which (it is implied), led defense counsel not to object, potentially for strategic reasons. *Id.* Thus there is no question that the Defendant, through counsel, was aware of the dispute and made the volitional decision not to raise the matter to the Court. In contrast, here, the record is clear that neither defense counsel nor the Defendant were present when the motion was addressed, and thus it is less clear that the failure to object represented any knowing, willful, or tactical decision.

The case must also be distinguished because the right in *Jeremias* was "trivial" whereas the right in this case is of great importance. In *Jeremias*, the trial court excluded the defendant's family "for a small portion of voir dire" and did so without objection. This was, as such, a simple slight diversion from the ordinary course of the case. The presence of the family members (although likely a true

right of the defendant, if objected to) would not have materially altered the conduct of the parties during voir dire, much less the subsequent trial.

In contrast, here there is not a slight change in the way the case should have taken place, but rather a monumental shift. Here there is a dispute over the validity of *the entire case being filed* in the first place. The Justice Court had already determined there was not sufficient evidence to hold Bolden to answer for the charged offenses. The State improperly bringing this Motion, without the statutorily-required affidavit, goes to the District Court's very jurisdiction over the subject matter of the case, as the Court could not lawfully hold the defendant to answer where the State had failed to comply with the statutory requirements of NRS 173.035(2). For these reasons, the rights at issue in this case were not "trivial" and are not subject the same type of willful tactical forfeit as the inconsequential right challenged in *Jeremias*.

This Court should apply plain error review and conclude that plain error requires reversal and remand in this case.

CERTIFICATE OF COMPLIANCE

I certify that I have read this brief and, to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I certify that this brief is typed in 14-point Times New Roman font using Microsoft Word, is 6736 words long, and complies with the typeface and -style requirements of NRAP 32(a)(4)–(6), as well as the page length requirements of NRAP 32(a)(7)(A). I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure and/or subsequent orders of this Court and with NRAP 28(e), which requires every assertion in the brief regarding matters in the record be supported by a reference to a page 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.

CONCLUSION

For these reasons, reversal and remand are required. **DATED this** 8th day of June, 2022

BEN NADIG, ESQ.
Nevada State Bar No. 9876
Law Offices of Benjamin Nadig, Chtd.

CERTIFICATE OF SERVICE

I hereby certify that I am a person competent to serve papers, that I am not a party to the above-entitled action , and that on June 8, 2022 I served the foregoing document via the Nevada Supreme Court's Eflex system upon all counsel and/or parties registered to receive service in the above-captioned matter.

DATED this 8th day of June, 2022

BEN NADIG, ESQ.
Nevada State Bar No. 9876
Law Offices of Benjamin Nadig, Chtd.
228 South Fourth Street, 3rd Floor
Las Vegas, NV 89101
P: (702) 545-7592
F: (702) 382-6903