

IN THE SUPREME COURT OF THE STATE OF NEVADA

BARRY HARRIS,

Appellant,

VS.

THE STATE OF NEVADA,

Respondent.

) DOCKET NO.

) DIST. CASE NO.

Electronically Filed
 App 18 2022 02:24 p.m.
 Elizabeth A. Brown
 Clerk of Supreme Court

APPEAL OF DENIAL OF WRIT OF HABEAS CORPUS
APPELLANT’S APPENDIX
(VOLUME 2 OF 2)

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IN THE SUPREME COURT OF THE STATE OF NEVADA

BARRY RASHAD HARRIS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 76774

FILED

MAY 10 2019

ELIZABETH L. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER DENYING MOTION

This is a direct appeal from a judgment of conviction. Appellant has submitted a pro se motion that requests the discharge of his appointed counsel and the appointment of a new attorney.

Appellant is not entitled to reject court-appointed counsel and insist on appointment of alternate counsel absent a showing of good cause. *See Thomas v. State*, 115 Nev. 148, 979 P.2d 222 (1999). Appellant has failed to demonstrate any cause for the discharge of his appointed counsel. *See Thomas v. Wainwright*, 767 F.2d 738, 742 (11th Cir. 1985) (appellant's general loss of confidence or trust in counsel is not adequate cause for appointment of new counsel). Finally, appellant has no right to proceed without counsel on direct appeal from a judgment of conviction. *Blandino v. State*, 112 Nev. 352, 914 P.2d 624 (1996); *see also Martinez v. Court of Appeal of Cal.*, 538 U.S. 152 (2000). The motion is denied.

It is so ORDERED.

 C.J.

cc: Mayfield, Gruber & Sheets
Attorney General/Carson City
Clark County District Attorney
Barry Rashad Harris

IN THE SUPREME COURT OF THE STATE OF NEVADA

Barry Harris,
Appellant

vs.

The State of Nevada,
Respondent,

) Supreme Court Case No.: 76774

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Electronically Filed
Apr 26 2019 07:16 p.m.
Singer Brown
Clerk of Supreme Court

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that there are no persons or entities as described in NRAP 26.1(a) that must be disclosed.

DATED this 26 day of April, 2019.

MAYFIELD GRUBER & SHEETS

Respectfully Submitted By:



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JURISDICTIONAL STATEMENT

The Nevada Supreme Court retains jurisdiction as an appeal from a verdict in a criminal case pursuant to NRS 177.015(3). A timely notice of appeal was filed on August 21, 2018, approximately five days after the Judgment of Conviction was filed.

NRAP 17 ROUTING STATEMENT

This matter should be retained by the Nevada Supreme Court as an appeal from a jury verdict involving a Category A felony with a sentence of 15 years to life pursuant to NRAP 17(b)(2)(A).

MEMORANDUM OF POINTS AND AUTHORITIES

I. Statement of the Issues

1. Can Appellant be convicted of Kidnapping Resulting in Substantial Bodily Harm when the State's only theory of the offense was involving use a firearm, for which Appellant was found Not Guilty?
2. Can Appellant be convicted of Kidnapping Resulting in Substantial Bodily Harm when the substantial bodily harm was inflicted prior to the kidnapping?
3. Did the District Court commit error by admitting the victim's statements (both written and oral) as an excited utterance?
4. Did the District Court commit error by admitting a jury instruction regarding flight based on Appellant leaving the scene?
5. Did the District Court commit error by admitting, over Defense objection, a jury instruction for Kidnapping that is a partial statement of the law and likely to confuse or mislead the jury?

6. Does the doctrine of cumulative error warrant reversal in the instant case?

II. Statement of the Case

On or about August 23, 2017, Appellant was charged in the Las Vegas Justice Court with a total of nine counts:

1. Burglary with Use of a Deadly Weapon
2. Kidnapping (First Degree) with Use of a Deadly Weapon Resulting in Substantial Bodily Harm
3. Assault with a Deadly Weapon
4. Battery with Use of a Deadly Weapon
5. Domestic Battery by Strangulation
6. Domestic Battery Resulting in Substantial Bodily Harm
7. Preventing or Dissuading a Witness
8. Carrying a Concealed Weapon
9. Ownership of a Gun by Prohibited Person

Following brief competency proceedings wherein Appellant was found competent to proceed, a preliminary hearing was set on October 26, 2017 and November 3, 2017. Both times, the alleged victim, Nicole Dotson, refused to attend despite a valid subpoena. The State requested a material witness warrant, and Ms. Dotson was subsequently arrested on the warrant. Preliminary hearing took place on December 14, 2017 and January 16, 2018. Appellant was bound over to the Eighth Judicial District Court on all charges.

Appellant was arraigned in District Court on January 18, 2018, where Mr. Harris invoked his right to a speedy trial within 60 days. The matter was sent to overflow, where it was referred back to the originating department. A status check on trial date was held on March 27, 2018. Calendar Call was heard on April 2, 2018, wherein both parties announced ready on the first setting.

Jury trial took place over five days and commenced from April 9, 2018 to April 16, 2018. Mr. Harris was only convicted on *one* of the original charges as alleged, with the remainder resulting in findings of Not Guilty or Guilty of lesser included offenses:

1. Burglary with Use of a Deadly Weapon – **Not Guilty**;
2. Kidnapping (First Degree) with Use of a Deadly Weapon Resulting in Substantial Bodily Harm – **Guilty of lesser included** offense, Kidnapping Resulting in Substantial Bodily Harm;
3. Assault with a Deadly Weapon – **Guilty of lesser included** offense, misdemeanor assault;
4. Battery with Use of a Deadly Weapon – **Guilty of lesser included** offense, misdemeanor battery constituting domestic violence
5. Domestic Battery by Strangulation – **Not Guilty**
6. Domestic Battery Resulting in Substantial Bodily Harm – **Guilty**
7. Preventing or Dissuading a Witness – **Not Guilty**
8. Carrying a Concealed Weapon – **Not Guilty**
9. Ownership of a Gun by Prohibited Person – **Dismissed** by State

After continuing sentencing to discuss potential errors in his pre-sentence investigation report, Appellant was ultimately sentenced on August

14, 2018 to the following: for Kidnapping, 15 years to life; on misdemeanor assault, 6 months (concurrent); on misdemeanor battery constituting domestic violence, 6 months (concurrent); on domestic battery with substantial bodily harm, 24-60 months (concurrent). Appellant's total aggregate sentence was 15 years to life in the Nevada Department of Corrections. The Judgment of Conviction was filed August 16, 2018.

III. Statement of Facts

The victim in this case, Nicole Dotson, gave a total of three different versions of what happened on August 23, 2017, with varying degrees of consistency between them; the first, she gave to Las Vegas Metropolitan Police Department officers the night of the incident; the second, she gave on December 14, 2017 at Appellant's preliminary hearing; the third, she gave on April 10, 2018, during Appellant's jury trial. However, while the distinctions between each version carry legal significance, the generalized factual timeline remained largely consistent.

Prior to arriving home from work that evening, Ms. Dotson and Appellant Barry Harris were having an argument over the telephone regarding Barry "cheating as usual" (Appellant's Appendix, hereinafter "AA,"

31: 12). She reaffirmed this sentiment at trial, when describing the argument as stemming from “him not coming home” and Ms. Dotson “felt like he was cheating” (AA, 521: 23).

When she arrived, Ms. Dotson testified at trial that Barry was laying on the bed of the apartment, and the telephonic argument from earlier re-initiated (AA, 524: 21). She left the bedroom and went into the kitchen, and he followed her (id.). They continued to argue until Barry returned to the bedroom and laid back down on the bed; this time, Ms. Dotson followed and sat on the edge of the bed, where they continued to argue at length until tempers flared on both sides (AA, 526: 24). The argument culminated when Barry hit Ms. Dotson with a closed fist on her left eye (AA, 529: 21).

From there, the testimony diverges, and will be recounted chronologically. The statement by Ms. Dotson given to officers on that night was admitted as an excited utterance through the State’s first witness, Blake Ferron. Officer Ferron is a patrol officer with the Las Vegas Metropolitan Police Department, and was the first officer to arrive at the scene (AA, 486: 25). He was dispatched to the apartment at 11:25pm, knowing only that an anonymous caller had reported a possible domestic violence (AA, 489: 8; 489: 17).

Once he arrived, Officer Ferron observed a silver vehicle leaving the apartment complex that “kind of stopped” when he entered through the gate (AA, 490: 5); Officer Ferron wrote down the license plate number of the silver vehicle, later tied to Barry, and proceeded to the apartment. He made contact with Ms. Dotson after she had already left the apartment and was on her way down the stairs (AA, 493: 12). When asked to describe her demeanor, Officer Ferron testified that she was very shaken and “seemed like she was trying to get away from the apartment or out of the area” (AA, 496: 13). Officer Ferron asked her questions regarding what occurred that night, which she answered.

According to Officer Ferron’s recollection, Ms. Dotson told him that she had told Barry she no longer wanted to be with him, and he then “became increasingly agitated towards her, and then started to strangle her with two hands around her neck” (AA, 498: 14). Ms. Dotson was then able to run from the bedroom into the living room, where Barry followed (AA, 531: 2). He grabbed a handgun, put it into her mouth, and forced her at gunpoint into the bathroom (AA, 499: 17). She sat on the bathroom floor until Barry left the apartment, after which she waited before leaving the apartment herself and subsequently ran into the Metro officer at the bottom of the stairs (AA, 500: 24).

After being photographed and interviewed, Ms. Dotson refused medical treatment. Officer Ferron testified that throughout the investigation process, Ms. Dotson did not appear to calm down (AA, 498: 23). At the insistence of the officers, Ms. Dotson agreed to go to the hospital in a second ambulance that arrived on the scene (AA, 504: 12).

Ms. Dotson's testimony during the preliminary hearing was both consistent and inconsistent with her initial statement to police. She testified that she and Barry had been in a dating relationship about six years, and he had a key to the apartment (AA, 8: 1; 9: 4). She testified that she didn't remember Barry putting his hands on her neck, but did state that Barry would not let her leave the apartment when he had his gun (AA, 12: 15; 14: 24; 16: 15). She also testified that Barry struck and kicked her more than once (AA, 20: 19).

One significant distinction between Ms. Dotson's statement to officers and her preliminary hearing testimony is when Barry supposedly retrieved his gun. The incident took place in three distinct areas: the bedroom, the living room, and the bathroom. It's uncontested that Barry punched Ms. Dotson in the bedroom, where the argument first became physical, and then she ran into the living room. That night, Ms. Dotson told Officer Ferron that Barry

retrieved the gun while she was in the living room, but at preliminary hearing testified that she hadn't seen the gun until she entered the bathroom: "Q: Okay. Did you see the gun before you went to the bathroom? A: No" (AA, 17: 16)

Ms. Dotson testified that she doesn't remember him putting the gun to her head, and was adamant that he never put the gun in her mouth, contrary to what she had told officers that night (AA, 22: 22; 25: 13). She further could not describe the gun, nor could she remember how she described it to Officer Ferron (AA, 30: 10). Ms. Dotson was consistent to the officers and while testifying that when she was in the bathroom, Barry gathered her belongings while still holding his gun (AA, 75: 23). She stayed in the bathroom until she heard the deadbolt lock with a key from the outside (id.).

During trial, Ms. Dotson's version of events was still somewhat different than her previous testimony. She testified again that Barry did in fact live with her in the apartment, which is why he had a key and kept personal belongings there (AA, 516: 8; 517: 23). He stayed there about five nights per week (AA, 509: 15). After he struck her in the bedroom, she ran into the living room and began screaming for help (AA, 531: 2). Barry followed her into the living room where they "began to tussle a little bit, and then at some point he walked away

and I went into the bathroom” (AA, 532: 7). During trial, Ms. Dotson denied the use of a firearm altogether.

He walked away from the bathroom multiple times to collect his belongings, but she did not leave (AA, 532: 20). While in the bathroom, she peeked around the corner and saw him going through his pockets to remove what “at the time I thought[] was a gun” (AA, 533: 21), and afterwards returned to the bathroom and poured lemonade on her (AA, 534: 13). She remained in the bathroom for “at least like 30 minutes” while Barry left the apartment (AA, 537: 18). She testified that she was in the bathroom for about 15 minutes after Barry had left “until I knew for sure he was gone” (538: 2; 569: 9).

The distinctions between her statements primarily revolve around the alleged firearm use; she first told officers that Barry brandished the firearm after she had run into the living room, and beat her about the head with it. She next testified at preliminary hearing that Barry only used the firearm when she was in the bathroom, but that he did not strike her with it. She finally testified during trial that no firearm was used at all, and she mistakenly believed he had a gun but her vision was extremely obstructed given the swelling of her eye. On cross examination, Ms. Dotson also conceded that she

physically could not have seen Barry with a gun while he collected his belongings because there was a wall blocking the line of sight from the bathroom to the bedroom (AA, 643: 8).

Ms. Dotson also testified at trial regarding the state of her injuries, or lack thereof. Specifically, with the exception of her eye, she had *no injury* to her face, head, neck or abdomen despite telling officers that she had been strangled with two hands, kicked several times, and struck repeatedly with a firearm (AA, 542: 17). Medical examination revealed no bruises, scratches or bumps on her head; after taking several scans of her head, neck and chest area, there were also no signs of strangulation (AA, 639: 25; 648: 14). Her *only* injury was that to her eye, but she described a four-month healing process for her eye, which required surgery to remove a blood clot although the injury no longer caused her pain at that point (AA, 543: 9).

Ms. Dotson was confronted with her inconsistent testimony during trial. When asked why she testified differently than her preliminary hearing, she stated that while she was in custody on the material witness warrant, an officer at the correctional center told her “that if you give a statement at the preliminary hearing that different from the statement to the police, that you would be found in contempt of court and given jail time” (AA, 614: 13). As a

result, she testified as consistently as she could from her memory, but was unable to remember exactly what she had told the officers that night in many respects.

The State also tried to impeach Ms. Dotson with recorded jail calls between her and Barry prior to trial. During the calls, Ms. Dotson indicated that she wanted Barry to come home, and would say what he wanted her to say. However, when playing the tape further, Barry only repeatedly admonished Ms. Dotson to simply tell the truth:

Q: Okay. In fact, during several of those phone calls, my client actually told you that he just wanted the truth; correct?

A: Yeah, there were times when he did say that.

Q: And, in fact, in one phone call he says all I want is the truth no matter what.

A: Correct.

Q: And – and to you, did that mean – did that mean no matter what as long as it helps me, or just no matter what good or bad?

A: He knew it meant no matter what good or bad.

Q: Okay. And – in another phone call, he – you were – he encouraged you to come to court; is that correct?

A: Correct.

Q: Because he wanted you to testify; correct?

A: Correct.

Q: Because he wanted the jury to hear the truth; correct?

A: Correct.

Q: In fact, at one point you said something along the lines of I'll do whatever you need, and he said don't – don't do as I say, do what's true, do what's the truth, and that's all I want.

A: That's correct (AA, 616: 24)

Following Officer Ferron and Ms. Dotson, the third witness to testify at trial was Gabrielle Guerrero, a crime scene analyst with the Las Vegas Metropolitan Police Department. Ms. Guerrero interviewed Ms. Dotson to document her injuries, describing her as very upset during the process (AA, 715: 25). Ms. Guerrero also photographed the interior of the apartment, but no firearm was ever located (AA, 624: 8).

The fourth witness was Officer Nicholas Bianco, another patrol officer with the Las Vegas Metropolitan Police Department that arrived to the apartment complex after Officer Ferron. Officer Bianco conceded that prior to giving Ms. Dotson a blank voluntary statement, he specifically told her what to say and emphasize in her report, even telling her that emphasizing certain aspects of the incident was “icing on the cake” (AA, 760: 8).

The State’s next witness was Detective Ken Krmpotich with the Las Vegas Metropolitan Police Department (AA, 794: 7). The Detective admitted that he simply copy/pasted the earlier officer’s report when seeking a search warrant to impound Barry’s vehicle, which was located more than a week after the incident (AA, 802: 22). In the vehicle, Detective Krmpotich located ammunition and a magazine in the trunk sealed inside a bag labelled “Girl Talk.” Although Detective Krmpotich states that he was instructed to search

for all items that would show a possessory interest in the vehicle, he in fact ignored several documents that showed a possessory interest by people other than Barry. While no items in the vehicle were tied directly to Barry Harris, several other documents were found in the name of other individuals, including the registration and insurance card found in the vehicle:

Q: In the vehicle, Officer, you actually found registration for the vehicle and that registration said that it was for Sheila Towns; correct?

A: Yes.

Q: Okay. Did you impound that in your return, sir?

A: No, I did not.

Q: Did you impound that insurance card [for Sheila Towns] in your return, sir?

A: I did not.

...

Q: Now, you had testified earlier that your warrant instructed you to search out for any possessory interest that Mr. Harris might have in the car or the firearms; correct?

A: Yes.

Q: Isn't it true that the warrant actually instructs you to seek out any items of personal property which would tend to establish a possessory interest in the items seized?

A: Yes (AA, 816: 21).

...

Q: And – and the only document inside the vehicle that actually linked a name in that vehicle did not have my client's name on it; correct?

A: There were more documents in there with names on them.

Q: Okay.

A: But I only grabbed those two because those were the names that were on the documents.

Q: Okay. So there were other documents with Ms. Towns' name on them, as well?

A: There probably could have been (AA, 831: 1)

The sixth witness was Lisa Gavin, a forensic pathologist medical examiner for Clark County (AA, 849: 16). Dr. Gavin testified that after having reviewed the scans and tests performed on Ms. Dotson, she could not conclude that strangulation took place, stating only that the evidence was “inconclusive” due to the lack of injury (AA, 872: 19). The last witness for the State was Kevin Carey, a detective with the Las Vegas Metropolitan Police Department (AA, 888). Through Detective Carey, the State introduced the jail calls to the jury as described above.

Following the testimony of Detective Carey, the State rested. Only one witness testified for the defense, Sheila Towns, the registered owner of the silver vehicle allegedly used by Barry that night. Ms. Towns testified that at least five different family members routinely use the same vehicle where the ammunition was found in the trunk (AA, 975: 7). Barry exercised his constitutional right not to testify, and the Defense rested.

Jury instructions were argued on the fourth day of jury trial. Specifically, two contested jury instructions are relevant for purposes of the instant appeal. First, the State proposed an instruction regarding flight and

consciousness of guilt (AA, 1039: 24) (Jury Instruction 41). Defense objected on the grounds that no indication of flight had been presented as opposed to Mr. Harris simply leaving the scene, which was insufficient. The Court admitted the instruction, concluding that “You have him gathering up his items and clothes of a man found in the trunk. I think the State’s got enough there to justify it” (AA, 1040: 13). The second contested instruction was regarding the definition of kidnapping, and whether “incidental movement” alone could support the charge. The Defense proposed a separate instruction to specifically state that incidental movement could not support a charge of kidnapping, but the Court omitted this entire portion of the proposed instruction, admitting the instructions only on finding dual convictions for both kidnapping and the associated offense of battery with incidental movement under certain circumstances (AA, 1017: 3) (Jury Instruction 18). However, what constitutes “incidental movement” was not defined.

During closing arguments, the State reiterated the basis for the Kidnapping charge: “The defendant willfully seized and/or confined Nicole Dotson with the intent to hold or detain her for the purpose of inflicting that substantial bodily harm, the continual beating, using a deadly weapon, and substantial bodily harm resulted” (AA, 1065: 9). The substantial bodily harm

that resulted, according to the State, was the injury to Ms. Dotson's eye (AA, 1064). Specifically, the State argued that "substantial bodily harm actually resulted, as well... she had pain for one month after this occurred, prolonged physical pain. It didn't heal for four months. It was a process, as she told us. She had to have a procedure remove blood clots that were a direct result of the defendant's battering her" (id.). No alternative types or theories of substantial bodily harm existed aside from Ms. Dotson's eye. Finally, the State further noted that "flight" is evident only by Barry packing his bags and leaving prior to police arrival (AA, 1070: 7).

The jury returned to deliberations, and returned a verdict the same day. Barry was found guilty of only one original charge – Battery Resulting in Substantial Bodily Harm – and then three lesser included offenses, with the remainder of the charges resulting in acquittal. Notably, *for all offenses involving a firearm*, Barry was acquitted or convicted of lesser included offenses where the only distinction between the original and lesser charges was firearm use. Specifically, the jury found that Barry did not use a firearm during the alleged offense, a fact of great significance for purposes of the instant appeal. As a result, following the verdict, the State voluntarily

dismissed the charge of Ex Felon in Possession of a Firearm, even after Defense stipulated that Barry was convicted of a felony in 2006.

This appeal follows.

IV. Summary of the Argument

In this case, there is an inconsistency as to whether Appellant brandished a gun while Ms. Dotson was in the living room, while Ms. Dotson was in the bathroom, or whether a firearm was even used at all (although the jury found the latter). The State pled only one theory of Kidnapping in the information, that Appellant restrained or confined Ms. Dotson through use of a firearm. Because he was acquitted of using a firearm, the conviction for Kidnapping based on firearm use is inherently flawed.

The finding of Kidnapping with Substantial Bodily Harm is further invalid because the only substantial bodily harm inflicted – the injury to Ms. Dotson’s eye – occurred while she was in the bedroom. There is no dispute that Ms. Dotson was able to move, of her own volition, from the bedroom to the living room. Therefore, regardless of whether a firearm was used in the living room *or* in the bathroom, in either instance the Kidnapping with a firearm occurred **after** the substantial bodily harm was inflicted. Per statute,

the substantial harm must be inflicted during the kidnapping or in an attempt to escape from confinement, and the record is undisputed that the facts underlying this case do not comply with these statutory parameters.

The District Court also erred by admitting hearsay testimony regarding Ms. Dotson's statements to police officers on the night of the event. The District Court found that such statements qualified as an "excited utterance," and therefore were admissible. However, multiple individuals, including Ms. Dotson, testified that she waited for at least 15 minutes after Barry left the apartment to leave because she felt safe. Therefore, there was ample opportunity to fabricate, and motive to fabricate as a result of Barry's alleged cheating (the basis for the entire incident) was made an issue with the case as early as counsel's Opening Statements. Further, the officers testified that Ms. Dotson retained the same distressed demeanor for several hours after the incident, belying a claim that her excited mental state was a direct result of the stress of the event.

Next, the District Court erred in submitting two different jury instructions: the first erroneous instruction was flight as consciousness of guilt. In this case, the basis for the instruction was simply that Barry had packed his belongings and left the scene before officers arrived. However, the

law is clear that simply leaving the scene is insufficient to support an instruction for flight.

The second erroneous instruction was regarding Kidnapping; specifically, there is a considerable amount of text regarding whether and in what circumstances “incidental movement” can still support a conviction for Kidnapping. However, not only is this incidental movement never defined, but the instruction provided to the jury (over Defense objection) omits key language regarding the role of incidental movement for a Kidnapping conviction. Specifically, incidental movement cannot support a conviction for kidnapping alone, but it can under limited circumstances support dual convictions for kidnapping and the associated offense; the jury was instructed only as to the dual conviction portion of the law, despite the Defense’s proposed instruction that was complete, accurate and supported by case law..

Lastly, the doctrine of cumulative error warrants reversal in this case. The issue of guilt is close, as indicated by multiple acquittals and lesser included offenses; the character of the error is substantial, as Appellant was convicted of a charge based on facts he was not accused of; and the severity of the charges is substantial, given that Appellant was sentenced to 15 years to life as a result of the Kidnapping, the most contested of his convictions.

ARGUMENT

A. Appellant Cannot be Simultaneously Convicted of Kidnapping based on Use of a Firearm and then Acquitted of Using a Firearm

The legal premises underlying this argument are almost mathematically concise: Appellant was charged with Kidnapping on *one* factual basis only – that he used a firearm to detain Ms. Dotson against her will. Specifically, the Information alleges:

[Barry Harris] did willfully, unlawfully, and feloniously seize, confine, inveigle, entice, decoy, abduct, conceal, kidnap, or carry away NICOLE DOTSON, a human being, with the intent to hold or detain the said NICOLE DOTSON against her will, and without her consent, for the purpose of committing inflicting substantial bodily harm to wit: by forcing her into the bathroom and/or preventing her from leaving the apartment and/or bathroom, with use of a deadly weapon, to wit: a firearm, resulting in substantial bodily harm to NICOLE DOTSON (AA, 53) (emphasis added).

There are no alternative theories of Kidnapping alleged – the sole basis for the charge is Barry's use of a firearm to prevent Ms. Dotson from leaving and/or forcing her into the bathroom. The State's theory of the charge is precisely what was argued repeatedly throughout the trial, which is why the focus was primarily on Ms. Dotson's first statement to police that Barry had brandished a firearm in the living room and forced her to crawl into the

bathroom. The State did not charge alternative or lesser theories for the offense.

However, Barry was acquitted of using a firearm. He was acquitted of carrying a concealed weapon, convicted of lesser included offenses that specifically excluded a firearm as an element (i.e. convicted of simple assault rather than assault with a deadly weapon), and the State voluntarily agreed to dismiss the charge of Ex Felon in Possession of a Firearm after the Defense stipulated that Barry had a prior felony conviction. Simply put, the jury found that Barry *did not* use a firearm during the incident.

Therefore, because the State only pled one theory of Kidnapping that was based exclusively on use of a firearm, the jury returned a verdict that relies on a factual premise of which he was acquitted.

“NRS 173.075 provides that a charging document ‘must be a plain, concise and definite written statement of the essential facts constituting the offense charged.’ To satisfy this requirement, ‘the [charging document] standing alone must contain the elements of the offense intended to be charged and must be sufficient to apprise the accused of the nature of the offense so that he may adequately prepare a defense.’” *Hidalgo v. Eighth Judicial Dist. Court*, 124 Nev. 330, 338-39, 184 P.3d 369, 375-76 (2008);

Laney v. State, 86 Nev. 173, 178, 466 P.2d 666, 669 (1970); *Sheriff v. Levinson*, 95 Nev. 436, 437, 596 P.2d 232, 233 (1979) “[T]he prosecution is required to make a definite statement of facts constituting the offense in order to adequately notify the accused of the charges and to prevent the prosecution from circumventing the notice requirement by changing theories of the case”).

“To provide a defendant with an opportunity to prepare an adequate defense, a charging instrument must provide adequate notice to the accused of the prosecution's theories by stating the essential facts constituting the offense in ordinary and concise language.” *Buford v. State*, No. 66147, 2016 Nev. Unpub. LEXIS 50 (Jan. 15, 2016); *Viray v. State*, 121 Nev. 159, 162, 111 P.3d 1079, 1081-82 (2005).

The charging document in this case contained only one factual basis to assert Kidnapping, that Appellant used a firearm to prevent Ms. Dotson from leaving and/or force her into the bathroom. The State had an unbridled opportunity to also charge Appellant was simple Kidnapping or another offense that was unrelated to firearm use, but instead charged only for a firearms-based Kidnapping. However, as noted previously, it is undisputed that Barry was acquitted of using a firearm during this event. Therefore, the only possible outcome is that the jury found Barry guilty of Kidnapping using

a factual basis that was not alleged in the charging document. As a result, such a conviction is not legally justified because the Defense was not put on notice of any other factual basis to support the charge as alleged by the State.

Summarily, the State only alleged one factual basis for Kidnapping, that being use of a firearm, and Appellant was acquitted of that factual basis. Therefore, his conviction is legally invalid or based on an *unalleged* factual premise, both of which must mandate reversal.

B. Appellant May Not be Convicted of Kidnapping with Substantial Bodily Harm when the Harm was Inflicted Prior to the Kidnapping

There was considerable debate throughout the litigation of this case as to whether Barry used a firearm in the living room, in the bathroom, or not at all. As noted previously, the jury found that Barry did not use a firearm, but notwithstanding that finding, the final conviction of Kidnapping with Substantial Bodily Harm may not stand when the bodily harm was inflicted *before* the kidnapping took place.

Interestingly, it doesn't matter which version of events is correct, because in all three scenarios, the substantial bodily harm was inflicted before a kidnapping occurred. The incident began in the bedroom, when it was initially verbal but turned physical when Barry struck Ms. Dotson in the eye.

The eye injury is the *sole basis* for substantial bodily harm, as it was the only injury that resulted from the event. The State concedes during their closing arguments that the eye injury is the basis for the jury to find substantial bodily harm.

The fight then moves from the bedroom where the harm was inflicted out to the living room. However, for purposes of argument and disregarding the jury verdict to the contrary, we can assume that Barry brandished a gun while in the living room. This was the earliest point in the argument that a gun was mentioned being used, and this is what Ms. Dotson told Metro officers when they confronted her at the apartment that night. It can further be assumed, for purposes of argument, that Barry did exactly what the State alleged – he used the gun to force her to crawl into the bathroom. However, even under this factual scenario most favorable to the state, it *still* does not fit within the statutory guidelines for the charge.

Barry was charged with First Degree Kidnapping Resulting in Substantial Bodily Harm under NRS 200.320. The statute states, in pertinent part,

1. Where the kidnapped person suffers substantial bodily harm **during the act of kidnapping or the subsequent detention** and confinement **or in attempted escape** or escape therefrom, by imprisonment in the state prison:

- (a) For life without the possibility of parole;
- (b) For life with the possibility of parole, with eligibility for parole beginning when a minimum of 15 years has been served; or
- (c) For a definite term of 40 years, with eligibility for parole beginning when a minimum of 15 years has been served.

The statute sets forth a clear and unambiguous timing requirement: the substantial bodily harm *must be inflicted* “during the act of kidnapping,” “[during] the subsequent detection and confinement,” or “in an attempted escape” from that confinement. Every possible factual scenario presented by the State alleged that Barry struck Ms. Dotson and inflicted the substantial bodily harm in the bedroom – *before* the act of kidnapping took place.

Unsurprisingly, the focus on the case was primarily directed to what occurred *after* Ms. Dotson left the bedroom and entered the living room; for example, whether Barry had a firearm at that point, or whether he blocked her exit from the living room. However, the record is clear that Ms. Dotson went from the bedroom to the living room on her own accord.

Detective Carey testified that on the night of the event, Ms. Dotson told him the only time she tried to escape was initially in the living room (AA, 72: 2). Officer Ferron similarly testified that Ms. Dotson told him that Barry pulled out a gun while she was in the living room and “pointed the handgun at her

and forced her to – or told her to go into the bathroom” (AA, 499: 24). During her trial, Ms. Dotson herself testified that after Barry punched her, “I got up and ran to the living room, and that’s when I screamed help me” (AA, 531: 2). In fact, Ms. Dotson specifically told officers that she was able to freely go to the living room:

Q: Do you recall telling the officer that at one point you were able to get into the living room, but the defendant followed you into the living room?

A: I may have said that, yeah (AA, 564: 19).

From there, the discussion devolved into her inconsistent statements as to whether she saw a gun for the first time in the living room or in the bathroom. However, the record is clear from all parties involved that no kidnapping took place until, at the very earliest, Ms. Dotson was in the living room. Even the State’s charging document specifies that the Kidnapping was forcing Ms. Dotson from the living room to the bathroom.

Simply put, even taking the facts in a light most favorable to the State, the injury resulting in substantial bodily harm was inflicted before any kidnapping or confinement took place. The kidnapping has a very distinct point for where it began, and that is *after* the injury was inflicted. The injury was inflicted in the bedroom, but any alleged kidnapping took place after she had moved into the living room. Therefore, the facts and conviction does not

fall within the statutory requirement that substantial bodily harm be inflicted “during” the kidnapping or in an attempt to escape confinement.

Further, the State cannot argue that the statute should be interpreted to include the infliction of harm prior to the act of kidnapping. The legislature set forth two very discrete temporal parameters for when the harm must be inflicted, which is why the underlying charge is Kidnapping *resulting in* substantial bodily harm, requiring a causal nexus between the act of kidnapping and the harm inflicted.

“[O]missions of subject matters from statutory provisions are presumed to have been intentional.” *Dep’t of Taxation v. DaimlerChrysler Servs. N. Am., LLC*, 121 Nev. 541, 548, 119 P.3d 135, 139 (2005); see also *Galloway v. Truesdell*, 83 Nev. 13, 26, 422 P.2d 237, 246 (1967); *Horizons at Seven Hills Homeowners Ass’n v. Ikon Holdings, Ltd. Liab. Co.*, 373 P.3d 66, 71 (Nev. 2016) (“The maxim *expressio unius est exclusio alterius* . . . instructs that, where a statute designates a form of conduct, the manner of its performance and operation, and the persons and things to which it refers, courts should infer that all omissions were intentional exclusions”).

Because the statute is limited as to when the harm can be inflicted, it would be improper to expand the statute to include an additional time frame

that was not already included. When a statute includes a list or definitive terms, those terms are presumed to be exhaustive and intentional.

Simply put, the record from any and all angles is clear that Barry inflicted the substantial bodily harm before any kidnapping took place. Therefore, by definition, Barry cannot be convicted of Kidnapping Resulting in Substantial Bodily Harm. Even if Barry were to be found guilty of simple Kidnapping, a new sentencing would be required given the 10-year difference in sentencing ranges between the charges.

C. The District Court Improperly Admitted Ms. Dotson's Statements as an Excited Utterance

During the initial direct examination of the State's first witness, Officer Ferron, the State sought to introduce what Ms. Dotson had told him about the event on the night it occurred. There hadn't yet been an inconsistency in her statements, because Ms. Dotson had not yet testified at this point in the trial. Further, there was both consistent and inconsistent statements between her voluntary statement to officers and her preliminary hearing testimony. Therefore, because it would have been improper to admit Ms. Dotson's statements as a prior inconsistent statement at that time, the State asked to admit her hearsay statements to Officer Ferron as an excited utterance.

An excited utterance is a well-recognized exception to the hearsay rule, and has been codified in Nevada Revised Statute § 51.095: “A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition is not inadmissible under the hearsay rule” (emphasis added). The excited utterance exception is typically utilized to introduce 9-1-1 calls that are made contemporaneously with or very shortly after an event has occurred.

However, the longer the time between the event and the statement, the less likely it is that the statement qualifies as an excited utterance. See, e.g. *Browne v. State*, 113 Nev. 305, 313, 933 P.2d 187, 192 (1997) (“[T]iming is often the determining factor for an excited utterance”); *Medina v. State*, 122 Nev. 346, 352, 143 P.3d 471, 475 (2006) (the elapsed time between the event and statement is considered “in determining whether the declarant was under the stress of the startling event when he or she made the statement”).

An excited utterance is typically admissible when made during or “moments” after a startling event. As the time between the event and statement grows longer, a greater showing of the declarant’s stress is necessary for admissibility. For example, a statement made 45 minutes after a murder was admissible because the declarant “was agitated after the event;

[Declarant] had attacked an officer and he had to be restrained; and [Declarant] was crying, mumbling, and acting very irrational.” *Rowland v. State*, 118 Nev. 31, 43, 39 P.3d 114, 121 (2002). In another case, statements made several minutes after the startling event were admitted because they “were made while the victim was crying, very upset, shaken up, shivering, [and] very nervous.” *Valentin v. State*, No. 62820, 2014 WL 495498 (Nev. Jan. 15, 2014). Furthermore, statements made longer after the events took place require a great degree of trustworthiness to be found admissible. See, *Felix v. State*, 109 Nev. 151, 849 P.2d 220 (1993) (superseded on other grounds by statute).

As noted above, typically an excited utterance is made contemporaneously with the startling event or very shortly thereafter. When a substantial amount of time has elapsed, a greater need of visible stress and trustworthiness is required. In this case, there is neither.

From the outset, there is the passage of a significant amount of time between the incident with Barry and when Ms. Dotson gave her statement to arriving Metro officers. By her own testimony, Ms. Dotson waited at least fifteen minutes *after* she heard Barry leave the apartment by locking it from the outside. She waited until “she felt safe” before exiting the apartment. By

her own admission, then, the statements she gave to officers are not likely made “under the stress of excitement caused by the event” because Ms. Dotson had already decided she felt safe enough to leave the premises.

Here, the State will likely cite to Ms. Dotson’s shaken and excited demeanor when interacting with Officers; however, there is also ample testimony from the State’s witnesses that Ms. Dotson retained this same demeanor *hours* after the event took place. She was excited when speaking to the first officer, she was excited when filling out her voluntary statement, and she was even still excited when being photographed by the State’s crime scene analyst, Gabrielle Guerrero. Ms. Dotson’s continuous stream of excitement would facially bely any claim that her demeanor is specifically related to the events that occurred, or at least that they were caused by the events to the degree necessary to qualify as a hearsay exception. Yet, all of her statements to virtually anyone who was on the scene that night was admitted as an excited utterance.

Given the substantial lapse of time between the event and her statements, case law would require a greater showing of trustworthiness in her statements to be deemed admissible. That is not present here. Not only did Ms. Dotson have a substantial amount of time to create a fabrication

before the arrival of Metro officers, but the record would indicate that she did in fact fabricate (or at least substantially embellish) many aspects of her statements to officers. For example, Ms. Dotson told officers that she had been strangled with two hands, kicked repeatedly, and beat about the head with a firearm. Yet, photographs and medical testing *immediately* after the event revealed no injuries corresponding to her claims. Further, Ms. Dotson has an ample motive to fabricate – the very basis for the argument that initiated the incident was due to her anger of Barry “cheating as usual.”

Finally, her statements were improperly admitted as an excited utterance because they were not “utterances” at all, but rather direct answers to questions solicited by law enforcement. The law requires a degree of spontaneity in the statements in order to be considered an “utterance.” One of the earliest court decisions regarding the admissibility of an excited utterance, from the year 1915, is directly on point in this regard:

Undoubtedly such statements should be received with great caution, and only when they are made so recently after the injury is received, and under such circumstances as to place it beyond all doubt that they are not made from design or for the purpose of manufacturing evidence. ...

The case of *State v. Daugherty*, 17 Nev. 376, 30 P. 1074, was reversed because of the admission by the trial court of a statement made by the person assaulted seven or eight

minutes after the assault was made; the court, after quoting from several authorities, saying:

"The evidence was the narration of a past occurrence, and was incompetent."

...

Professor Jones lays down the rule to be:

"Hence, if there is reason to suppose that the declarations are not the natural and spontaneous utterance of the declarant, but that they are premeditated or designed for a purpose, they are inadmissible." (2 Jones on Evidence, sec. 351.)

"The utterance, it is commonly said, must be 'spontaneous,' 'natural,' 'impulsive,' 'instinctive,' generated by an excited feeling which extends without let or breakdown from the moment of the event they illustrate." (3 Wigmore on Evidence, sec. 1749.)

The same learned author, at paragraph (b) of section 1750, says:

"The utterance must have been before there has been time to contrive and misrepresent, i. e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance. This limitation is in practice the subject of most of the rulings." *State v. Pappas*, 39 Nev. 40, 44-45, 152 P. 571, 572 (1915).

Here, there was "time to contrive and misrepresent," a motive to do so, and the statements given were a direct response to solicited questions rather than a "spontaneous, natural, impulsive, [or] instinctive" utterance. Further, the credibility of Ms. Dotson was a central issue given her varying levels of

consistency throughout the progress of the case. The excited utterance exception to the hearsay rule was the basis to admit the *entirety* of her statements made to officers that night, whether they were consistent, inconsistent, or had never previously been mentioned in testimony. It essentially provided the admission of Ms. Dotson's testimony without Ms. Dotson, followed by the State's plea to the jury to adhere to this first statement as the most trustworthy version of events.

Given the amount of time that had passed, Ms. Dotson's continuous excited demeanor hours after the event, and her opportunity and motive to fabricate, it was improper to introduce the entirety of her statement of officers that night when several components of that statement would have otherwise been inadmissible. Further, the State's reliance on this first statement as the most trustworthy version of events in the face of a partial recantation places the admission of this statement at the front and center of the case. For these reasons, the error committed was not harmless, and Appellant is entitled to a new trial.

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*D. It was Improper to Instruct the Jury on Flight as Consciousness of Guilt
Based on Appellant Leaving the Scene*

The law is abundantly clear that leaving the scene of a crime is not in and of itself sufficient to support a jury instruction for flight as consciousness of guilt. “Flight is more than merely leaving the scene of the crime. It embodies the idea of going away with a consciousness of guilt and for the purpose of avoiding arrest.” *Potter v. State*, 96 Nev. 875, 875-76, 619 P.2d 1222, 1222 (1980); *Theriault v. State*, 92 Nev. 185, 547 P.2d 668 (1976); see e.g., *Shults v. State*, 96 Nev. 742, 616 P.2d 388 (1980) (escape from custody).

In this case, the State’s argument on the jury instruction for flight as well as the District Court’s justification for the admission of the flight instruction confirms that it is based solely on Barry leaving the apartment. The jury instruction for flight was provided to the jury as Jury Instruction No. 41. When the Defense objected to the admission of this instruction, the Court found it to be justified because “you have him gathering up his items and clothes of a man found in the trunk. I think the State’s got enough there to justify it” (AA, 1040: 13). As noted previously, the fact that Barry gathered his belongings after a fight and left the apartment is not in and of itself sufficient to support an instruction for flight; there is no indication that Barry did it to

avoid apprehension or to “flee” the scene. In fact, Ms. Dotson testified that Barry took his time to lock the deadbolt from the outside with his key, which directly refutes the notion that Barry was fleeing the scene. Additionally, he was arrested approximate a week later while at work – again, not indicative of an attempt to avoid arrest or prosecution.

The State’s basis for the instruction is equally improper; as argued during closing arguments, “he heard the sirens, he grabbed his stuff, and he fled the scene” (AA, 1070: 7). However, there is *zero evidence* in the record that sirens were heard or that they played any role whatsoever in Barry’s decision to collect his belongings while Ms. Dotson was in the bathroom. In fact, there was no reason for Barry to even know that police were called, as the 9-1-1 call was made by an anonymous neighbor. Lastly, Barry had already collected his belongings and left the apartment *before* the police arrived, which is the only way his vehicle met Officer Ferron’s police vehicle while Barry was already on his way out of the apartment complex; Barry would have had to already be in his car and driving *out* of the complex in order for Officer Ferron to see him while driving *into* the complex. Thus, the record supports only that Barry had gathered his personal belongings and left the apartment before any indication that police were en route.

Given that there was no evidence of flight or any attempt to avoid arrest or prosecution, admission of the flight instruction based solely on Barry gathering his belongings and leaving the scene was improper. Although case law holds that an improper flight instruction is not alone enough for reversal, it must be considered with reference to the other errors committed and other confusing or misleading jury instructions.

E. The Admitted Kidnapping Instruction was Incomplete and Confusing with Regards to Incidental Movement

Jury instructions that are confusing or misleading are often grounds for reversal in criminal cases as legally erroneous. *Zelavin v. Tonopah Belmont*, 39 Nev. 1, 7-11, 149 P. 188, 189-91 (1915). “The errors assigned all relate to instructions given to the jury by the trial court. Many separate points are raised in an effort to show that certain instructions do not properly state the law or might tend to mislead or confuse the jury.” *Pfister v. Shelton*, 69 Nev. 309, 310, 250 P.2d 239, 239 (1952). Jury instructions can be erroneous because they partially state the law, state the law in a vague or misleading manner, or misstate the law entirely.

In this case, the Defense’s position is the final jury instruction for Kidnapping only partially stated the law, and did so in a confusing manner.

The following jury instruction was proposed by the Defense; the entirety of the underlined provision was omitted completely from the final instruction submitted to the jury as Jury Instruction No. 18:

With regards to movement, it is the fact, not the distance, or forcible movement of the victim that constitutes kidnapping. However, when a Defendant is accused of First Degree Kidnapping with the specific intent to commit an unlawful act and is also accused of the unlawful act itself, the defendant may not be convicted of the kidnapping if the movement and/or confinement of the victim was merely incidental to the unlawful act.

In this case, whether the movement and/or confinement of the victim is incidental to the offense of Battery or whether the risk of harm to the victim was increased thereby is a question for you to determine after considering all the facts and circumstances in this case.

In order for you to find the defendant guilty of both First Degree Kidnapping and an associated offense of Battery, you must also find beyond a reasonable doubt either:

- (1) That any movement of the victim was not incidental to the Battery;
- (2) That any incidental movement of the victim substantially increased the risk of harm to the victim over and above that necessarily present in the Battery;
- (3) That any incidental movement of the victim substantially exceeded that required to complete the Battery;
- (4) That the victim was physically restrained and such restraint substantially increased the risk of harm to the victim; or

(5) The movement or restraint had an independent purpose or significance.

"Physically restrained" includes but is not limited to tying, binding, or taping.

The law is well settled that the defense is entitled to jury instructions in their theory of the case when the instruction is supported by the record, no matter how strong or weak. "It is well established in our state that a defendant in a criminal case is entitled to have the jury instructed on his theory of the case as disclosed by the evidence, no matter how weak or incredible the evidence appears to be." *Margetts v. State*, 107 Nev. 616, 621, 818 P.2d 392, 396 (1991); *Brooks v. State*, 103 Nev. 611, 613, 747 P.2d 893, 894 (1987); *Adler v. State*, 95 Nev. 339, 594 P.2d 725 (1979).

In this case, it remained a substantive defense theory that any movement by Ms. Dotson around the apartment was incidental to the battery when she was struck in the eye; the incidental movement, which would preclude a finding of Kidnapping, is of particular import given the jury acquitted Barry of using a firearm.

The instruction that was provided to the jury excludes the first two paragraphs, and as a result only contained the subsequent list of additional requirements. However, this portion is limited in relevance only under the

premise of finding Barry guilty of **both** Kidnapping and the associated offense of Battery, whereas the language proffered by the Defense would preclude a conviction of Kidnapping standing alone if the movement were incidental to the battery. As the instructions address different factual scenarios, one being a requirement for Kidnapping and the other a requirement to find dual convictions for both Kidnapping and Battery, the instruction offered by the defense and that provided to the jury are substantively and legally distinct. Furthermore, the final jury instruction is confusing and misleading in the sense that the jury would infer that incidental movement is not a basis to find a conviction for *both* Kidnapping and Battery, without guidance as to whether incidental movement can support Kidnapping alone.

Both portions of the proposed jury instruction, including that which was omitted from the final instruction, are supported by case law:

We now clarify that movement or restraint incidental to an underlying offense where restraint or movement is inherent, as a general matter, will not expose the defendant to dual criminal liability under either the first- or second-degree kidnapping statutes. However, where the movement or restraint serves to substantially increase the risk of harm to the victim over and above that necessarily present in an associated offense, i.e., robbery, extortion, battery resulting in substantial bodily harm or sexual assault, or where the seizure, restraint or movement of the victim substantially exceeds that required to complete the associated crime

charged, dual convictions under the kidnapping and robbery statutes are proper. *Mendoza v. State*, 122 Nev. 267, 274-75, 130 P.3d 176, 180 (2006).

As stated previously, case law recognizes the distinction regarding incidental movement: it will *not* result in criminal liability for Kidnapping, but it may result in criminal liability for *both* Kidnapping and Battery “where the movement or restraint serves to substantially increase the risk of harm to the victim over and above that necessarily present in an associated offense” or “where the seizure, restraint or movement of the victim substantially exceeds that required to complete the associated crime charged.”

The Defense proposed instruction was complete, applicable and legally accurate. The final instruction submitted to the jury was incomplete and misleading regarding the role of incidental movement. It is not duplicative, as it provided distinct legal information that was not covered by any other proposed or submitted jury instructions. Therefore, the District Court’s decision to omit the language of the Defense instruction was erroneous and warrants reversal.

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F. *Cumulative Error Warrants Reversal*

In this case, the multiple errors as noted above warrant reversal in aggregate, even if the errors are not sufficient to mandate reversal standing alone. “Cumulative error can violate a defendant's constitutional right to a fair trial. This court considers the following factors for a cumulative error claim: (1) if the issue of guilt is close, (2) the errors' size and character, and (3) the severity of the charged crime.” *Smith v. State*, No. 54397, 2011 Nev. Unpub. LEXIS 1132, at 7-8 (Jan. 31, 2011); *Valdez v. State*, 124 Nev. 1172, 1195, 196 P.3d 465, 481 (2008).

In this case, there is little doubt the issue of guilt is close – Barry was convicted on only *one* of his original nine charges, with *four* Not Guilty, three Guilty of lesser included offenses, and one voluntary dismissal by the State. The errors’ size and character is also prominent given that three of the five substantive errors alleged in the instant appeal directly relate to the conviction for First Degree Kidnapping; the State alleged a single factual basis that Barry was acquitted of, the record in support of the verdict does not facially comply with Nevada statute, and the jury received incomplete and misleading instructions regarding the Kidnapping charge. In conjunction, the improper admission of Ms. Dotson’s *entire* statement to the Officers and an

improper instruction regarding flight compound the errors. Lastly, the severity of the charged crime is high, as Barry was alleged and ultimately convicted of an offense that carries a maximum of life in prison.

For these reasons, the cumulative effect of the five substantive errors outlined above warrant reversal.

CONCLUSION

For these reasons, Appellant respectfully requests the convictions be vacated, and the matter remanded for a new trial and/or sentencing hearing.


VERIFICATION OF KELSEY BERNSTEIN, ESQ.

1. I am an attorney at law, admitted to practice in the State of Nevada.
2. I am the attorney handling this matter on behalf of Appellant.
3. The factual contentions contained within the Opening Brief are true and correct to the best of my knowledge.

Dated this 26 day of April, 2019.

MAYFIELD GRUBER & SHEETS.

Respectfully Submitted By:



KELSEY BERNSTEIN, ESQ.
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

1. I certify that this brief 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 2007 with 14 point, double spaced Cambria font.
2. I further certify that this brief complies with the page-or-type-volume limitations of NRAP 32(a)(7)(A)(ii) because it is proportionally spaced, has a monospaced typeface of 14 points or more and contains 10,095 words.
3. I hereby certify that I have read this appellate brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(c), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.

I understand that I may be subject to sanction in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 26 day of April, 2019.

MAYFIELD GRUBER & SHEETS.

Respectfully Submitted By:



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Attorney for Appellant

CERTIFICATE OF SERVICE

Pursuant to NRAP 25(d), I hereby certify that on the 26 day of
April, 2019, I served a true and correct copy of the Opening

Brief to the last known address set forth below:

Steve Wolfson
Clark County District Attorney's Office
200 Lewis Avenue
Las Vegas, Nevada 89101



Employee of Mayfield Gruber & Sheets



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 black ink, appearing to read "D. Richards", written in a cursive style.

D. Richards
Deputy Clerk

Enclosures

18-909527
Appellant's Appendix #000265

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.

15

16 * * * * *

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

19

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
28

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.¹ 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 ¹ 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 station² or to control an arbitrary or capricious exercise of discretion.³ 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*

² *See* N.R.S. 34.160

³ *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
2 623.⁴ 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
26

27
28 ⁴ 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."⁵ 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 ⁵ *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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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;⁶ in comparison, in Salas v.
9 State, the prosecutor had not even issued a subpoena.⁷ 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.

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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 ⁶ Bustos, 87 Nev. at 623.

28 ⁷ 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 5th and 14th Amendments to the United States
6 Constitution.

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

8 THE STATE OF NEVADA,
9 Plaintiff,

10 -vs-

11 BARRY HARRIS,
12 #1946231

13 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.

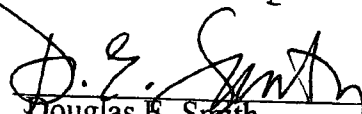
24 The Justice Court did not manifestly abuse its discretion by finding that the
25 State showed good cause through due diligence to procure the named victim in the
26 instant case. The State clearly laid out for the court that the witness was in fact the
27 named victim in the case. Additionally, the 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

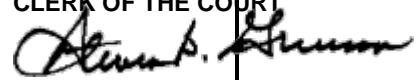
12 
13 Douglas E. Smith
14 DISTRICT COURT JUDGE *JS*

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
23 Scott Ramsey, Scott.ramsey@clarkcountynv.gov

24 
25 Jill Jacoby, Judicial Executive Assistant



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
) DC CASE NO. C326569
)
BARRY HARRIS,)
)
Defendant.)
_____)

REPORTER'S TRANSCRIPT

OF

PRELIMINARY HEARING

**BEFORE THE HONORABLE MELANIE ANDRESS-TOBIASSON
JUSTICE OF THE PEACE**

THURSDAY, DECEMBER 14, 2017

Volume 1

APPEARANCES:

For the State: GENEVIEVE CRAGGS
Deputy District Attorney

For the Defendant: SCOTT RAMSEY
Deputy Public Defender

Reported by: Donna J. McCord, CCR #337

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EXHIBITS

PAGE

STATE'S

EXHIBIT 1 - JOC

38

1 LAS VEGAS, NEVADA, DECEMBER 14, 2017, 12:47 P.M.

2
3 * * * * *

4
5 THE COURT: 17F15265X, Barry Harris. He's
6 present in custody with the Public Defender. This
7 is the time set for preliminary hearing. State, are
8 you ready to proceed?

9 MS. CRAGGS: Yes, your Honor.

10 THE COURT: Defense ready to proceed?

11 MR. RAMSEY: Yes, your Honor.

12 THE COURT: All right. State, who is your
13 first witness?

14 MS. CRAGGS: Nicole Dotson, your Honor.
15 For the record she's in custody.

16 THE COURT: Thank you.

17 Just have a seat.

18 Do you want to talk to her?

19 MS. CRAGGS: Yeah.

20 THE DEFENDANT: You ain't got to do
21 nothing you don't want to do. You got a right to an
22 attorney.

23 MS. CRAGGS: Your Honor --

24 MR. RAMSEY: You need to keep your
25 mouth -- you're not helping yourself.

1 THE COURT: I'm just going to make a
2 record that as soon as the witness came into the
3 courtroom who is in custody on a material witness
4 warrant the defendant made the statements that have
5 been documented in the record.

6 I'm going to direct you, sir, that
7 you are not to communicate with her again.

8 THE DEFENDANT: Okay. I'm sorry, your
9 Honor.

10 THE COURT: Just look over here. She's
11 going to swear you in. You don't have to stand up.

12 Go ahead. Oh, he will.

13

14 **NICOLE DOTSON,**

15 having been first duly sworn, was
16 examined and testified as follows:

17

18 THE WITNESS: I do.

19 THE CLERK: Please state your first and
20 last name and spell it for the record.

21 THE COURT: Is your name Nicole Dotson?

22 THE WITNESS: Yes, ma'am.

23 THE COURT: Is it N-I-C-O-L-E?

24 THE WITNESS: Yes, ma'am.

25 THE COURT: D-O-T-S-O-N?

1 THE WITNESS: Yes, ma'am.

2 THE COURT: All right. Thank you.

3 State.

4

5 **DIRECT EXAMINATION**

6 BY MS. CRAGGS:

7 Q All right. Nicole, I'm just going to ask
8 you a couple questions, okay?

9 A (Nods head.)

10 Q All right. You don't want to be here,
11 right?

12 A (Inaudible response.)

13 Q Okay. First thing I'm going to ask you is
14 I know it's going to be hard but you have to say yes
15 or no, okay? And if you need to take a second
16 that's fine. Do you want a second?

17 A No, I want to go home.

18 Q Okay. I'm just going to ask you a few
19 questions and then you can go home after Mr. Ramsey
20 asks you a few questions.

21 A You promise?

22 Q I promise.

23 Right, Judge? If we ask for the
24 warrant to be quashed today she can go home today?

25 THE COURT: Yes, you'll be released today,

1 okay?

2 BY MS. CRAGGS:

3 Q We've just got to get through this part,
4 okay?

5 A (Nods head.)

6 Q Okay. So do you know Barry Harris?

7 A Yes.

8 Q Okay. Do you see him today?

9 A Yes.

10 Q Okay. Is he sitting over at this table to
11 my right?

12 A Yes.

13 Q In the blue shirt?

14 A Yes.

15 THE COURT: Record will reflect
16 identification of the defendant.

17 MS. CRAGGS: Thank you, your Honor.

18 BY MS. CRAGGS:

19 Q Now, have you been in a relationship with
20 Mr. Harris?

21 A Yes.

22 Q Okay. A dating relationship or what kind
23 of a relationship?

24 A Yeah, a relationship.

25 Q Okay. For how long?

1 A Like six years.

2 Q Okay. And were you in a relationship with
3 him in August of this year?

4 A Yes.

5 Q Okay. And I know this is going to be hard
6 but remember we just talked about you just have to
7 tell me the truth, okay?

8 A (Nods head.)

9 Q Okay. So on August 22nd of this year do
10 you remember where you were living?

11 A Yes.

12 Q Okay. Where was that?

13 A The address?

14 Q Yeah, the address. Was it on Mountain
15 Vista Street?

16 A Yeah.

17 Q Does 3850 sound right?

18 A Uh-huh.

19 Q In Vegas?

20 A Yeah.

21 Q Okay. Now, when you got home on
22 August 22nd was anyone in your house?

23 A Yes.

24 Q Who was in your house?

25 A Barry was there.

1 Q Did you invite him over that day?

2 A He lived there.

3 Q He lived there at the time?

4 A He had a key, yeah.

5 Q Okay. Was he living with you full time at
6 the time?

7 A Kinda, yes.

8 Q Kinda, okay.

9 Court's indulgence, your Honor.

10 So he was living with you at that
11 time?

12 A Yeah.

13 Q Okay. Now, what happened when you walked
14 in and saw him? Where was he?

15 A He was in the room.

16 Q Which room?

17 A He was in the bedroom.

18 Q In the bedroom, okay. Did he say anything
19 to you when you first walk in there or did you say
20 anything to him?

21 A No, I was talking on my phone.

22 Q Okay. Now, you said that he wasn't living
23 or he was living with you at the time, right?

24 A Yes.

25 Q Okay. Do you remember talking to a

1 detective, Detective Carey on that day, on
2 August 22nd?

3 A Honestly I don't know who was who.

4 Q Okay. Do you remember talking to a
5 detective on that day?

6 A Yeah.

7 Q Okay. And you remember talking to him a
8 little bit about what happened that day?

9 A Yeah, you told me.

10 Q Okay.

11 And for opposing counsel I'm on
12 page 3 of the voluntary statement.

13 And do you remember when he asked you
14 if Mr. Harris lived with you?

15 A No.

16 Q Okay. Do you remember telling him that
17 Mr. Harris didn't live with you on that day?

18 A No.

19 Q Okay. So you said you walked in and he
20 was already in which room?

21 A The bedroom.

22 Q Okay. And you said he had a key, right?

23 A He had a key.

24 Q Okay. Had you guys been fighting that
25 day?

1 A Not that day, no.

2 Q Okay. So you hadn't been talking to him
3 on the phone at all?

4 A Yes. Previous, yeah.

5 Q Okay. And did you have any issues when
6 you were talking on the phone?

7 A We was arguing a little bit.

8 Q Arguing a little bit, okay. Now, when you
9 saw him in your house did you tell him to get out?

10 A At some point I did, yes.

11 Q Okay. Did you think he was going to be
12 there when you got home?

13 A No.

14 Q Okay. Did he say that he would leave when
15 you asked him to get out?

16 A No.

17 Q Okay. Do you remember if he said he
18 wasn't going to leave?

19 A Yes.

20 Q Did he call you any names?

21 A We were arguing.

22 Q Now, you were arguing about him leaving,
23 right?

24 A Yeah, that and a lot of things.

25 Q Okay. And did you ever tell him when you

1 were arguing that you were going to call the police?

2 A Yeah.

3 Q Okay. What happened when you told him you
4 were going to call the police?

5 A The beginning is really blurry for me.

6 THE COURT: Okay. Just tell her what you
7 remember.

8 BY MS. CRAGGS:

9 Q Yeah, tell me what you remember, that's
10 okay. Do you remember if he ever put his hands on
11 your neck?

12 MR. RAMSEY: Object, leading.

13 THE COURT: I'm going to give her a little
14 leeway.

15 THE WITNESS: No.

16 BY MS. CRAGGS:

17 Q You don't remember that?

18 A No.

19 MS. CRAGGS: Your Honor, may I approach?

20 THE COURT: Yes, you may.

21 BY MS. CRAGGS:

22 Q All right. Do you remember writing this
23 statement?

24 A (Nods head.)

25 Q Is that your handwriting?

1 A (Nods head.)

2 Q Did you sign it too?

3 A (Nods head.)

4 Q Okay. Do you remember this was on that
5 day, right, August 22nd?

6 A Uh-huh.

7 Q Okay. And then you talked to a detective
8 after that, right?

9 A Uh-huh.

10 Q Okay. Do you remember in this statement
11 when you wrote he started strangling me?

12 A I remember the statement, yes.

13 Q Okay.

14 A The actual in the house, I have like this
15 point on what I remember and everything before I
16 just --

17 Q That's okay, I'm just going to keep asking
18 you, okay? But you remember writing this statement,
19 right?

20 A Yeah.

21 Q Okay. And you did sign it?

22 A Uh-huh.

23 Q Okay. And you said in the statement that
24 he was strangling you on that day?

25 A Okay.

1 Q But you don't remember that right now?

2 A No.

3 Q Okay. Do you remember that he punched you
4 at all?

5 A (Nods head.)

6 Q Okay. Is that a yes?

7 A Yeah.

8 Q Okay. Was that when you guys were arguing
9 in the bedroom?

10 A Yes.

11 Q Okay. Do you know how many times he
12 punched you?

13 A Once.

14 Q Okay. And you said you didn't remember
15 the strangling part, right?

16 A Huh-uh.

17 Q Okay. So do you remember telling the
18 detective that when that happened you had a hard
19 time breathing?

20 A Yeah. I was pretty worked up.

21 Q Okay. Do you remember telling the
22 detective that when the defendant had his hands
23 around your neck you had a hard time breathing?

24 A No.

25 Q Okay. So after you're inside the bedroom

1 and you remember him punching you --

2 A Uh-huh.

3 Q -- did you leave the bedroom?

4 A Yes.

5 Q Where did you go when you left the
6 bedroom?

7 A I was trying to go out the front door. I
8 was trying to --

9 Q Were you trying to leave?

10 A Yeah.

11 Q And where did you end up getting to? Were
12 you able to leave?

13 A I was in the bathroom.

14 Q Okay. Did you walk to the bathroom
15 yourself or did you go somewhere else first when you
16 were trying to leave the apartment? I'm asking you
17 bad questions. How come you weren't able to leave
18 the apartment?

19 A Barry wouldn't let me.

20 Q He wouldn't let you leave?

21 A Huh-uh.

22 Q Is that a no?

23 A No.

24 Q Okay. Now, did you end up going to the
25 living room?

1 A For a second, yeah.

2 Q Okay. Now, did you ever see Barry have
3 any weapons?

4 A At some point.

5 Q Do you remember what that was? Do you
6 remember what it was?

7 A (Nods heads.)

8 Q What was it? I know you don't want to be
9 here but you just have to tell the truth and answer
10 my questions, okay?

11 A I know.

12 Q Nicole, do you remember what he had?

13 A Yes.

14 Q Okay. What was it?

15 A It was a gun.

16 Q Okay. Did you see the gun when you were
17 first talking to him when you went home?

18 A No.

19 Q Did you see it when you were in the
20 bedroom?

21 A No.

22 Q Okay. Did you see it when you were in the
23 living room?

24 A No.

25 Q And then I think you said you went to the

1 bathroom, right?

2 A (Nods head.)

3 Q Is that a yes, Nicole?

4 A Yes.

5 Q Did you want to go to the bathroom?

6 A No.

7 Q Why did you go to the bathroom? Did you
8 feel like you had to?

9 A (Nods head.)

10 Q Is that a yes?

11 A Yes.

12 Q Okay. Why did you feel like you had to go
13 to the bathroom?

14 A Well, we were arguing or fighting,
15 arguing.

16 Q Okay. Did you see the gun before you went
17 to the bathroom?

18 A No.

19 Q Okay. Did he tell you that you had to go
20 to the bathroom?

21 A No.

22 Q But you said you didn't want to go.

23 A I mean, I wanted to leave altogether
24 but --

25 Q Okay. When did he have the gun out?

1 A In the bathroom.

2 Q In the bathroom?

3 A (Nods head.)

4 Q Okay. What did he do with the gun? Did
5 he ever point it at you?

6 A What if I have a question?

7 Q You have a question?

8 A (Nods head.)

9 Q Do you have a question for me or the
10 judge?

11 THE COURT: Probably better for you.

12 MS. CRAGGS: She was looking at you.

13 Do you want me to come up there so
14 you can tell me?

15 THE COURT: No, no, no, what's the
16 question? It doesn't necessarily mean I'll answer
17 it. Let's just hear what it is. What's the
18 question?

19 THE WITNESS: What if maybe it wasn't
20 necessarily pointed at me but kind of like wavered
21 in the air.

22 THE COURT: That's fine. If that's what
23 happened that's what you say. Just tell the truth,
24 okay?

25 ///

1 BY MS. CRAGGS:

2 Q Just answer it as best as you can.

3 A That's the answer.

4 Q That it was wavering in the air?

5 A Yeah, that is the answer.

6 Q Okay. Did he ever hit you with the gun?

7 A I don't know because Barry's fist is
8 pretty strong so I'm not sure if it was -- I was hit
9 but I'm not sure if it was with that or with his
10 fist.

11 Q Okay. You remember that statement we
12 talked about that you said you wrote?

13 A Yeah.

14 Q Okay. Now, do you remember when you said
15 that he started beating you with a gun on top of
16 your head?

17 A Now that you're reading it to me I
18 remember.

19 Q Okay. Do you remember that happening?

20 A To some extent.

21 Q So you remember him hitting you on your
22 head with a gun?

23 A I remember being hit, yes.

24 Q Okay. But you're not sure if it's the
25 gun?

1 A Yeah.

2 Q Okay. But you remember writing that it
3 was with a gun?

4 A Now that you're telling me, yes.

5 Q Okay. And I think you said that he
6 punched you one time in your face; is that right?

7 A Correct.

8 Q Okay. Did he ever hit you any other times
9 in the head?

10 A Could have been.

11 Q Could have been, okay. Do you remember
12 saying that he continued to put blows to your head?

13 A No.

14 Q Okay. Did he ever -- after he hit you,
15 well, you think he might have hit you on the top of
16 your head with a gun, did he ever kick you?

17 A Yeah.

18 Q Do you know how many times?

19 A More than once.

20 Q Now, did you ever say you were going to
21 call the police?

22 A Yes.

23 Q Okay. Did he say anything to you when you
24 said you were going to call the police?

25 A See, all that is still a blur to me.

1 Q Okay.

2 A What was said precisely I don't know. We
3 were arguing.

4 Q Okay. Did he ever tell you not to make
5 any sounds?

6 A At some point, yes.

7 Q Did he ever make any threats to you while
8 this was going on?

9 A Just about not calling the police, yeah.

10 Q Did he ever make any threats about your
11 life or doing anything to you?

12 A See, again this is like four months later.

13 THE COURT: It's okay. If you don't
14 remember you don't remember. Just tell the truth.

15 THE WITNESS: It's just that's a blur what
16 was said.

17 BY MS. CRAGGS:

18 Q Okay. So in this statement we keep
19 talking about that you wrote --

20 A Yeah, I know, I know.

21 Q Okay. And I'm saying this so that it all
22 gets down on the record, okay?

23 A Okay.

24 Q I know you remember. So referring to the
25 statement, you remember saying, writing that he told

1 you if you screamed he was going to kill you?

2 A Do I remember writing that or saying that?

3 Q Both. Do you remember writing it?

4 A I don't remember writing it, no.

5 Q Do you remember him saying it to you?

6 A Some things were said that scared me but
7 again when all that happened that was in the
8 beginning.

9 Q I understand. Like I said, just tell me
10 the truth and do your best.

11 A So, I mean, that's why I'm hesitant
12 because I don't want to tell you yeah and I don't
13 remember that or clearly. It's like I have what I
14 remember clearly.

15 Q If you don't remember just tell me you
16 don't remember.

17 A Okay. I don't remember that precisely
18 clearly.

19 Q That's okay. Now, did he ever do anything
20 else with the gun?

21 A No.

22 Q Okay. Do you remember him putting it to
23 your head?

24 A No.

25 Q Okay. And in the same statement do you

1 remember saying that he cocked the gun back and put
2 it to your head?

3 A I don't remember saying it but I remember
4 what you're, now that you're reading it to me.

5 Q Okay. So you remember when he put it to
6 your head?

7 A Well, I remember being in the bathroom and
8 I was being hit in some form at the top.

9 Q Okay.

10 A But my eye was shut closed, that's what I
11 remember.

12 Q Why was your eye shut closed?

13 A Because there was a punch.

14 Q Okay.

15 A And I just remember feeling like I
16 couldn't open my eye and I was confused. But I
17 don't -- that's what I'm telling you, the stuff that
18 was happening around me, it wasn't as clear as I
19 thought. My head was down. I was sitting on the
20 floor.

21 Q Okay.

22 A So I don't remember precisely what was
23 happening because I wasn't like staring at him or --
24 I was like on the floor.

25 Q So do you remember him putting the gun to

1 your head?

2 A Not precisely, no.

3 Q Okay. Do you remember him saying that
4 I'll blow your brains out when the gun was to your
5 head?

6 A Anything that was said I don't remember
7 anymore. I know some things were said but I don't
8 remember them anymore.

9 Q And you said you do remember talking to
10 detectives that day but you're not sure you remember
11 what you said?

12 A Yeah, right.

13 Q Okay.

14 A I remember them greeting me as I walked
15 out the door.

16 Q Okay. Do you remember them saying they
17 were going to record anything?

18 A No.

19 Q Okay. But you do remember talking to them
20 though?

21 A Yeah, I remember talking to them.

22 Q Okay.

23 Page 4.

24 So do you remember telling detectives
25 that the defendant said I'll blow your brains out,

1 if you make any noise I will fucking kill you?

2 A No.

3 Q Okay. Do you remember telling the
4 detectives that he said if you made any noise he
5 would pull the trigger?

6 A No, but I do remember him telling me to be
7 quiet.

8 Q Okay.

9 Court's indulgence, your Honor.

10 Do you remember -- you said you don't
11 really remember much with the gun, right?

12 A Yeah.

13 Q But do you remember him putting the gun in
14 your mouth?

15 A No, that never happened I know for a fact.

16 Q Do you remember telling the detectives
17 that he put the gun in your mouth?

18 A Possibly, yeah.

19 Q Okay. And at this time you said you were
20 scared?

21 A Right.

22 Q Were you trying to leave?

23 A Was I trying to leave, what, my house?

24 Q Yeah, trying to get away.

25 A Yeah.

1 Q Now, were you eventually able to leave?
2 What happened next that you remember?

3 A Barry eventually left on his own and when
4 I opened the door there were a bunch of cops at the
5 bottom of my stairs I can remember.

6 Q Okay. Now, you didn't call the police,
7 right?

8 A No.

9 Q Okay. So somebody else must have done it?

10 A Someone else called the police. I didn't
11 even have a phone.

12 Q Okay. Now, did you have any injuries
13 after this? You said your eye was swollen shut,
14 right?

15 A Yeah.

16 Q Okay. Did you have any bruises?

17 A For a little while.

18 Q Did you go to the doctor?

19 A (Nods heads.)

20 Q Did you go to the hospital or the doctor?

21 A They made me go to the hospital.

22 Q Okay. What did they tell you at the
23 hospital? Did you have a hard time breathing or --

24 MR. RAMSEY: Objection, calls for hearsay.

25 THE COURT: Sustained with regard to that

1 but --

2 MS. CRAGGS: I'll rephrase, your Honor, I
3 apologize.

4 BY MS. CRAGGS:

5 Q When you went to the hospital did you have
6 any injuries at that point?

7 A My eye was black.

8 Q Anything else?

9 A No, not that I can remember. My eye was
10 the biggest thing.

11 Q Did you get any medication when you left?

12 A The hospital?

13 Q Yeah.

14 A Absolutely.

15 Q Okay. Do you know what it was for?

16 A Pain.

17 Q Where else did you have pain other than
18 your eye?

19 A I mean, my body was a little sore but I
20 just remember my eye being the biggest issue.

21 THE COURT: I'm sorry, I didn't hear what
22 you said.

23 THE WITNESS: My eye was the most --

24 THE COURT: Okay.

25 ///

1 BY MS. CRAGGS:

2 Q How long did you have pain?

3 A For my eye?

4 Q Yeah, for your eye.

5 A Oh, my God, like four months.

6 Q Okay. Did you ever have to get any
7 surgery or anything on it?

8 A So there were like blood clots once they
9 opened the eye. He said that those would not
10 recover on their own so they would have to remove
11 them.

12 THE COURT: And did they?

13 THE WITNESS: Yes.

14 THE COURT: Okay.

15 MS. CRAGGS: Court's indulgence, your
16 Honor.

17 THE COURT: Sure.

18 MS. CRAGGS: I don't have any further
19 questions.

20 THE WITNESS: Thank God.

21 THE COURT: All right.

22 MS. CRAGGS: I'm done asking you
23 questions, okay, Nicole?

24 THE WITNESS: So I can leave now?

25 THE COURT: I'm sorry, he's got to ask you

1 some questions, his attorney is going to ask you
2 some questions as well. She might have some to ask
3 after he asks questions. Once they're done you're
4 done, you go home, okay?

5 THE WITNESS: Okay.

6 THE COURT: All right.

7 MR. RAMSEY: Court's brief indulgence.

8 THE COURT: Of course.

9

10 **CROSS-EXAMINATION**

11 BY MR. RAMSEY:

12 Q Miss Dotson, you said you've been in a
13 relationship with Mr. Harris --

14 A Yes, sir.

15 Q -- for about six years?

16 A Yes, sir.

17 Q You had lived together off and on for a
18 period of time?

19 A Yes, sir.

20 Q And he resided with you at that house?

21 A In the Mountain Vista house, right?

22 Q Yes.

23 A Right.

24 Q And he had a key to the apartment?

25 A Yes.

1 Q He was free to come and go as he pleased?

2 A At that time, yes.

3 Q You may not have expected him that night
4 but he still had permission to be there?

5 A Yeah.

6 Q Okay. I wanted to talk to you about this
7 gun. Can you describe the gun, please?

8 A No.

9 Q Was it any specific color?

10 THE WITNESS: I can't describe the gun,
11 your Honor.

12 THE COURT: Okay.

13 BY MR. RAMSEY:

14 Q Was it one that fit in a single hand or
15 was it a large gun?

16 A It had to have fit in his hand.

17 Q Okay. In one hand?

18 A I don't know, I was kneeled down. I just
19 got a glimpse of it.

20 Q Okay. And you didn't see the gun you said
21 until you were in the bathroom?

22 A Correct.

23 Q Okay. Prior to the bathroom you had tried
24 to leave out the front door?

25 A Yes.

1 Q And he stopped you?

2 A Yes.

3 Q How did he stop you?

4 A Well, he kind of pulled me back.

5 Q Okay. You said the two of you had been
6 arguing throughout the day, correct?

7 A We had started arguing that night.

8 Q That night when you got home?

9 A No, previous to me going home I remember
10 there was some conversations on the phone.

11 Q What were you arguing over?

12 A Barry was cheating as usual.

13 Q Were you upset about that?

14 A Very.

15 Q Is that why you told him to leave when you
16 got to the house?

17 A Absolutely.

18 Q Okay. You said you don't remember his
19 hands on your neck at all?

20 A No.

21 Q You said he only punched you once?

22 A One time that I can remember distinctly,
23 yes.

24 Q And that's the time that caused the eye
25 issue?

1 A Correct.

2 Q Okay. When you were in the bathroom were
3 you ever locked in the bathroom?

4 A No, but I wasn't allowed to leave the
5 bathroom.

6 Q I understand, I'm just asking if you were
7 locked in.

8 A No.

9 Q Okay. And when he left you remained in
10 the bathroom until you heard the door lock?

11 A That's correct.

12 Q Did you go to the front door immediately
13 after you heard the door lock?

14 A Nope.

15 Q You stayed in the bathroom for how long?

16 A Maybe like 20 minutes.

17 Q Twenty minutes, okay. You said he never
18 pointed the gun at you, he just waived it in the
19 air, correct?

20 A I believe that to be what happened.

21 Q Okay. He never put the gun in your mouth?

22 A No.

23 Q Although you say you do recall writing
24 that in your written statement?

25 A After she refreshed my memory, yes.

1 Q Do you know why you wrote that in the
2 statement when you say it didn't happen?

3 A Honestly, no, I don't. But again there
4 was a matter of mixed emotions, a whole lot of mixed
5 emotions.

6 Q You were upset about him cheating?

7 A Well, yeah.

8 Q And you were upset about him fighting or
9 punching you?

10 A Correct. But, I mean, it wasn't — at
11 that point when I talked to a detective I was no
12 longer concerned about him cheating. My face was —
13 that's what I was concerned about.

14 Q I understand.

15 Court's brief indulgence.

16 THE COURT: Sure.

17 MR. RAMSEY: I'll pass the witness, your
18 Honor.

19 THE COURT: Any other questions?

20 MS. CRAGGS: Just a couple, your Honor.
21 Thank you.

22 THE COURT: Okay.

23 ///

24 ///

25 ///

REDIRECT EXAMINATION

BY MS. CRAGGS:

Q Nicole, do you remember when you were talking with the detectives about the gun you said you thought it was black with a brown bottom and the pointy part was skinny; do you remember that?

A Somewhat, yeah.

Q Sorry?

A I said I -- everything when you read it back to me kind of I remember it but not clearly, no.

Q But you don't remember what it looked like today?

A No.

Q Okay. How long can you estimate from when you came home Mr. Harris was there to when he left? Do you know how long that was?

A I need you to explain to me.

Q From when you came home --

A Uh-huh.

Q -- and he's in your bedroom --

A Uh-huh.

Q -- to when he leaves, do you know how many minutes?

A Oh, you're talking about the duration of

1 time that he was with me?

2 Q See, you said it better than me. Yes.

3 THE COURT: That's exactly what she meant.

4 BY MS. CRAGGS:

5 Q Thank you. That's exactly what I meant.

6 A I don't know precisely how long it was.

7 Q Do you think it was less than a half hour?

8 A It seemed to be longer than that.

9 Q Okay. Less than an hour?

10 A Probably something.

11 Q Okay. So like between 30 minutes and an
12 hour?

13 A Maybe, yeah, uh-huh.

14 Q All right.

15 No further questions, your Honor.

16 THE COURT: Any others based on those?

17 MR. RAMSEY: No recross, your Honor.

18 THE COURT: All right. They're going to
19 take you out and you will get released, all right?

20 THE WITNESS: Thank you.

21 THE COURT: Can you approach real quick?

22 (Discussion held off the record.)

23 THE COURT: All right. State, you rest?

24 MS. CRAGGS: Well, your Honor --

25 THE COURT: Oh, there's probably some

1 amendments.

2 MS. CRAGGS: Well, there's amendments and
3 honestly, your Honor, I was hoping I wouldn't need
4 to have a police officer come and testify as to the
5 substance of her statement and I have a
6 nonappearance form for the officer that would be
7 testifying.

8 THE COURT: Oh, you do have an officer,
9 okay.

10 MS. CRAGGS: So I had told Mr. Ramsey that
11 I may have to request for it to be bifurcated
12 depending on what --

13 THE COURT: Well, at least you guys talked
14 about it and I wasn't aware of it but at least
15 you --

16 MS. CRAGGS: I don't know that he agrees
17 to it but --

18 MR. RAMSEY: Oh, obviously I don't agree
19 to it. If the State's going to make a motion to
20 continue, I just ask that she be sworn and we go
21 through the proper Bustos --

22 THE COURT: Oh, absolutely. I just want
23 to say this. Hold on, I need to say something.

24 THE DEFENDANT: Oh, I'm sorry, your Honor.

25 THE COURT: You can't hear me if you're

1 talking in his ear. Had I been advised of this
2 previously based on the fact that she was in custody
3 I would have required her testimony today anyway
4 because I would not have wanted to hold her for two
5 weeks assuming that their motion is in order.

6 MR. RAMSEY: I understand.

7 THE COURT: So let's go there first and
8 then I can make a lengthier record if necessary.
9 All right. So she's going to be sworn.

10 MS. CRAGGS: And, your Honor, I do have a
11 judgment of conviction if I could enter that right
12 now or I can wait until next time. It's a
13 possession of firearm by a prohibited person.

14 THE COURT: You may as well do it now.

15 You've seen this?

16 MR. RAMSEY: I received a copy of that,
17 your Honor.

18 THE COURT: So it's State's Exhibit 1?

19 MS. CRAGGS: Yes.

20 THE COURT: Proposed exhibit?

21 MS. CRAGGS: Yes.

22 THE COURT: Any objection?

23 MR. RAMSEY: Objection, your Honor, but, I
24 mean, it is sealed.

25 THE COURT: Okay.

1 MS. CRAGGS: It is. And for the record
2 it's a judgment of conviction from 2007 from Clark
3 County for a battery with a deadly weapon resulting
4 in substantial bodily harm --

5 THE COURT: Okay.

6 MS. CRAGGS: -- for Mr. Barry Harris.

7 THE COURT: All right. And I'll note the
8 objection on the record but I am going to allow its
9 admission for purposes of preliminary hearing. It
10 will be admitted as State's Exhibit 1.

11 (State's Exhibit 1 admitted.)

12 MS. CRAGGS: And I should have told you
13 about the bifurcation.

14 THE COURT: It's okay.

15 MS. CRAGGS: I was just hoping that it
16 would not be a necessity.

17 THE COURT: I know. We were kind of going
18 back and forth but he'll swear you in.

19 (At this time, Miss Craggs was sworn.)

20 MS. CRAGGS: I do. My name is Genevieve
21 Craggs. I'm a Deputy District Attorney assigned to
22 the State of Nevada versus Barry Harris which is
23 17F15265X.

24 When I was going through my subpoenas
25 this morning, your Honor, I did notice that I had a

1 return, first of all, for Detective Casey. He is
2 one of the detectives who took the voluntary
3 statement that I was referring to multiple times and
4 we did have a transcription of that and it was
5 provided to Mr. Ramsey before we started. Then I
6 also noticed that I had received a nonappearance
7 form at some point that says that he will be out of
8 state on family business and that he would be
9 returning to duty on December 23rd of 2017.

10 Your Honor, obviously based on this I
11 do need him in order to get the substance of her
12 statements in. This is made in good faith and not
13 for the purpose of delay. I would request a
14 continuance, your Honor.

15 MR. RAMSEY: And the defense would object
16 and move for dismissal, your Honor. It seems like
17 she just checked this morning. And I understand she
18 was in trial but there's no element of surprise
19 here. If she received that before it should have
20 done by written motion.

21 THE COURT: It's a Hill motion. You have
22 a nonappearance notification.

23 MS. CRAGGS: I do. I mean, I didn't see
24 it until this morning.

25 THE COURT: No, I understand that but, I

1 mean, it is, you know, for all intents and purposes
2 an oral Hill.

3 MS. CRAGGS: And if I need to write it up,
4 your Honor, I guess I would request a -- and I
5 should have been more clear when I spoke with
6 Mr. Ramsey about it earlier and made assumptions,
7 but I would be happy to write it up if you give me a
8 five-minute recess to do so.

9 MR. RAMSEY: I'm not going to require
10 that. Additionally, your Honor, this is a second
11 preliminary hearing setting. We should have been
12 ready to proceed here. My client has his due
13 process rights. He has a statutory right to a
14 preliminary hearing in 15 days. He would like to
15 exercise that right and have his preliminary hearing
16 today, have it decided, bound over or not today,
17 your Honor. I don't think there's a valid basis for
18 a second continuance here and I'll submit.

19 THE COURT: Well, the first continuance
20 was based on the nonappearance of Miss Dotson and
21 the case was re-subpoenaed and this continuance is
22 being requested because of the nonappearance or the
23 unavailability of the detective, obviously two
24 different witnesses. I do appreciate her
25 representations that she thought she may be able to

1 go forward with just the one witness. With regard
2 to the custody status of that witness, even if she
3 had made the motion at the beginning of the hearing
4 I would have allowed the testimony of the victim
5 because of her custody status. And so I would have
6 granted -- I mean, it appears to be in order. I
7 realize she didn't see that until this morning, but
8 it is a nonappearance notification, she does have
9 that, he clearly was served, and I think, you know,
10 there's no rule that dictates that a preliminary
11 hearing can only be continued one time. And so I
12 know that it's kind of been a standard procedure but
13 there is no direct rule that says you can't have
14 more than one continuance. And I will say at least
15 this one is for a separate witness and who has now
16 become somewhat of an essential witness.

17 So I am going to grant the State's
18 request. The 15-day date is the 28th. We don't
19 have to do 15 days. He's back to duty on the 23rd.
20 I mean, we do it on the 24th if you'd like.

21 MR. RAMSEY: The 15-day date is the 28th,
22 is that what you said?

23 THE COURT: Yeah. Today's the 14th. It's
24 actually 14 days.

25 MR. RAMSEY: Give me a second so I can

1 check that because I'm out of town. Your Honor, is
2 there an earlier date?

3 MS. CRAGGS: Well, he's not back until the
4 23rd which is a Saturday.

5 THE COURT: I mean, I can do the 26th or
6 the 27th.

7 MR. RAMSEY: 26th I can't do. I can do
8 the 27th or the 28th.

9 THE COURT: Which one do you prefer?

10 MR. RAMSEY: Probably the 28th because my
11 first day back in the office is the 27th.

12 THE COURT: Okay. So let's do the 28th.

13 MS. CRAGGS: And somebody else will be
14 here because I'm not here but we'll find someone.

15 THE COURT: How many do we have set on the
16 28th already?

17 THE CLERK: Let me check.

18 MR. RAMSEY: We had all this morning and
19 it was quite a few.

20 THE COURT: I know.

21 THE CLERK: We have eight in custody, four
22 out of custody.

23 THE COURT: I'll just own it now. I
24 probably set it.

25 THE CLERK: On the 27th we have five in

1 and one out.

2 MR. RAMSEY: Do the 27th, I'll deal with
3 it.

4 THE COURT: Okay. We'll do the 27th at
5 10:00 o'clock.

6 MS. CRAGGS: Thank you.

7 THE COURT: Will you be here then?

8 MS. CRAGGS: I will not but I'll have
9 someone. I think Lisa will be happy to.

10 THE DEFENDANT: Can I get a bail
11 reduction?

12 THE COURT: No.

13 THE DEFENDANT: An OR?

14 THE COURT: No.

15 THE DEFENDANT: All right.

16 MS. CRAGGS: And can we admonish what no
17 contact means in terms of third parties as well?

18 THE COURT: Yeah, I mean, there's to be no
19 contact including through third parties. It's a
20 understatement to say I'm concerned about the other
21 party that's here today and his attempts to keep
22 coming in the courtroom after he was asked to leave
23 the courtroom. You can have that conversation, I
24 don't need to, you can. So we'll finish the
25 preliminary hearing December 27th. Thank you.

1 MS. CRAGGS: Thank you.

2
3 * * * * *

4 Attest: Full, true, accurate transcript of
5 proceedings.

6
7 _____/S/Donna J. McCord
DONNA J. McCORD CCR #337

<p>BY MR. RAMSEY: [2] 29/10 30/12</p> <p>BY MS. CRAGGS: [12] 6/5 7/1 7/17 12/7 12/15 12/20 18/25 21/16 27/3 27/25 34/1 35/3</p> <p>MR. RAMSEY: [19] 4/10 4/23 12/11 26/23 29/6 33/16 35/16 36/17 37/5 37/15 37/22 39/14 40/8 41/20 41/24 42/6 42/9 42/17 43/1</p> <p>MS. CRAGGS: [32] 4/8 4/13 4/18 4/22 7/16 12/18 18/11 27/1 28/14 28/17 28/21 33/19 35/23 36/1 36/9 36/15 37/9 37/18 37/20 37/25 38/5 38/11 38/14 38/19 39/22 40/2 42/2 42/12 43/5 43/7 43/15 43/25</p> <p>THE CLERK: [4] 5/18 42/16 42/20 42/24</p> <p>THE COURT: [68]</p> <p>THE DEFENDANT: [6] 4/19 5/7 36/23 43/9 43/12 43/14</p> <p>THE WITNESS: [14] 5/16 5/21 5/23 5/25 12/14 18/18 21/14 27/22 28/12 28/19 28/23 29/4 30/9 35/19</p> <p>/</p> <p>/S/Donna [1] 44/6</p> <p>1</p> <p>10:00 [1] 43/5</p> <p>12:47 [1] 4/1</p> <p>14 [3] 1/16 4/1 41/24</p> <p>14th [1] 41/23</p> <p>15 [2] 40/14 41/19</p> <p>15-day [1] 41/18</p> <p>17F15265X [3] 1/8 4/5 38/23</p> <p>2</p> <p>20 [1] 32/16</p> <p>2007 [1] 38/2</p> <p>2017 [3] 1/16 4/1 39/9</p> <p>22nd [4] 8/9 8/22 10/2 13/5</p> <p>23rd [3] 39/9 41/19 42/4</p> <p>24th [1] 41/20</p> <p>26th [2] 42/5 42/7</p> <p>27th [7] 42/6 42/8 42/11 42/25 43/2 43/4 43/25</p> <p>28th [6] 41/18 41/21 42/8 42/10 42/12 42/16</p> <p>29 [1] 2/5</p> <p>3</p> <p>30 [1] 35/11</p> <p>337 [2] 1/25 44/7</p> <p>34 [1] 2/6</p> <p>38 [1] 3/4</p> <p>3850 [1] 8/17</p> <p>A</p> <p>able [4] 15/12 15/17 26/1 40/25</p> <p>about [20] 8/6 10/8 11/22 19/12 21/9 21/10 21/19 29/15 30/6 31/13 33/6 33/8 33/12 33/13 34/4 34/25 36/14 38/13 40/6 43/20</p>	<p>absolutely [3] 27/14 31/17 36/22</p> <p>accurate [1] 44/4</p> <p>actual [1] 13/14</p> <p>actually [1] 41/24</p> <p>Additionally [1] 40/10</p> <p>address [2] 8/13 8/14</p> <p>admission [1] 38/9</p> <p>admitted [2] 38/10 38/11</p> <p>admonish [1] 43/16</p> <p>advised [1] 37/1</p> <p>after [9] 6/19 13/8 14/25 20/14 26/13 29/3 32/13 32/25 43/22</p> <p>again [4] 5/7 21/12 22/7 33/3</p> <p>agree [1] 36/18</p> <p>agrees [1] 36/16</p> <p>ahead [1] 5/12</p> <p>ain't [1] 4/20</p> <p>air [3] 18/21 19/4 32/19</p> <p>all [23] 4/12 6/2 6/7 6/10 11/3 12/22 14/4 20/25 21/21 22/7 28/21 29/6 31/19 35/14 35/18 35/19 35/23 37/9 38/7 39/1 40/1 42/18 43/15</p> <p>allow [1] 38/8</p> <p>allowed [2] 32/4 41/4</p> <p>already [2] 10/20 42/16</p> <p>also [1] 39/6</p> <p>Although [1] 32/23</p> <p>altogether [1] 17/23</p> <p>am [2] 38/8 41/17</p> <p>amendments [2] 36/1 36/2</p> <p>ANDRESS [1] 1/15</p> <p>ANDRESS-TOBIASSON [1] 1/15</p> <p>answer [5] 16/9 18/16 19/2 19/3 19/5</p> <p>any [19] 11/5 11/20 16/3 20/8 21/5 21/7 21/10 25/1 25/4 26/12 26/16 27/6 27/11 28/6 28/18 30/9 33/19 35/16 37/22</p> <p>anymore [2] 24/7 24/8</p> <p>anyone [1] 8/22</p> <p>anything [9] 9/18 9/20 20/23 21/11 22/19 24/6 24/17 27/8 28/7</p> <p>anyway [1] 37/3</p> <p>apartment [3] 15/16 15/18 29/24</p> <p>apologize [1] 27/3</p> <p>APPEARANCES [1] 1/19</p> <p>appears [1] 41/6</p> <p>appreciate [1] 40/24</p> <p>approach [2] 12/19 35/21</p> <p>are [2] 4/7 5/7</p> <p>arguing [12] 11/7 11/8 11/21 11/22 12/1 14/8 17/14 17/15 21/3 31/6 31/7 31/11</p> <p>around [2] 14/23 23/18</p> <p>as [15] 5/2 5/2 5/16 19/2 19/2 23/18 23/18 24/14 29/2 30/1 31/12 36/4 37/14 38/10 43/17</p> <p>ask [8] 6/7 6/13 6/18 6/23 28/25 29/1 29/2 36/20</p> <p>asked [3] 10/13 11/15 43/22</p> <p>asking [4] 13/17 15/16 28/22</p>	<p>32/6</p> <p>asks [2] 6/20 29/3</p> <p>assigned [1] 38/21</p> <p>assuming [1] 37/5</p> <p>assumptions [1] 40/6</p> <p>attempts [1] 43/21</p> <p>Attest [1] 44/4</p> <p>attorney [4] 1/21 4/22 29/1 38/21</p> <p>August [5] 8/3 8/9 8/22 10/2 13/5</p> <p>August 22nd [4] 8/9 8/22 10/2 13/5</p> <p>aware [1] 36/14</p> <p>away [1] 25/24</p> <p>B</p> <p>back [7] 23/1 31/4 34/10 38/18 41/19 42/3 42/11</p> <p>bad [1] 15/17</p> <p>bail [1] 43/10</p> <p>BARRY [10] 1/9 4/5 7/6 8/25 15/19 16/2 26/3 31/12 38/6 38/22</p> <p>Barry's [1] 19/7</p> <p>based [4] 35/16 37/2 39/10 40/20</p> <p>basis [1] 40/17</p> <p>bathroom [18] 15/13 15/14 17/1 17/5 17/7 17/13 17/17 17/20 18/1 18/2 23/7 30/21 30/23 32/2 32/3 32/5 32/10 32/15</p> <p>battery [1] 38/3</p> <p>be [27] 6/10 6/14 6/24 6/25 8/5 11/11 16/8 25/6 30/4 32/20 35/8 36/6 36/11 36/20 37/9 38/10 38/16 39/7 39/8 40/7 40/25 41/6 41/11 42/13 43/7 43/9 43/18</p> <p>beating [1] 19/15</p> <p>because [10] 19/7 22/12 23/13 23/23 37/4 40/22 41/5 42/1 42/10 42/14</p> <p>become [1] 41/16</p> <p>bedroom [9] 9/17 9/18 10/21 14/9 14/25 15/3 15/6 16/20 34/21</p> <p>been [13] 5/5 5/15 7/19 10/24 11/2 20/10 20/11 29/12 31/5 37/1 40/5 40/11 41/12</p> <p>before [5] 1/15 13/15 17/16 39/5 39/19</p> <p>beginning [3] 12/5 22/8 41/3</p> <p>being [5] 19/23 23/7 23/8 27/20 40/22</p> <p>believe [1] 32/20</p> <p>best [2] 19/2 22/10</p> <p>better [2] 18/11 35/2</p> <p>between [1] 35/11</p> <p>bifurcated [1] 36/11</p> <p>bifurcation [1] 38/13</p> <p>biggest [2] 27/10 27/20</p> <p>bit [3] 10/8 11/7 11/8</p> <p>black [2] 27/7 34/5</p> <p>blood [1] 28/8</p> <p>blow [2] 24/4 24/25</p> <p>blows [1] 20/12</p> <p>blue [1] 7/13</p>
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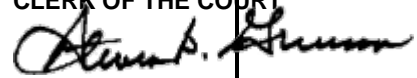
F fist [2] 19/7 19/10 fit [2] 30/14 30/16 five [2] 40/8 42/25 five-minute [1] 40/8 floor [2] 23/20 23/24 follows [1] 5/16 form [3] 23/8 36/6 39/7 forth [1] 38/18 forward [1] 41/1 four [3] 21/12 28/5 42/21 free [1] 30/1 front [3] 15/7 30/24 32/12 fucking [1] 25/1 full [2] 9/5 44/4 further [2] 28/18 35/15	happening [3] 19/19 23/18 23/23 happy [2] 40/7 43/9 hard [5] 6/14 8/5 14/18 14/23 26/23 harm [1] 38/4 HARRIS [10] 1/9 4/5 7/6 7/20 10/14 10/17 29/13 34/16 38/6 38/22 has [3] 40/12 40/13 41/15 have [57] having [1] 5/15 he [81] he'll [1] 38/18 he's [5] 4/5 28/25 34/21 41/19 42/3 head [22] 6/9 7/5 8/8 12/24 13/1 13/3 14/5 17/2 17/9 18/3 18/8 19/16 19/22 20/9 20/12 20/16 22/23 23/2 23/6 23/19 24/1 24/5 heads [2] 16/7 26/19 hear [3] 18/17 27/21 36/25 heard [2] 32/10 32/13 hearing [9] 1/14 4/7 38/9 40/11 40/14 40/15 41/3 41/11 43/25 hearsay [1] 26/24 held [1] 35/22 helping [1] 4/25 her [10] 4/18 5/7 12/6 12/13 36/5 37/3 37/4 39/11 40/24 41/5 here [10] 5/10 6/10 16/9 39/19 40/12 40/18 42/14 42/14 43/7 43/21 hesitant [1] 22/11 Hill [2] 39/21 40/2 him [30] 7/8 8/3 9/1 9/14 9/20 10/7 10/16 11/2 11/9 11/9 11/15 11/22 11/25 12/3 15/1 16/17 19/21 22/5 22/22 23/23 23/25 24/3 25/6 25/13 30/3 31/15 33/6 33/8 33/12 39/11 his [11] 12/10 14/22 19/9 26/3 29/1 30/16 31/18 37/1 40/12 40/15 43/21 hit [7] 19/6 19/8 19/23 20/8 20/14 20/15 23/8 hitting [1] 19/21 hold [2] 36/23 37/4 home [11] 6/17 6/19 6/24 8/21 11/12 16/17 29/4 31/8 31/9 34/16 34/19 honestly [3] 10/3 33/3 36/3 Honor [30] 4/9 4/11 4/14 4/23 5/9 7/17 9/9 12/19 25/9 27/2 28/16 30/11 33/18 33/20 35/15 35/17 35/24 36/3 36/24 37/10 37/17 37/23 38/25 39/10 39/14 39/16 40/4 40/10 40/17 42/1 HONORABLE [1] 1/15 hoping [2] 36/3 38/15 hospital [5] 26/20 26/21 26/23 27/5 27/12 hour [3] 35/7 35/9 35/12 house [8] 8/22 8/24 11/9	13/14 25/23 29/20 29/21 31/16 how [12] 7/25 14/11 15/17 20/18 28/2 31/3 32/15 34/15 34/17 34/23 35/6 42/15 huh [10] 8/18 13/6 13/9 13/22 14/16 15/2 15/21 34/20 34/22 35/13 Huh-uh [2] 14/16 15/21
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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
) DC CASE NO. C326569
)
BARRY HARRIS,)
)
Defendant.)
_____)

REPORTER'S TRANSCRIPT

OF

PRELIMINARY HEARING

**BEFORE THE HONORABLE MELANIE ANDRESS-TOBIASSON
JUSTICE OF THE PEACE**

TUESDAY, JANUARY 16, 2018

Volume 2

APPEARANCES:

For the State: MICHELLE SUDANO
Deputy District Attorney

For the Defendant: DAMIAN SHEETS
Attorney at Law

Reported by: Donna J. McCord, CCR #337

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1 LAS VEGAS, NEVADA, JANUARY 16, 2018, 1:12 P.M.

2
3 * * * * *

4
5 THE COURT: Barry Harris. All right.
6 This is the time set for the continuation of the
7 preliminary hearing. State, are you ready?

8 MS. SUDANO: Yes.

9 THE COURT: All right. Defense ready?

10 MR. SHEETS: Yes, your Honor.

11 MS. SUDANO: Well, I say that and I need
12 to make sure my detective is still out there.

13 THE COURT: I'm sure he is. I hope he is.

14 MS. SUDANO: Or he's in the restroom.
15 He's not far away.

16 THE COURT: What's his name?

17 MS. SUDANO: Detective Carey.

18 THE COURT: All right. Do I have the
19 transcript?

20 MR. SHEETS: I have an extra copy for your
21 Honor.

22 THE COURT: That would be great. Thank
23 you.

24 If you could raise your right hand
25 the clerk will swear you in.

KEVIN CAREY,

having been first duly sworn, was
examined and testified as follows:

THE CLERK: Please have a seat. State and
spell your first and last name both for the record.

THE WITNESS: Kevin, K-E-V-I-N, last name
is Carey, C-A-R-E-Y.

THE COURT: Thank you.
State.

MS. SUDANO: Thank you.

DIRECT EXAMINATION

BY MS. SUDANO:

Q Sir, how are you employed?

A I'm a detective with the Las Vegas
Metropolitan Police Department.

Q And how long have you been a detective
with Metro?

A Six months now.

Q Were you working as a detective on
August 22nd of 2017?

THE COURT: Can I just interrupt you real
quick?

Mr. Sheets, you said you have a copy

1 of the transcript? May I make a copy of your
2 transcript, please?

3 MR. SHEETS: Yes.

4 THE DEFENDANT: Will you read this, Judge?

5 THE COURT: No.

6 THE DEFENDANT: It's a copy of the
7 questions I want to be asked.

8 THE COURT: Listen, you're not asking
9 questions, okay, your attorney is.

10 THE DEFENDANT: That's my Sixth Amendment.

11 THE COURT: Oh, for the love of God.
12 Don't start, Mr. Harris.

13 THE DEFENDANT: Can I participate? It's
14 my Sixth Amendment.

15 THE COURT: I know all about the Sixth
16 Amendment.

17 THE DEFENDANT: It says right to
18 participate on the defense, right?

19 THE COURT: It doesn't mean you ask
20 questions, okay? All right.

21 THE DEFENDANT: Where does it say that?

22 THE COURT: I'll let you talk to your
23 attorney, okay?

24 (Recess.)

25 THE COURT: All right. State, go ahead.

1 BY MS. SUDANO:

2 Q Sir, I started to ask were you a detective
3 with Metro on August 22nd of 2017?

4 A Yes, I was.

5 Q And how long have you been with Metro?

6 A Twelve years.

7 Q Now, sometime, August 22nd to August 23rd,
8 were you assigned to investigate a domestic
9 disturbance?

10 A Yes, I was.

11 Q Okay. Was it your understanding that that
12 took place at 3850 Mountain Vista?

13 A That sounds correct, yes.

14 Q At apartment 267?

15 A Uh-huh.

16 Q Is that here in Las Vegas, Clark County,
17 Nevada?

18 A It is.

19 Q When you were assigned to that case did
20 you have reason to make contact with an individual
21 named Nicole Dotson?

22 A Yes, I did.

23 Q And were you able to speak with
24 Miss Dotson?

25 A Uh-huh. Yes.

1 Q And did that take place on the 22nd or did
2 it take place on the 23rd; do you recall?

3 A By the time — I spoke with her when I
4 first arrived. I'm not sure what time it was. I'm
5 pretty sure it was the early first hours of the
6 23rd.

7 Q And did you have occasion to speak with
8 her about what had happened?

9 A I did.

10 Q Okay. And did you conduct a formal
11 recorded interview with Miss Harris?

12 A Yes, I did.

13 Q I mean Miss Dotson?

14 A Yes, I did, with Miss Dotson.

15 Q And did she indicate to you that she had
16 been the victim of a domestic violence offense?

17 A Yes.

18 Q Okay. And did she indicate to you who
19 that was involving?

20 A She said it was a Mr. Barry Harris.

21 Q And did you ever have any reason to come
22 into contact with Mr. Harris during your
23 investigation?

24 A I did not.

25 Q So your only interaction was with

1 Miss Dotson?

2 A Correct.

3 Q When you spoke with Miss Dotson did she
4 have any visible injuries?

5 A She did.

6 Q Can you describe those for the Court?

7 A Her left eye was swollen shut and extended
8 a couple inches out from her face. I believe she
9 had a few scratches on the arms, maybe the neck.
10 I'm not positive of those though.

11 Q And during the course of your interview
12 with her did she indicate pain anywhere?

13 A Yes, she said she pretty much hurt all
14 over and when she was asked to demonstrate
15 something —

16 MR. SHEETS: I'm going to object as to
17 hearsay, your Honor.

18 MS. SUDANO: It's all hearsay at this
19 point with prior inconsistent statements at this
20 point.

21 MR. SHEETS: You know, to the best of my
22 recollection she didn't say that she wasn't in pain.
23 I don't think this is an inconsistent statement or
24 anything like that with regards to what she told him
25 at that point.

1 MS. SUDANO: So my response to that would
2 be if she testified that she was in pain at the time
3 then it's not necessarily a prior inconsistent
4 statement; however, there's no prejudice to it
5 because she's already testified to it. I'm just
6 trying to lay some foundation for his interaction
7 with her, her demeanor and her --

8 THE COURT: Well, I think that's where
9 we're going is with the demeanor and the appearance.
10 I mean, we're getting -- I mean, I think there's
11 some additional foundation that can be laid which I
12 will give you an opportunity to do.

13 MS. SUDANO: Thank you.

14 BY MS. SUDANO:

15 Q Now, Detective, when you spoke with Miss
16 Dotson, you indicated that her left eye was swollen
17 shut and she had some other cuts on her body; is
18 that accurate?

19 A Yes.

20 Q What was her demeanor when she spoke with
21 you?

22 A At that point she was crying, she was
23 upset.

24 Q And did that last throughout your
25 interaction with her?

1 A On and off.

2 Q Okay. Now, did you indicate to her or was
3 she aware that the interview with you was going to
4 be recorded?

5 A Yes.

6 Q And did you in fact record that interview
7 with her?

8 A I did.

9 Q Did she indicate to you when she had first
10 gone to the apartment on Mountain Vista on the
11 evening of the 22nd?

12 A If I recall correctly she indicated she, I
13 believe she got off of work at 10:00 o'clock and she
14 says she arrived around 10:45 p.m.

15 Q Did she indicate to you whether there was
16 anybody inside the apartment?

17 A Yes.

18 Q And who did she say was there?

19 A Mr. Harris was there.

20 Q And that was Barry Harris?

21 A Correct.

22 Q Did she indicate to you whether Mr. Harris
23 was living in the apartment at that time?

24 A I asked her in the interview and she
25 indicated no.

1 Q Did she indicate whether or not he had a
2 key to the residence?

3 A Yes, she did and she said he does have a
4 key.

5 Q But she indicated no other possessions, no
6 mail, no clothing, anything like that; is that
7 accurate?

8 A Correct. That's correct.

9 Q Did she indicate to you whether she
10 expected Mr. Harris to be at the apartment when she
11 arrived home?

12 A I asked her that, somewhat of that
13 question, and she said, no, she did not expect him
14 to be there.

15 Q When she arrived and found Mr. Harris
16 there, did she indicate to you what she did at that
17 point?

18 A She engaged him verbally and I believe
19 told him to get out was one of the first things she
20 said she said to him, to Mr. Harris.

21 Q Was it your understanding through her
22 interview that Mr. Harris left at that point?

23 A No.

24 Q Did she indicate to you instead that the
25 argument turned physical?

1 A Yes.

2 Q What did she say about that?

3 A She stated he was lying on the bed in the
4 master bedroom. She sat there. They got into a
5 verbal argument. She asked or told him to leave.
6 He refused. I believe she said, eventually she said
7 I'm going to call the police if you don't leave and
8 that's when she said he got mad enough and began
9 choking and strangling her.

10 Q And when she said that she was being
11 choked and strangled, did you ask her or follow up
12 with her about what she meant by that?

13 A Yes. I asked her -- well, I don't
14 remember the particular question but she stated,
15 yeah, I could not breathe.

16 Q And did she indicate to you whether she
17 was being strangled with one hand or both hands?

18 A She indicated both hands.

19 Q Okay. And at that point she couldn't
20 breathe?

21 A Correct.

22 Q Did she indicate to you where she was when
23 Mr. Harris started to strangle her?

24 A On the bed. Sitting on the bed.

25 Q Did she indicate to you whether she ever

1 left the bed as a result of being strangled?

2 A She stated that everything happened so
3 fast. I believe it was -- she stated the strangling
4 was first, she started to fight back and she states
5 that Mr. Harris then threw her on the bed, began
6 hitting her with fists and both of them ended up on
7 the floor.

8 Q Okay. She indicated she fell to the
9 ground; is that correct?

10 A Yes.

11 Q Okay. Did she indicate to you whether
12 Mr. Harris was saying anything to her during that
13 part of the altercation?

14 A I don't recall.

15 Q Okay. Did she indicate that at some point
16 the argument or the fight moved from the bedroom to
17 another part of the house?

18 A Yes.

19 Q Where did she indicate she went to?

20 A She stated that when Mr. Harris got up off
21 of her she ran into the living room and started
22 screaming help, help, help.

23 Q When she started to scream for help did
24 she indicate to you what Mr. Harris started to do?

25 A She stated then that he came from the

1 master bedroom, produced a handgun and hit her with
2 the handle of the --

3 MR. SHEETS: I'm going to object --

4 THE WITNESS: -- handgun.

5 MR. SHEETS: -- as to foundation for the
6 handgun.

7 THE COURT: Overruled.

8 BY MS. SUDANO:

9 Q I apologize, Detective, so she indicated
10 that Mr. Harris came out into the living room,
11 produced a handgun and began hitting her with the
12 handle of the handgun; is that correct?

13 A On top of the head is what she indicated,
14 yeah.

15 Q Did she indicate to you whether Mr. Harris
16 was making any statements to her at that point?

17 A Yes. I cannot remember verbatim but it
18 was you better be quiet or I'm going to pull the
19 trigger, something of that sort.

20 Q Did he indicate or did she indicate to you
21 that Mr. Harris did anything with the gun other than
22 putting it or hitting her in the head with it?

23 A Yes, she said that he put it in her mouth.

24 Q Did he say anything to her while he had
25 the gun in her mouth?

1 A I believe that's when the statement was
2 made, according to her, that he said something like
3 you better be quiet, shut up, stop screaming or I
4 will pull the trigger.

5 Q Okay. And you indicated you don't recall
6 specifically what that statement was?

7 A I don't.

8 Q Would looking at a copy of that voluntary
9 statement refresh your memory as to that exact
10 statement?

11 A Yes.

12 Q And, Detective, I'm showing you a copy of
13 the voluntary statement from Nicole Dotson from
14 August 23rd. I'm going to direct you to the top of
15 page 4. Let me know if that refreshes your
16 recollection.

17 A Yes. So she stated that, this was a
18 quote, "Bitch, I'll blow your brains out. You make
19 any noise I will fucking kill you."

20 Q And Detective, Miss Dotson indicated that
21 that was what the defendant was saying while he had
22 the gun, or Mr. Harris was saying while he had the
23 gun in her mouth; is that correct?

24 A Yes.

25 Q Okay. Did she indicate at that point that

1 she moved again from the living room to somewhere
2 else in the apartment?

3 A She did. She stated that they both ended
4 up in the guest bathroom.

5 Q Did Miss Dotson indicate to you how it was
6 that she ended up in that guest bathroom?

7 A When asked she said crawled or climbed.
8 He had the gun at my head the whole time, indicating
9 that she was forced at gunpoint into the bathroom.

10 Q Okay. And that was your understanding
11 from your conversation with her as well?

12 A Yes.

13 Q Did you ever ask her during this
14 conversation whether she wanted to leave the
15 apartment or attempted to leave the apartment?

16 A My partner Detective Hambly who was also
17 sitting in on the interview did ask her later on if
18 she tried to escape and she indicated she made it
19 basically as far as the living room.

20 Q Okay. And what happened when she arrived
21 back in that living room?

22 A From the bathroom or from the original --
23 she did not try to escape from the bathroom, no.

24 Q Okay. So the only time she tried to leave
25 was --

1 A I'm sorry, I misunderstood.

2 Q The only time she tried to leave was
3 initially in the living room; is that correct?

4 A Yes.

5 Q Did she indicate whether something stopped
6 her from leaving the apartment?

7 A Yes, she felt threatened.

8 Q Okay.

9 A Again, I cannot remember verbatim but
10 there are statements made on tape. She said that
11 she was threatened to stay in the bathroom,
12 otherwise I will, she states by Mr. Harris.

13 Q Okay. And did she indicate the end of
14 that thought, otherwise I will what?

15 A Kill you.

16 Q And it's your understanding from
17 Miss Dotson that these statements took place in the
18 bathroom; is that correct?

19 A Yes.

20 Q Okay. Did she indicate to you whether
21 anything else happened in the bathroom?

22 A She stated that at some point Mr. Harris
23 left the bathroom, went into the kitchen, grabbed a
24 two liter of some sort of beverage, came back into
25 the bathroom and poured it all over her from the

1 head down calling her names.

2 Q Now, did Miss Dotson indicate whether she
3 was struck with anything other than the handgun?

4 A Fists and feet.

5 Q Did she indicate where she was struck with
6 the fists and the feet?

7 A I believe she stated that she was kicked
8 in the body while she was on the ground, fists to
9 the head is what I believe she indicated.

10 Q And do you know where inside the apartment
11 that part of the altercation took place?

12 A Both in the master bedroom and in the
13 living room.

14 Q Now, you've stated that Miss Harris, or
15 excuse me, Miss Dotson saw Mr. Harris with a
16 handgun; is that correct?

17 A Yes.

18 Q Did she describe that handgun for you at
19 all?

20 A She did.

21 Q How did she describe it?

22 A She described it as a smaller black
23 handgun with a brown bottom.

24 Q Now, in addition to the statements that
25 were made about threatening to kill her if she made

1 any noise, did Miss Dotson indicate to you any
2 additional threats that Mr. Harris made to her?

3 A I believe she said that, she said
4 Mr. Harris said to her if you call the police or I
5 find out you called the police I will come back and
6 kill you. Again, not verbatim.

7 Q Did Miss Dotson indicate to you that the
8 firearm was ever pointed at her at any point?

9 A Other than inside of her mouth, no, not
10 specifically that I recall.

11 Q And are you sure about that, Detective?

12 A No.

13 Q Would looking at the transcript refresh
14 your memory as to that point?

15 A It would.

16 MS. SUDANO: May I approach?

17 THE COURT: Yes.

18 BY MS. SUDANO:

19 Q Detective, I'm showing you the top of page
20 5. Go ahead and read that to yourself.

21 A Okay.

22 Q And did that refresh your recollection as
23 to whether Miss Dotson said the gun was ever pointed
24 at her?

25 A I do. Yes, it did, I'm sorry.

1 Q And specifically what did she tell you
2 about that?

3 A She stated that he kept the gun pointed at
4 me the whole time while he was collecting his
5 belongings to leave.

6 Q And did she indicate to you that he made
7 any additional statements at that point?

8 A Yes.

9 Q And what was that statement?

10 A If you make any noise or try to get out
11 I'm going to kill you.

12 Q Okay. And did she indicate where she was
13 at that point?

14 A That was when she was in the bathroom.

15 Q Okay.

16 A The guest bathroom.

17 Q Did she indicate to you whether Mr. Harris
18 stayed in the apartment or whether he left at some
19 point?

20 A She stated he left.

21 Q And did she describe to you how that
22 happened?

23 A She stated while she was in the bathroom
24 he collected his belongings and exited the door and
25 she heard the deadbolt lock with a key from the

1 outside.

2 Q Did she indicate to you what she did at
3 that point?

4 A She said she waited until she felt it was
5 safe enough.

6 Q And what did she do at that point?

7 A At that point she grabbed her belongings
8 and she exited the apartment.

9 Q Okay. And did she indicate that the
10 police were already there at the time she left the
11 apartment?

12 A Yes, she met a patrolman on the way down
13 the stairs.

14 MS. SUDANO: Court's indulgence.

15 Nothing further, your Honor.

16 THE COURT: All right. Cross.

17

18 **CROSS-EXAMINATION**

19 BY MR. SHEETS:

20 Q Now, Detective, you testified that as of
21 today you've been a detective for about six months?

22 A Correct.

23 Q Were you a police officer before then?

24 A Yes.

25 Q How long have you been a police officer?

1 A A total of 12 years, sir.

2 Q Thank you. Now, when you went out and
3 talked to Miss Dotson, did you have an opportunity
4 to walk in or go through the apartment at all?

5 A I did.

6 Q I'm obviously trying to get a perspective
7 of everything, we're talking about bathrooms, as you
8 walk into the door of the apartment, the main entry
9 door, what do you see?

10 A The main living room area.

11 Q Okay. And the bathroom that's in question
12 would be located where in reference to you looking
13 in the front door?

14 A If you're entering the front door it is to
15 the left.

16 Q So it's on your left. Is it down a
17 hallway, is it connected to the living room?

18 A I guess I'd call it a tiny little hallway.
19 If I may, the layout is going to be, from what I
20 recall, your main living room, master bedroom off to
21 the right, straight ahead would be your
22 kitchenette/dining type area and then the guest
23 bathroom and then the guest bedroom.

24 Q Okay. So the guest bathroom was connected
25 to a second bedroom?

1 A Not connected, it's just a few steps away.

2 Q Okay. So the mini hallway, bathroom,
3 bedroom?

4 A Yes.

5 Q Now, down the mini hallway, was the
6 bathroom at the end of it with the door facing to
7 the living room or was the door facing along the
8 hallway?

9 A It was facing the living room.

10 Q Okay. And so the bedroom down that
11 hallway would be the same thing, is the door facing
12 the living room or the bedroom?

13 A That door would be facing the bathroom,
14 bathroom door.

15 Q Okay. So you have a bedroom and a
16 bathroom door facing each other at the end of this
17 hallway?

18 A Yes.

19 Q Okay. And are the doors -- I guess what
20 I'm asking, if you're looking out the bathroom door
21 or the bedroom door to what you call the guest
22 rooms, do you have a line of sight into the living
23 room?

24 A From the bathroom door, yes.

25 Q Okay. But from the bedroom door no?

1 A No.

2 Q Okay. Thank you. And you have a line of
3 sight into the master bedroom from that bathroom
4 door?

5 A I'm not sure.

6 Q And the kitchenette?

7 A Can you see it from the master? I'm
8 sorry, from the bathroom, probably not.

9 Q Okay. And it was your testimony that she
10 told you he kept the gun pointed at her the whole
11 time while she was walking around?

12 A I believe that is what she said.

13 Q Okay. Now, let me ask you this, Officer.
14 You never asked her if she knew why it was a gun,
15 correct?

16 A Not specifically, no.

17 Q Okay. In fact, you ask her at one point
18 if it looked like a real real gun and you started to
19 ask another part of the question but she interrupted
20 and said she had no idea; is that right?

21 A That's correct.

22 Q And then she stated shortly thereafter
23 she's never really seen a bunch of guns, correct?

24 A Correct.

25 Q All right. So when she says gun, you're

1 unable to say whether she actually knew it was a
2 firearm or whether it could have been a fake one or
3 anything like that, correct?

4 A Correct.

5 Q Okay. Now, you had testified that you had
6 seen some injuries. Did you see any cuts on the top
7 of Miss Dotson's head?

8 A I myself did not, no.

9 Q No bleeding or bruising on the top of her
10 head?

11 A No bleeding. I couldn't tell bruising.

12 Q And again I'm talking about the top of the
13 head, not around the eye obviously, but no large
14 bumps or anything like that?

15 A Not that I felt.

16 Q Okay.

17 A And I did not examine her head in that
18 way.

19 Q Now, when you interviewed her, you did
20 testify earlier that she told you that he did not
21 live there. She actually told you in that same
22 interview that my client did live there
23 periodically; isn't that correct?

24 A I don't know if it was at that particular
25 residence to be clear. She did say that they lived

1 together periodically throughout the six years they
2 had been together.

3 Q Okay. And that was actually in reference
4 when you were talking about the apartment in
5 question; isn't that correct?

6 A No.

7 Q Would it refresh your recollection to look
8 at —

9 A Yes, please.

10 MR. SHEETS: May I? Page 2.

11 THE COURT: Yes.

12 THE WITNESS: Thank you.

13 BY MR. SHEETS:

14 Q Just read through that whole line of
15 questioning.

16 A Sure thing. Up to the pen mark is what
17 you're referring to, right?

18 Q That was my own note. I'm sorry about
19 that.

20 A Oh, okay, that's all right.

21 Q In that line of questioning you were
22 talking about the apartment in question, correct?

23 A In my domestic violence training and
24 experience and interviews, to determine the domestic
25 relationship I always ask dating, children in

1 common, live together.

2 Q Correct.

3 A So I myself didn't specifically refer to
4 that apartment. I didn't indicate whether or not
5 though, whether that's semantics or not.

6 Q And the very next question you refer to as
7 this apartment; is that correct?

8 A I'm sorry, can you point out what you're
9 referring to?

10 MR. SHEETS: May I, your Honor?

11 THE COURT: Yes.

12 THE WITNESS: I apologize.

13 THE COURT: It's okay.

14 THE WITNESS: Yes. Okay.

15 BY MR. SHEETS:

16 Q So she never indicated to you that at the
17 time my client entered the apartment he was not
18 allowed to be there, correct?

19 A No, she never indicated that.

20 Q In fact, she had indicated that he had a
21 key to that apartment; isn't that correct?

22 A That is correct.

23 Q Okay. Now, during that interview did you
24 have an opportunity to discuss with Miss Dotson what
25 the argument was about?

1 A I did.

2 Q And she indicated that he was cheating as
3 usual; is that correct?

4 A Again, not verbatim I don't know, but she
5 did say something to that effect.

6 Q Okay.

7 A Yes.

8 MR. SHEETS: Court's indulgence.

9 BY MR. SHEETS:

10 Q During that interview she also indicated
11 that my client had beat her on the top of the head
12 with what she thought was the gun, correct?

13 A Yes.

14 Q Okay. Did you apply for a search warrant
15 of that apartment or anything belonging to my
16 client?

17 A No.

18 Q Okay. Officer, did you ever find a
19 canister or two liter bottle of lemonade in the
20 apartment?

21 A Yes.

22 Q Okay. And was that empty or full?

23 A It was empty from what I recall.

24 Q Did you find, was there anywhere on the
25 floor or the carpet wet?

1 A I believe in the bathroom, I don't recall
2 whether it was the toilet tank top or somewhere in
3 there there was some sort of puddle of some fluid.

4 Q Did you ask CSI to photograph or document
5 this?

6 A Yes.

7 Q Okay. Thank you. To your knowledge did
8 any of the responding or -- strike that.

9 You weren't the primary officer on
10 the scene, correct?

11 A No, I was not.

12 Q To your knowledge were any of the initial
13 responding officers in possession of a functioning
14 body cam?

15 A I believe so. I can't say a hundred
16 percent.

17 Q And did you have the opportunity to review
18 any of those if they existed?

19 A I did not.

20 Q Okay. Did you find a phone inside the
21 apartment?

22 A No, I didn't.

23 MR. SHEETS: I have no further questions,
24 your Honor.

25 THE COURT: Redirect?

1 MS. SUDANO: Very briefly.

2
3 **REDIRECT EXAMINATION**

4 BY MS. SUDANO:

5 Q So, Detective, you were asked some
6 questions about whether or not Mr. Harris ever lived
7 in that apartment with Miss Dotson. Do you recall
8 those questions?

9 A Yes.

10 Q Okay. And it was your testimony that Miss
11 Dotson indicated they lived together at some point
12 but you're not sure where?

13 A That's correct.

14 Q And she did indicate to you that
15 Mr. Harris was not living in the apartment with her
16 at that point; is that correct?

17 A That's correct.

18 Q Okay. And she didn't expect him to be
19 there?

20 A No, she did not.

21 Q And in fact when she first saw him there
22 the first thing she said to him was get out of my
23 apartment?

24 A That is what she told me.

25 MR. SHEETS: Objection, your Honor, she's

1 leading through this whole line.

2 THE COURT: Sustained.

3 BY MS. SUDANO:

4 Q And did she indicate to you what the first
5 thing that she said to Mr. Harris when she came into
6 the apartment was?

7 A Yes.

8 Q What did she say?

9 A She told him to leave.

10 Q And he refused to leave; is that correct?

11 A That is correct.

12 Q Did she indicate to you whether the first
13 part of the argument or some part of the argument
14 was about trying to get Mr. Harris to leave?

15 A From what I recall she indicated that was
16 the first part of the argument.

17 MS. SUDANO: Nothing further, your Honor.

18 THE COURT: Recross?

19

20 **RECROSS-EXAMINATION**

21 BY MR. SHEETS:

22 Q Officer, she never actually told you that
23 he was not allowed to be present in that apartment,
24 correct?

25 A She didn't say that, correct.

1 Q Okay. And, Officer, I'm sorry, Detective,
2 I'm sorry, I keep saying officer, through your
3 training and experience you're familiar with
4 statutes and crimes that you can potentially charge
5 defendants with; is that right?

6 A Yes.

7 Q To your knowledge through that training
8 and experience, if somebody legally enters the
9 property and then refuses to leave after being told
10 to leave, what would that crime be?

11 MS. SUDANO: I'm going to object, your
12 Honor, that calls for a legal conclusion.

13 THE COURT: Sustained.

14 MR. SHEETS: I have no further questions.

15 THE COURT: All right. Thank you.

16 Any other questions?

17 MS. SUDANO: No.

18 THE COURT: Thank you so much for your
19 testimony and your patience today. I know it was a
20 long day. Just don't discuss your testimony with
21 any other witnesses.

22 THE WITNESS: Understood.

23 THE COURT: Thank you.

24 THE WITNESS: Thank you, your Honor.

25 THE COURT: And he's free to go?

1 MS. SUDANO: He is.

2 Do you have your subpoena?

3 THE COURT: Any other witnesses, State?

4 MS. SUDANO: I don't have any additional
5 witnesses. I did file an amended criminal complaint
6 this morning.

7 THE COURT: I have it. Any amendments to
8 that? Do you want to look over it for a minute?
9 Well, you've got the other prelim too so I guess you
10 may as well look over it before we start that one.

11 MS. SUDANO: The only thing that I would
12 add that I didn't add in here is on Count 2, the
13 first degree kidnapping with use of a deadly weapon,
14 I would move to amend that to first degree
15 kidnapping with use of a deadly weapon resulting in
16 substantial bodily harm. I think that that comports
17 with the victim's testimony. She did indicate that
18 she was still in pain at the time of the preliminary
19 hearing or had been in pain for a number of months
20 due to the clotting issue with her eye.

21 THE COURT: Right. Okay.

22 MS. SUDANO: Other than that I would rest,
23 your Honor.

24 THE COURT: All right. And Mr. Sheets,
25 have you advised your client of his right to

1 testify?

2 MR. SHEETS: If I can have a brief moment?

3 THE COURT: Yes.

4 (At this time, Mr. Sheets consulted
5 with the defendant.)

6 MR. SHEETS: Your Honor, I've advised my
7 client of his right to testify. I've also advised
8 my client of his right not to testify. I advised
9 him that that right is his, his alone, he's the one
10 that makes the choice and I can't make that choice
11 for him. My client is choosing to take my advice
12 today and to remain silent for the purposes of this
13 hearing.

14 THE COURT: Okay. So defense rests?

15 MR. SHEETS: We do, your Honor.

16 THE COURT: All right. And Mr. Harris, I
17 will tell you as well you do have a right to
18 testify. Your decision not to exercise that right
19 is not going to be used against you, okay? Anything
20 you say could be used against you but not testifying
21 will not be used against you.

22 THE DEFENDANT: Right.

23 THE COURT: Do you understand?

24 THE DEFENDANT: Yes, ma'am. Could I --

25 THE COURT: I just want yes or no.

1 THE DEFENDANT: Could I --

2 THE COURT: No. No.

3 THE DEFENDANT: -- get a private
4 investigator, appointed a private investigator?

5 THE COURT: Mr. Sheets.

6 MR. SHEETS: I hate to be kind of the bear
7 on this, it's tough for me to come into a case mid
8 preliminary hearing and I just kind of -- I've got
9 to make the record that I would have asked different
10 follow-up questions of the alleged victim in this
11 case.

12 THE COURT: I understand that as well
13 but --

14 MR. SHEETS: I just put that out there,
15 you know, for what it's worth just because I feel
16 like there's questions --

17 THE COURT: Do you want time to review the
18 transcript along with the detective's testimony
19 before you argue?

20 MR. SHEETS: I'm prepared to argue based
21 on the transcript and the testimony. I've read
22 through them all. Just so the record is clear, I
23 mean, there's different questions I would have
24 asked. If we get to the standpoint of we're going
25 on a trial and they're trying to admit the

1 transcript of her preliminary hearing testimony,
2 obviously I would have asked basically a whole slew
3 of different questions.

4 THE COURT: That's not where we are.

5 MR. SHEETS: No, I know, I'm just putting
6 that in the record, your Honor.

7 THE COURT: All right. Do you rest?

8 MR. SHEETS: Yes, your Honor.

9 THE COURT: All right. State, argument?

10 MS. SUDANO: Your Honor, I'll reserve for
11 rebuttal. The only thing that I should have made
12 sure was in the record before was Miss Craggs had
13 previously marked a copy of a prior judgment of
14 conviction for Mr. Harris, State's Exhibit 1. So as
15 long as that's in the record. Thank you.

16 THE COURT: It's been admitted already.
17 And you reserve for rebuttal?

18 MS. SUDANO: Yes.

19 THE COURT: Argument?

20 MR. SHEETS: Your Honor, I would argue on
21 a couple of points. Obviously the burden here is
22 slight or marginal evidence that a crime has been
23 committed and the defendant committed it. We had
24 not heard either through the officer's testimony or
25 through her, the alleged victim Miss Dotson's

1 testimony, that my client was not allowed to be
2 there. Burglary, obviously the misconception is
3 that you're entering, breaking and entering.
4 Obviously it's with the intent to commit a felony or
5 larceny therein. I don't think there's been any
6 testimony to establish that that was the purpose for
7 his entry into that particular apartment. I don't
8 think that Miss Dotson offers anything to bridge
9 that gap. Miss Dotson said he was lying on the bed
10 and then the argument reconvened from there. That's
11 a combination of both through testimony and
12 according to the officer. So I don't think that
13 there's enough there to bind over on Count 1 unless
14 we're creating inferences that haven't been laid out
15 through the testimony.

16 Again, with regards to Count 2,
17 additionally, your Honor, I would put forth that I
18 don't believe there's enough there. As the
19 complaint reads, the amended complaint reads, it
20 indicates that she was being forced into the
21 bathroom for the purpose of inflicting the
22 substantial bodily harm. And what we heard through
23 the testimony of the alleged victim and the officer,
24 the only thing that went on once they arrived in the
25 bathroom at that point was the pouring of lemonade

1 over the head. Had the complaint been pled
2 differently with regards to the apartment versus the
3 bathroom I think it would be different, but I think
4 on the lines of the complaint itself they're
5 deficient. It indicates that the purpose for
6 forcing her into a bathroom was to inflict
7 substantial bodily harm, bodily harm which the
8 testimony establishes or the testimony infers would
9 have occurred prior to being forced into the
10 bathroom. I think that that's an important
11 distinction because on the letter of the complaint
12 that's how it reads.

13 With regards to the deadly weapon
14 enhancements, your Honor, the reason for the
15 objection as to foundation is the firearm, we didn't
16 clarify why it was believed to be a firearm. We
17 heard her testimony -- well, you heard her testimony
18 at the preliminary hearing which differed from the
19 statement she gave the officer that even when asked
20 by the officer as to whether or not it was a real
21 real gun or what did it look like, she said she had
22 no idea and that she had never really seen a bunch
23 of guns. So even the, quote, unquote, inconsistent
24 statement doesn't necessarily establish that she has
25 knowledge that this is an actual firearm that's

1 being used. So I don't believe that there's been a
2 proper foundation for deadly weapon and I would ask
3 that that be stricken from all of the allegations
4 here.

5 As a result of that same line of
6 thinking, your Honor, I would ask your Honor to
7 dismiss Counts 8 and 9 as they require that
8 possession of the firearm which we've heard no
9 testimony a firearm was recovered either.

10 With regards to the remaining counts,
11 your Honor, I would submit and I think there's been
12 slight or marginal evidence to set it for trial.

13 THE COURT: All right.

14 State.

15 MS. SUDANO: Your Honor, she had the
16 firearm in her mouth, she was struck with the
17 firearm. I think that that's probably enough for
18 slight or marginal evidence for her to indicate that
19 it was a firearm.

20 As far as the intent on the burglary
21 and the kidnapping, I would submit that both of
22 those are jury questions, that they should be left
23 up to the jury to make the determination. Miss
24 Dotson did tell the detective that she didn't expect
25 the defendant to be there, he didn't have any reason

1 to be there, she told him to leave, had no
2 possessions or anything there. So although he had a
3 key he didn't have permission to be there according
4 to her testimony, according to what she told the
5 detective because she told him to leave and was
6 trying to get him to leave for the entire first part
7 of the argument and he refused to do so which is
8 then what starts the rest of it.

9 THE COURT: Right.

10 MS. SUDANO: As far as the kidnapping
11 count, it's pled preventing her from leaving the
12 apartment and/or the bathroom as well as forcing her
13 into the bathroom. I think that there was slight or
14 marginal evidence through her testimony and the
15 statements that she made to the detective to support
16 that count as well.

17 THE COURT: All right. Let's start with
18 Count 1, the burglary while in possession of a
19 firearm. I went back through the transcript at page
20 10 and I remember from when she testified apparently
21 on December 14th, even though you all got the
22 transcript and apparently I didn't because it's not
23 scanned and it's not in the system but I have it
24 now, she indicated that he did not live with her on
25 that day. He did have a key but he didn't live

1 there, and just because you have a key to somebody's
2 house doesn't mean you can go in there at any time
3 and it's not a burglary. So he didn't live there,
4 it doesn't appear that his name was there, that he
5 had lived there.

6 MR. SHEETS: You're saying she said that
7 on page 10, your Honor?

8 THE COURT: Well --

9 MR. SHEETS: That he didn't live with her?
10 I think the question was did she remember telling
11 the officer that and she said, no, she didn't
12 remember telling the officer that.

13 THE COURT: And you know what, you're
14 right when you're reading it but because I was here,
15 the way it was stated, and it's difficult to -- it
16 reads differently, but she indicated he did not live
17 with her. You see what I'm saying? Like the way
18 she answered the question was indicating that he did
19 not live with her. I know how it reads but I know
20 how the testimony came out. Do you see what I'm
21 saying?

22 MR. SHEETS: I wasn't there.

23 THE COURT: I know and that's why I'm
24 explaining it to you. I'm continuing to read the
25 transcript. And, I mean, that's the way you argued

1 it and that's my recollection of it, Miss Sudano,
2 was that was how she answered the question that he
3 did not live there but —

4 MS. SUDANO: I'm making a face because I
5 wasn't there either.

6 THE COURT: Oh, that's right, it was
7 Genevieve.

8 MS. SUDANO: However, that is what the
9 detective stated was that he was told he did not
10 live there.

11 THE COURT: Right. Anyway, I guess that's
12 going to be an issue. But, I mean, at the end of
13 the day it was understanding he did not live there,
14 he did not have permission to be there on that
15 particular day. She came home, she didn't think he
16 was going to be there and guess who was there and
17 guess what happened? So at this point I think at
18 least for purposes of preliminary hearing, it's
19 slight or marginal, the bind-up on Count 1.

20 With regard to first degree
21 kidnapping with use of a deadly weapon resulting in
22 substantial bodily harm, I kind of think that's
23 pretty clear at this point in time. He repeatedly
24 injured her severely. He used a gun that looked
25 like a gun. And, I mean, I don't even have words

1 for whether it was a gun or not because she said it
2 was a gun. I mean, I don't know what else a gun
3 looks like. I mean, some look like a pen. I've
4 seen a knife that looks like a gun. But anyway, I
5 think with regard to that, certainly his intent is a
6 question of fact for the jury. But for purposes of
7 preliminary hearing it certainly meets the slight or
8 marginal test.

9 And with regard to all the other
10 counts that allege a deadly weapon, I don't think we
11 need to address those individually, that it was a
12 gun, he hit her with a gun, put the gun in her
13 mouth, I'm pretty sure she knew it was a gun. You
14 guys didn't really argue much about the other
15 counts.

16 So at this point based on the
17 testimony presented at the preliminary hearing both
18 on December 14th and today and the complaint on
19 file, it appears to me that crimes have been
20 committed, to-wit: Count 1, burglary while in
21 possession of a firearm; Count 2, first degree
22 kidnapping with use of a deadly weapon resulting in
23 substantial bodily harm; Count 3, assault with a
24 deadly weapon; Count 4, battery with use of a deadly
25 weapon constituting domestic violence; Count 5,

1 battery constituting domestic violence
2 strangulation; Count 6, battery resulting in
3 substantial bodily harm constituting domestic
4 violence; Count 7, preventing or dissuading witness
5 or victim from reporting crime or commencing
6 prosecution; Count 8, carrying a concealed firearm
7 or other deadly weapon; Count 9, ownership or
8 possession of firearm by prohibited person, and that
9 the defendant Barry Harris did commit those
10 offenses, I hereby order said defendant be held to
11 answer to said charges in the Eighth Judicial
12 District Court, County of Clark, State of Nevada at
13 the following date and time.

14 THE CLERK: January 18th at 10:00 a.m.

15 THE COURT: Thank you.

16
17 * * * * *

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

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

<p>BY MR. SHEETS: [5] 21/18 26/12 27/14 28/8 31/20 BY MS. SUDANO: [7] 4/13 5/25 9/13 14/7 19/17 30/3 31/2 MR. SHEETS: [25] 3/9 3/19 5/2 8/15 8/20 14/2 14/4 26/9 27/9 28/7 29/22 30/24 32/13 34/1 34/5 34/14 35/5 35/13 35/19 36/4 36/7 36/19 41/5 41/8 41/21 MS. SUDANO: [24] 3/7 3/10 3/13 3/16 4/10 8/17 8/25 9/12 19/15 21/13 29/25 31/16 32/10 32/16 32/25 33/3 33/10 33/21 36/9 36/17 39/14 40/9 42/3 42/7 THE CLERK: [2] 4/3 44/13 THE COURT: [57] THE DEFENDANT: [10] 5/3 5/5 5/9 5/12 5/16 5/20 34/21 34/23 34/25 35/2 THE WITNESS: [7] 4/6 14/3 26/11 27/11 27/13 32/21 32/23</p>	<p>31/22 add [2] 33/12 33/12 addition [1] 18/24 additional [4] 9/11 19/2 20/7 33/4 additionally [1] 37/17 address [1] 43/11 admit [1] 35/25 admitted [1] 36/16 advice [1] 34/11 advised [4] 33/25 34/6 34/7 34/8 after [1] 32/9 again [6] 16/1 17/9 19/6 25/12 28/4 37/16 against [3] 34/19 34/20 34/21 ahead [3] 5/25 19/20 22/21 all [25] 3/5 3/9 3/18 5/15 5/20 5/25 8/13 8/18 17/25 18/19 21/16 22/4 24/25 26/20 32/15 33/24 34/16 35/22 36/7 36/9 39/3 39/13 40/17 40/21 43/9 allegations [1] 39/3 allege [1] 43/10 alleged [3] 35/10 36/25 37/23 allowed [3] 27/18 31/23 37/1 37/23 alone [1] 34/9 along [2] 23/7 35/18 already [3] 9/5 21/10 36/16 also [3] 16/16 28/10 34/7 altercation [2] 13/13 18/11 although [1] 40/2 always [1] 26/25 amend [1] 33/14 amended [2] 33/5 37/19 Amendment [3] 5/10 5/14 5/16 amendments [1] 33/7 and/or [1] 40/12 ADDRESS [1] 1/15 ADDRESS-TOBIASSON [1] 1/15 another [2] 13/17 24/19 answer [1] 44/11 answered [2] 41/18 42/2 any [21] 7/21 8/4 14/16 15/19 19/1 19/1 19/8 20/7 20/10 25/6 29/8 29/12 29/18 32/16 32/21 33/3 33/4 33/7 37/5 39/25 41/2 anybody [1] 10/16 anything [13] 8/24 11/6 13/12 14/21 14/24 17/21 18/3 25/3 25/14 28/15 34/19 37/8 40/2 anyway [2] 42/11 43/4 anywhere [2] 8/12 28/24 apartment [32] 6/14 10/10 10/16 10/23 11/10 16/2 16/15 16/15 17/6 18/10 20/18 21/8 21/11 22/4 22/8 26/4 26/22 27/4 27/7 27/17 27/21 28/15 28/20 29/21 30/7 30/15 30/23 31/6 31/23 37/7 38/2 40/12 apologize [2] 14/9 27/12 apparently [2] 40/20 40/22 appear [1] 41/4 appearance [1] 9/9</p>	<p>APPEARANCES [1] 1/19 appears [1] 43/19 apply [1] 28/14 appointed [1] 35/4 approach [1] 19/16 are [7] 3/7 4/15 17/10 19/11 23/19 36/4 39/22 area [2] 22/10 22/22 argue [4] 35/19 35/20 36/20 43/14 argued [1] 41/25 argument [11] 11/25 12/5 13/16 27/25 31/13 31/13 31/16 36/9 36/19 37/10 40/7 arms [1] 8/9 around [3] 10/14 24/11 25/13 arrived [6] 7/4 10/14 11/11 11/15 16/20 37/24 as [33] 4/3 4/21 8/16 13/1 14/5 15/9 16/11 16/19 16/19 18/22 19/14 19/22 21/20 22/7 27/6 28/2 33/10 34/17 35/12 36/14 36/15 37/18 38/15 38/20 39/5 39/7 39/20 39/20 40/10 40/10 40/12 40/12 40/16 ask [12] 5/19 6/2 12/11 16/13 16/17 24/13 24/17 24/19 26/25 29/4 39/2 39/6 asked [13] 5/7 8/14 10/24 11/12 12/5 12/13 16/7 24/14 30/5 35/9 35/24 36/2 38/19 asking [2] 5/8 23/20 assault [1] 43/23 assigned [2] 6/8 6/19 attempted [1] 16/15 Attest [1] 44/18 attorney [4] 1/21 1/23 5/9 5/23 August [5] 4/22 6/3 6/7 6/7 15/14 August 22nd [3] 4/22 6/3 6/7 August 23rd [2] 6/7 15/14 aware [1] 10/3 away [2] 3/15 23/1</p> <p>B</p> <p>back [5] 13/4 16/21 17/24 19/5 40/19 BARRY [5] 1/9 3/5 7/20 10/20 44/9 based [2] 35/20 43/16 basically [2] 16/19 36/2 bathroom [33] 16/4 16/6 16/9 16/22 16/23 17/11 17/18 17/21 17/23 17/25 20/14 20/16 20/23 22/11 22/23 22/24 23/2 23/6 23/13 23/14 23/16 23/20 23/24 24/3 24/8 29/1 37/21 37/25 38/3 38/6 38/10 40/12 40/13 bathrooms [1] 22/7 battery [3] 43/24 44/1 44/2 be [35] 3/22 5/7 9/2 9/11 10/4 11/10 11/14 14/18 15/3 22/12 22/19 22/21 23/11 23/13 25/25 27/18 30/18 31/23 32/10 34/19 34/20 34/21 35/6 37/1 38/3 38/16</p>
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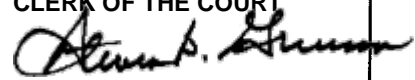
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**DISTRICT COURT
CLARK COUNTY, NEVADA**

THE STATE OF NEVADA,

Plaintiff,

-VS-

BARRY HARRIS,
#1946231

Defendant.

CASE NO: A-17-764110-W

DEPT NO: VIII

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

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

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

FINDINGS OF FACT, CONCLUSIONS OF LAW

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 ex rel. 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.

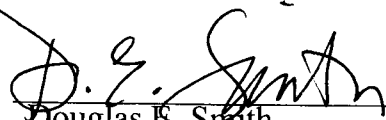
24 The Justice Court did not manifestly abuse its discretion by finding that the
25 State showed good cause through due diligence to procure the named victim in the
26 instant case. The State clearly laid out for the court that the witness was in fact the
27 named victim in the case. Additionally, the 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 **ORDER**

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


10 DATED this 27th day of November, 2017

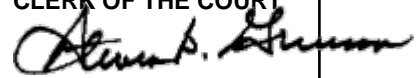
11 
12 Douglas E. Smith
13 DISTRICT COURT JUDGE *JS*

14 **CERTIFICATE OF SERVICE**

15
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@clarkcountynv.gov
23 Scott Ramsey, Scott.ramsey@clarkcountynv.gov

24 
25 Jill Jacoby, Judicial Executive Assistant



PHILIP J. KOHN, PUBLIC DEFENDER
NEVADA BAR NO. 0556
SCOTT A. RAMSEY, DEPUTY PUBLIC DEFENDER
NEVADA BAR NO. 13941
PUBLIC DEFENDERS OFFICE
309 South Third Street, Suite 226
Las Vegas, Nevada 89155
Telephone: (702) 455-4685
Facsimile: (702) 455-5112
Attorneys for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

BARRY HARRIS,)		
)		
Plaintiff,)	CASE NO.	A-17-764110-W
)		
v.)	DEPT. NO.	Department 8
)		
THE STATE OF NEVADA,)		
)	DATE:	
Defendant.)	TIME:	
)		

WRIT OF MANDAMUS/PROHIBITION

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

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

DATED this 3rd day of November, 2017.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

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

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 3rd day of November, 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 Transcript, 2:10-18.
28

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

4 The defense objected and moved to dismiss the case. In support of the Motion to dismiss,
5 defense counsel argued that “[t]he State hasn’t met their due diligence to serve her with a
6 subpoena. There is no personal service.” Transcript, 3:2-6. Defense counsel also argued that
7 Nevada law does not support serving a subpoena via text message, and while there is some
8 language in support of oral promises to appear, the alleged victim specifically told the State she
9 would not appear. Transcript, 3:6-13. Despite failing to submit a written affidavit pursuant to
10 Hill, or being sworn under oath pursuant to Bustos, and over Mr. Harris’s objection, the Court
11 granted the continuance, set an Order to Show Cause hearing for November 2, and reset the
12 preliminary hearing for November 9, 2017. Transcript, 6:2-9. The Court acknowledged that the
13 State’s motion did not comply with Hill nor Bustos, nor did the State’s attempts to serve the
14 alleged victim constitute service as defined by statute.¹ Based on the Court’s denial of Mr.
15 Harris’s Motion to dismiss despite the State’s failure to comply with Nevada Supreme Court
16 precedent, Mr. Harris submits the instant Writ requesting this Court order the Justice Court
17 dismiss the charges against Mr. Harris.

18 LEGAL ARGUMENT

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

20 Pursuant to N.R.S. 33.170, “a writ of mandamus shall issue in all cases where there is not
21 a plain, speedy and adequate remedy in the ordinary course of law.” A writ of mandamus is
22 available to compel the performance of an act which the law requires as a duty resulting from an
23 office, trust or station² or to control an arbitrary or capricious exercise of discretion.³ A

24 ¹ The court stated, “Although I understand it doesn’t technically fit under Hill or Bustos, I’ve always kind of taken
25 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
26 received a subpoena, even if technically it’s not service as defined by the statute, I don’t think that it’s – now,
27 believe me, differing minds differ, but it’s always been my position that if you have those representations a witness
28 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.

² See N.R.S. 34.160

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

1 defendant must raise issues regarding improper Hill or Bustos motions before the new
2 preliminary hearing date. *See Stockton v. Sheriff*, 87 Nev. 94 (1971). This Honorable Court's
3 intervention is necessary because the Justice Court exceeded its jurisdiction and acted arbitrarily
4 and capriciously by granting the State's continuance over defense objection. As the new
5 preliminary hearing is set for November 9, 2017, Mr. Harris respectfully asks this Court to order
6 the Justice Court to dismiss his case as the State failed to show good cause for its continuance.

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

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

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

15 A court must look at the totality of the circumstances when determining if "good cause" exists to
16 grant a continuance. *See Sheriff, Clark County v. Terpstra*, 111 Nev. 860, 863 (1995). Granting
17 a continuance without good cause gives the State leave to "frustrate the judicial system." *See*
18 *Bustos*, 87 Nev. at 624. There is no presumption that good cause exists when requesting a
19 continuance. *Ex Parte Morris*, 78 Nev. 123, 125 (1962). "[O]ur criminal justice system can ill
20 afford to bestow on prosecutors, or on defense counsel, largesse through continuances for which
21 no cause is shown." *See McNair v. Sheriff, Clark County*, 89 Nev. 434, 436-37, 514 P.2d 1175,
22 1176 (1973). No legal principle requires a judge to "grant a continuance on the hope that a
23 recalcitrant witness will later agree to testify." *See McCabe v. State*, 98 Nev. 604, 606-07 (1982);
24 *see also Zessman v. State*, 94 Nev. 28, 31 (1978).

25 ///

26
27 ///

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

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

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

16 Hill, 85 Nev. at 235-36.

17 The Court warned prosecutors that “they must either proceed to a preliminary hearing at the
18 appointed time, or show good cause for a continuance by affidavit.” *See* McNair v. Sheriff, Clark
19 County, 89 Nev. 434, 437, 514 P.2d 1175, 1176 (1973). In Bustos, the Supreme Court held there
20 are circumstances in which there is no time for the State to file a written affidavit, and therefore,
21 would be permitted to make the motion orally while sworn under oath. *See* Bustos, 87 Nev. at
22 623.⁴ The Supreme Court explained there are two exceptions to the Hill rule that the good cause
23 must be established through a written affidavit: 1. defense counsel stipulates to an oral argument
24 or 2. the State was “surprised” by the witness’ nonappearance. Id. In that case, the Court held
25 there was “surprise” as the State had valid subpoena returns and did not know the witness would
26 be absent until the time of the hearing. Id. at 624.

27 Condoning the State’s willful failure to comply with the directives of Hill would
28 effectively make the Supreme Court’s precedent meaningless. *See* Maes v. Sheriff, Clark
County, 86 Nev. 317, 318-19 (1970). “Willful” is not only intentional derelictions but also a

⁴ The State would still be required to outline all of the factors as delineated in Hill. Id.

1 conscious indifference on behalf of the State toward important procedural rules that affect a
2 defendant's rights. *See State v. Austin*, 87 Nev. 81, 82-83 (1971). In cases where the State
3 neither submitted a written affidavit nor provided sworn testimony in support of its motion to
4 continue, the Supreme Court held the appropriate response was to deny the State's motion and
5 dismiss the case against the defendant. *See Clark v. Sheriff, Clark County*, 94 Nev. 364 (1978)
6 (reversing the denial of the defendant's habeas petition for failure to submit an affidavit or be
7 sworn under oath); *see also Reason v. Sheriff, Clark County*, 94 Nev. 300 (1978) (reversing the
8 denial of the defendant's habeas petition based on the State's failure to submit an affidavit or be
9 sworn under oath); *compare with State v. Nelson*, 118 Nev. 399 (2002) (holding there was
10 sufficient evidence based on the prosecutor's sworn testimony that the State was surprised by the
11 witness' nonappearance); *compare with Terpstra*, 111 Nev. at 860 (holding the written affidavit
12 outlining all of the Hill factors supported the trial court's finding of good cause).

13 While the State did identify the named witness, and there is no dispute that said witness
14 would be necessary as she is the named victim, the State failed to meet the other four
15 requirements outlined in Hill. *See* Transcript, 2:10-23. At no point during the State's motion was
16 it indicated the expected testimony of the missing witness. *See* Transcript. At the time of the
17 motion, the State argued it had previously had contact with the missing witness and knew of her
18 current address but had since lost contact. Transcript, 2:10-17. Despite knowing the witness'
19 address, the State never attempted to personally serve the missing witness. *See* Transcript.
20 Additionally, the State never informed defense counsel nor the court of the date in which it last
21 had contact with the missing witness or when the State learned the missing witness would be
22 absent from the preliminary hearing. *See* Transcript. Finally, the State never argued that the
23 motion for a continuance was made in good faith and not for the purpose of delay. *See*
24 Transcript.

25 The State also failed to meet the standard required for "good cause" under Bustos. The
26 State would have needed to show it was "surprised" by the missing witness' nonappearance;
27 however, the State did not and could not argue it was surprised as the missing victim had
28

1 previously informed the State she “refused to promise to appear.” *See* Transcript, 2:16. Unlike
2 Bustos where the prosecutor had valid subpoena returns, the State made no representations
3 indicating it received any confirmation that the missing witness ever received the subpoena sent
4 via the mail. *See generally* Transcript. Most importantly, the Court stated it was not granting the
5 State’s motion under Hill or Bustos. *See* Transcript, 5:4-11 (“it wasn’t technically a Bustos or a
6 Hill ... Although I understand it doesn’t technically fit under Hill or Bustos...”). As the State’s
7 request failed to meet the standards outlined in Hill and Bustos, the State should not have
8 received a continuance and the case against Mr. Harris should have been dismissed.

9 **b. The State’s failure to either submit a written affidavit or give sworn**
10 **testimony prohibits the State from receiving a continuance and requires a**
11 **dismissal of the charges against Mr. Harris.**

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

23 **c. The State did not otherwise demonstrate “good cause” to continue the**
24 **preliminary hearing.**

25 The State did not comply with the requirements of Hill and Bustos, so it must
26 demonstrate good cause through other means for the Court to grant a continuance. “What
27 constitutes ‘good cause’ is not amenable to a bright-line rule. The justice's court must review the

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

1 totality of the circumstances to determine whether ‘good cause’ has been shown.” Terpstra, 111
2 Nev. at 863, 899 P.2d at 550. Under the totality of the circumstances, the State did not
3 demonstrate good cause to continue Mr. Harris’s preliminary hearing.

4 In Ormound v. Sherriff, Clark County the Nevada Supreme Court reversed a district
5 court’s denial of a petition for a writ of habeas corpus based on the improper continuance of a
6 preliminary hearing. 95 Nev. 173, 591 P.2d 258 (1979). In that case, the prosecutor mailed a
7 subpoena to an out-of-state witness, but did not utilize the Uniform Act to Secure the Attendance
8 of Witnesses From Without a State in Criminal Proceeding. Id. The Court found the failure to
9 use the Uniform Act was a willful disregard of procedural rules, and ordered the case to be
10 dismissed. Id.

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

19 In this case, the State had a legal means available to compel the attendance of the witness,
20 and failed to use it. NRS 174.315(2) permits a prosecutor to issue a subpoena to compel the
21 attendance of a witness at a preliminary hearing. NRS 174.345 mandates that “service of a
22 subpoena *must* be made by delivering a copy thereof to the person named” (emphasis added)
23 unless an exception applies. The only exception applicable to the witness in this case is NRS
24 174.315(3), which states that a “witness may accept delivery of a subpoena in lieu of service, by
25 a written or oral promise to appear given by the witness.”

26 In this case, there is no indication that the State even attempted to make personal service
27 upon the witness. *See* Transcript. Furthermore, the witness actually “refused to promise to
28

1 appear.” See Transcript, 2:16-17. As the witness did not accept the mailed subpoena by oral
2 promise to appear, the exception to personal service in NRS 174.315(3) does not apply in this
3 case. The State argued at the date of preliminary hearing that it sent the witness a subpoena via
4 text, but no statute permits service by text message; to the contrary, the statute specifies that
5 personal service is required.

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

18 **d. The State’s conscious indifference to important procedures requires Mr.**
19 **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 State failed to follow the statutory requirements in serving a subpoena, and failed to follow the

27 ⁶ Bustos, 87 Nev. at 623.

28 ⁷ 91 Nev. 802 (1975).

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

6 CONCLUSION

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

16 DATED this 3rd of November, 2017.

17 PHILIP J. KOHN
18 CLARK COUNTY PUBLIC DEFENDER

19 By: /s/ Scott Ramsey
20 SCOTT A. RAMSEY, #13941
21 Deputy Public Defender
22
23
24
25
26
27
28

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that service of the above and foregoing Writ of Mandamus was served via electronic e-filing to the Clark County District Attorney's Office at motions@clarkcountyda.com on this 3rd day of November, 2017.

By: /s/ Egda Ramirez
Employee of the Public Defender's Office

1 TRAN

2
3 IN THE JUSTICE'S COURT OF LAS VEGAS TOWNSHIP
4 COUNTY OF CLARK, STATE OF NEVADA

5 STATE OF NEVADA,
6 Plaintiff,
7 vs.
8 BARRY HARRIS,
9 Defendant.

JC CASE NO. 17-1026X

10
11 REPORTER'S TRANSCRIPT

12 OF

13 PROCEEDINGS

14
15 BEFORE THE HONORABLE MELANIE ANDRESS-TORTASSON
16 JUSTICE OF THE PEACE

17 FRIDAY, NOVEMBER 3, 2017

18
19 APPEARANCES:

20 For the State: GENEVIEVE CRAGGS
21 Deputy District Attorney
22 For the Defendant: KARA SIMMONS
23 Deputy Public Defender

24
25 Reported by: Donna J. McCard, CCR #337

1 LAS VEGAS, NEVADA, NOVEMBER 3, 2017, 8:30 A.M.

2
3 * * * * *

4
5 THE COURT: Barry Harris. I think this is
6 an order to show cause.

MS. SIMMONS: It is, your Honor.

THE COURT: Oh, that's right, we passed it
from yesterday.

MS. CRAGGS: Yes.

THE COURT: Do you have the file?

MS. CRAGGS: I do, your Honor.

THE COURT: Okay.

MS. CRAGGS: We are going to be -- I don't
believe she's here today.

THE COURT: Okay.

MS. CRAGGS: I know that our investigator
called yesterday after court and gave her a new
date. We are requesting a material witness warrant
if I can tell you what our investigator did.

THE COURT: Well, I knew up until
yesterday that they had contacted her, she indicated
she would be there at the prelim, he told her she
didn't have to show up for the order to show cause
hearing. But since then there have been some calls

1 listened to that caused him some concern. He
2 called her back, told her she had to be there
3 yesterday, or at least left her a message, and she
4 of course wasn't here. So I just passed it until
5 today just to see if they were able to contact her
6 in person. I'm sure she's not answering the phone
7 at this point.

MS. CRAGGS: And I think he went -- I
believe he went to the home, I have his report of
investigation, he went back, tried to contact her,
he wasn't able to do so. My conversation with him,
I thought that he had told her that she needed to
show up --

THE COURT: Yes.

MS. CRAGGS: -- today, but initially, or
yesterday initially as well.

THE COURT: Oh, no, well, I don't know.
Maybe there's --

MS. CRAGGS: When I spoke with him this
morning I thought that she had definitely said she
would show up for the preliminary hearing date, but
then I thought he also told her she needed to show
up yesterday as well unless I'm confused. But we
spoke with him earlier so --

THE COURT: Okay. All right. You were

1 privy to that conversation?

THE RECORDS CLERK: Yes.

THE COURT: All right. So at some point
there may have been some miscommunication --

MS. CRAGGS: Yes, I apologize.

THE COURT: -- which is why I didn't grant
the warrant yesterday.

MS. CRAGGS: Yes.

THE COURT: Go ahead.

MS. SIMMONS: So, your Honor, if there are
phone calls that are raising concern then we would
like to have copies of those, also some sort of copy
of the investigation into having this witness be
present because there was no substantial Hill or
Bustos when the continuance --

THE COURT: No, no, no, this is for the
order to show cause.

MS. SIMMONS: No, but, your Honor, the
reason I'm asking for the investigation report is
because when the continuance was granted is because
there was no Hill or Bustos. Because of that I'm
not really sure where or how the communication has
occurred with this witness and she's missing again
today for the second day in a row.

THE COURT: No, that's not -- no, that's

1 not exactly entirely true. The preliminary hearing
2 was continued and we did an order to show cause
3 hearing for yesterday.

4 MS. SIMONS: Yes.

5 THE COURT: He served her with the
6 subpoena for November 9th and she said she would be
7 here on November 9th. My understanding yesterday
8 was that he then told her she didn't have to show up
9 for the order to show cause hearing because he had
10 in person served her with a subpoena and she
11 indicated she would be here for the next prelim.

12 MS. SIMONS: I guess that's my
13 misunderstanding then because yesterday it was
14 unclear whether personal service was made on the
15 victim, the alleged victim.

16 THE COURT: Personal service was made on
17 the victim for November 9th, not for the last
18 prelim, not for the last prelim, for the next prelim
19 which is why he told her she didn't have to come to
20 the order to show cause hearing. But then he
21 listened to phone calls after he served her for the
22 November 9th hearing and was concerned that she was
23 indicating and/or was being told not to come to
24 court and so we wanted her here. She's not here so
25 I am going to grant the State's request for a

1 material witness warrant.

2 MS. CRAGGS: Thank you, your Honor. And I
3 received a report from our investigator this morning
4 detailing what he did. I will make a copy for the
5 Public Defender's office.

6 THE COURT: I think the misunderstanding,
7 and it was the same misunderstanding yesterday, was
8 that when they were talking about him personally
9 serving her they were thinking it was for the last
10 prelim. It's for the next prelim.

11 MS. CRAGGS: Yes, and that's detailed in
12 the report that I got from him this morning. Thank
13 you.

14 THE COURT: The prelim date stands and I'm
15 granting the request for a material witness warrant.

16 * * * * *

17 Attest: Full, true, accurate transcript of
18 proceedings.
19

20 /s/Donna J. McCord

21 ~~DONNA J. MCCORD~~ COR #337
22
23
24
25

TRAN

IN THE JUSTICE'S COURT OF LAS VEGAS TOWNSHIP

COUNTY OF CLARK, STATE OF NEVADA

STATE OF NEVADA,

Plaintiff,

vs.

BARRY HARRIS,

Defendant.

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JC CASE NO. 17F15265X

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.

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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 I'll 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.

15
16 * * * * *

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

19
20 /S/Donna J. McCord
DONNA J. McCORD CCR #337

1 TRAN

2
3 IN THE JUSTICE'S COURT OF LAS VEGAS TOWNSHIP
4 COUNTY OF CLARK, STATE OF NEVADA

5
6 STATE OF NEVADA,
7 Plaintiff,
8 vs.
9 BARRY HARRIS,
10 Defendant.

JC CASE NO. 17F15265X

FILED
2017 DEC -8 AM 10:10
JUSTICE COURT
LAS VEGAS NEVADA
BY DEPUTY

11
12 REPORTER'S TRANSCRIPT

13 OF

14 INITIAL ARRAIGNMENT

15 BEFORE THE HONORABLE MELANIE ANDRESS-TOBIASSON
16 JUSTICE OF THE PEACE

17 THURSDAY, AUGUST 31, 2017

18
19 APPEARANCES:

20 For the State: HAGAR TRIPPIEDI
21 Deputy District Attorney

22 For the Defendant: JACQUELINE CARMAN
23 CARLI KIERNY
24 Deputy Public Defenders

25 Reported by: Donna J. McCard, OCR #337

1 LAS VEGAS, NEVADA, AUGUST 31, 2017, 8:30 A.M.

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3 * * * * *

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5 THE COURT: Barry Harris. Mr. Harris, did
6 you receive a complaint, sir?

7 THE DEFENDANT: Yes, I did, your Honor.

8 THE COURT: Do you understand the charges?

9 THE DEFENDANT: Yes, I do.

10 THE COURT: And is your true name Barry
11 Harris?

12 THE DEFENDANT: Yes, ma'am.

13 THE COURT: Can you afford to hire your
14 own attorney?

15 THE DEFENDANT: Not at this moment.

16 THE COURT: Okay. I'll appoint the Public
17 Defender's office. Do you think — hold on, let me
18 look at this. I was going to ask if it would go to
19 a specialty team.

20 MS. CARMAN: We would ask that bail be
21 set.

22 THE COURT: Here's the thing, I don't
23 think I read this report.

24 MS. CARMAN: Okay.

25 THE COURT: Yeah, I didn't set this bail

1 and it's, I mean, it would be no bail anyway on the
2 first degree kidnapping.

3 But I'm going to bring you back at
4 10:00 o'clock just so I have time to read it and
5 determine a bail amount or hear argument, okay?

6 THE DEFENDANT: Okay. Thank you, your
7 Honor.

8 THE COURT: You're welcome.

9 (Other matters on calendar heard.)

10 THE COURT: On the Barry Harris case do
11 you have any photos in the file?

12 MS. TRIPPIEDI: Is that the one that Lisa
13 was going to come down on?

14 THE COURT: No, the one I was reading for
15 bail.

16 MS. KIERNY: Your Honor, we did receive
17 some photos in discovery but they are —

18 THE COURT: Well, how do they have photos
19 and you don't?

20 MS. TRIPPIEDI: They probably — they also
21 order photos a lot of the times.

22 MS. CARMAN: Not for the initial packet.

23 MS. TRIPPIEDI: We have black and white
24 photos. Yeah, I normally get colored ones when it
25 gets set for prelim but —

1 THE COURT: That's okay. Can I just see
2 them?

3 MS. TRIPPIEDI: Yeah.

4 THE COURT: Here's the situation,
5 Mr. Harris, here's a report — wait, Miss Trippiedi.

6 MS. TRIPPIEDI: Ch.

7 THE COURT: This report from a 2014 case
8 reads very much like this case, same victim,
9 dismissed per statute. Then I've got a report, I
10 believe this is in front of Goodman, battery by a
11 prisoner. I think it's pending in front of Judge
12 Goodman right now. It appears that this might have
13 been as a result of the arrest in our case,
14 17F15265X, where —

15 MS. TRIPPIEDI: Same victim on this one.

16 THE COURT: Yes. Kicked Sergeant Emery in
17 the stomach with both of his feet then spit — see,
18 that's why I couldn't be a police officer. I would
19 take a punch before that. So they have video
20 footage of it. He kicks the officer, spits on the
21 officer. There's another one for you if you want
22 it.

23 And then there's another one here
24 from 2015 I believe, yeah, same victim as in my case
25 or our case or this case, hit her in the head with a

1 bat, had a black semiautomatic handgun, stole her
2 cell phone and wallet, window was broken, bleeding
3 above her left ear, where the money at, bitch,
4 baseball bat and a gun. Whatever happened to this
5 case? Battery with deadly weapon, coercion with
6 force, conspiracy to commit robbery, battery with
7 intent to commit robbery, burglary with a deadly
8 weapon. Do you know whatever happened to that case,
9 Miss Trippiedi?

10 MS. TRIPPIEDI: On that case it looks
11 like --

12 THE COURT: Who are you looking at? Do
13 you got somebody in the courtroom?

14 THE DEFENDANT: I just had my head down
15 because I was going to speak to you.

16 THE COURT: We'll get there.

17 THE DEFENDANT: Sorry.

18 THE COURT: But I'm not schmoozed very
19 easily and I'm not charmed very easily.

20 MS. TRIPPIEDI: On that case it pled down
21 from an attempt murder with use to the battery with
22 deadly weapon with substantial bodily harm.

23 THE COURT: That's not -- no, this is
24 another one. This is from 2015. He has a
25 conviction for battery deadly weapon with

1 substantial from '07. I couldn't get that report
2 out of my system. But he's got another one in 2015,
3 came into the apartment she shares with a girlfriend
4 Monica Hobbs and her friend Shaquilla Walker, Barry
5 came into the apartment uninvited, broke the window
6 with a baseball bat, hit her girlfriend Monica Hobbs
7 in the head with the bat. That's the same victim in
8 this case. Oh, no, that's Nicole Dotson. Oh, who
9 the hell is Monica Hobbs?

10 Don't answer that.

11 I don't know what happened to this
12 case.

13 MS. TRIPPIEDI: The one you gave me the
14 report for?

15 THE COURT: No, I'm still holding this
16 report. I gave you a 2014 case, same victim as in
17 this case where he beat the snot out of her. Then
18 there's another case, battery by a prisoner that's
19 in front of Judge Goodman right now. I got another
20 report in my hand from 2015 where he goes into the
21 apartment of several women and --

22 MS. TRIPPIEDI: So it looks like that
23 case, if that case is 16F01751A --

24 THE COURT: That should be the right case.
25 What's the status of that case?

1 MS. TRIPPIEDI: Was it November 3rd or
2 March 11th?

3 THE COURT: Yep.

4 MS. TRIPPIEDI: Okay. The status,
5 according to scope, if it was just those charges it
6 shows dismissed. I don't know what the --

7 THE COURT: Well, you should tell your
8 boss Steve Wolfson that if he's worried about who's
9 really going to be a danger in our community he
10 might start here instead of on the Q calendar.

11 So Mr. Harris, what is it you would
12 like to say to me?

13 I'm going to give you this other
14 report. I'll give these all to you. You should
15 give them to Lisa.

16 THE DEFENDANT: Nothing, your Honor, at
17 the time.

18 THE COURT: What?

19 THE DEFENDANT: Nothing, your Honor, at
20 the time besides that I have a job, I have a life
21 out there.

22 THE COURT: What do you do for work?

23 THE DEFENDANT: I do construction at
24 Frontier Stone Work. Right now we're remodeling the
25 Monte Carlo.

1 THE COURT: Thank God you're not in my
2 house.

3 THE DEFENDANT: And, you know, I've been
4 through a lot in my life and I'm just here
5 trying to --

6 THE COURT: Don't say anything about the
7 facts of the case but you can talk to me.

8 THE DEFENDANT: I'm just saying that I got
9 a job, I got family out there.

10 THE COURT: Let me tell you something,
11 I'll tell you real quick but, I mean, I've got to
12 just figure out what I'm setting bail at.

13 THE DEFENDANT: Okay.

14 THE COURT: But I see a lot of guys in
15 here and I see a lot of guys that do a lot of bad
16 things, and women, but the majority of my customers
17 are guys and there's different variations on
18 domestic violence. Some of them are absolutely
19 ridiculous and should never have even been charged
20 and some of them we can't find charges serious
21 enough. And, you know, there's a lot of young guys
22 who come in here who never were taught how to deal
23 with a relationship and they lose their stuff and
24 they might do something bad but they're not
25 generally bad people. Then I've got guys who beat

1 up pretty much everybody they ever come in contact
 2 with, they're arrogant, they're narcissistic, they
 3 think that, you know — well, quite frankly they act
 4 like pimps and thugs and they treat women like
 5 garbage and they say stuff to them like all the
 6 things that I'm reading in the reports, on every
 7 single one of these reports; oh, you didn't learn
 8 the last time, bitch, while punching her in the
 9 head, that's a different kind of guy. That's the
 10 kind of guy that's just mean. That's not someone
 11 who never learned how to control his emotions and
 12 flips out and hits somebody and actually feels bad
 13 about it the next day, that's a guy, like the way I
 14 look at it, just does it because they're mean, does
 15 it for sport, does it because they like the way it
 16 feels to hurt somebody or beat them down. And when
 17 it happens over and over and over and over again,
 18 those are the — you know, and that's what I'm
 19 seeing here.

20 THE DEFENDANT: Well, your Honor, I seen
 21 due process, equal rights and opportunity as anybody
 22 that been charged or convicted of any of them.

23 THE COURT: Yeah, I know, I know, it's
 24 amazing, isn't it? It's amazing, isn't it?

25 THE DEFENDANT: I'm just saying I got the

1 right and the opportunity —

2 THE COURT: Yeah, you do have the right
 3 and the opportunity to fight these charges and all
 4 the other ones, but here's the thing, there's a
 5 reason you haven't been convicted — you actually
 6 have been convicted in the past.

7 THE DEFENDANT: I have. I have.

8 THE COURT: In 2007 —

9 THE DEFENDANT: I have.

10 THE COURT: — you were convicted of
 11 battery with deadly weapon with substantial bodily
 12 harm, I couldn't get those reports, you guys might
 13 have them in your office, but interestingly enough
 14 sounds just like these cases and it started as a
 15 attempt murder.

16 MS. TRIPPIEDI: Attempt murder, yes.

17 THE COURT: So, you know —

18 MS. TRIPPIEDI: Your Honor, can I be heard
 19 before you make a final decision on bail?

20 THE COURT: Yes.

21 MS. TRIPPIEDI: We're going to ask for
 22 half a million dollars bail. Back in 2007 when he
 23 was convicted of that very, very serious charge
 24 involving a deadly weapon also that was pled down —

25 THE COURT: I guarantee you if I — hold

1 on. I guarantee if I can get those reports they're
 2 going to sound just like this report.

3 MS. TRIPPIEDI: Yeah, I wouldn't be
 4 surprised. I wouldn't be shocked if it involved a
 5 gun as well. And not only does he have that case
 6 but then again in 2015 he again uses the black
 7 handgun, aims it, doesn't fire it but makes threats.
 8 He's also hitting the girlfriend, a different
 9 victim, in the head with a bat. This is a violent,
 10 very violent individual.

11 THE COURT: Oh, no, he wants to hit me
 12 about now. I know exactly what he wants.

13 MS. TRIPPIEDI: He was convicted and
 14 having a serious conviction continues to go out and
 15 use deadly weapons on women. The other report that
 16 you provided us also involved a gun.

17 THE COURT: Oh, they all did, every one of
 18 them, guns, baseball bats.

19 MS. TRIPPIEDI: And this one is the most
 20 appalling because he actually puts the gun in her
 21 mouth.

22 THE COURT: In her mouth allegedly.

23 MS. TRIPPIEDI: Puts the gun in her mouth.
 24 He tells her he's going to blow her brains out. He
 25 makes —

1 THE COURT: Oh, I read the report.

2 MS. TRIPPIEDI: — threats that he's going
 3 to kill her. Your Honor, I think \$500,000 is —

4 THE COURT: I actually think — he picked
 5 up this charge on August 22nd of 2017 while he was
 6 pending other charges. He had other charges pending
 7 while this case — I think. Maybe not. Maybe not.
 8 17F15787X, I think that's the one that arises out of
 9 the same incident here.

10 MS. TRIPPIEDI: Your Honor, the bottom
 11 line is this person is a danger.

12 THE COURT: Well, I was going to do no
 13 bail because I thought he had a pending case.

14 Counsel.

15 MS. KIERNY: Well, your Honor, obviously
 16 this does raise a lot of concerns and we understand
 17 that the State does have concerns, but the fact is
 18 the two cases that have also been mentioned today in
 19 2014 and 2015 were dismissed so it seems a little
 20 bit unfair that those would be held against him
 21 today. I understand that there are concerns
 22 concerning the allegations in this case; however, he
 23 is an indigent defendant, he's been accused of
 24 something but not yet convicted of something and he
 25 is not going to be able to afford half a million

1 dollars to be able to get out of prison or out of
2 jail and go back to work. He's been working at
3 Frontier Stone Construction Company for four years
4 full time. They're able to hold a spot open for him
5 now while he's waiting but we ask for a more
6 reasonable bail.

7 THE COURT: Well, here's the thing, in
8 2014 the report reads almost exactly like this
9 report, same victim, and I can guess that the reason
10 it got dismissed is because she refused to show up
11 for court. 2016, similar type charges, and my guess
12 is it got dismissed for the same exact reasons.
13 That's why I said if Mr. Wolfson is so concerned
14 about the cases they should be focusing on, perhaps
15 these are the ones they should be focusing on
16 because in this case he says — hold on, I'm going
17 to find it. Let's just start with I'm not going
18 nowhere, bitch, starts strangling her, punches her
19 multiple times in the head according to her
20 statement then removes a gun from his pants pocket,
21 puts it in her mouth, tells her he's going to blow
22 her brains out if she continues to make noise,
23 starts punching her again. Her eye is completely
24 swollen shut in those photographs, I mean like
25 completely swollen to the point where it's closed

1 up, she can't open it, he drags her into the
2 bathroom where he holds her and continues punching
3 her, kicking her and then pours a bottle of juice
4 all over her while calling her names saying he hates
5 her and if she calls the police he will come back
6 and kill her. He then took his belongings and left
7 her there on the bathroom floor. Then when the
8 police officers are able to make contact with him he
9 kicks the one officer in the stomach, spits on the
10 other officer.

11 So how many counts do we have? One,
12 two, three, four, five, six. It's going to be a
13 hundred thousand dollars per count for a total of
14 \$600,000 and we'll set a preliminary hearing in 15
15 days, September 14th at 10:00. You know what, we
16 might want to do the 15th, Friday.

17 MS. TRIPPIEDI: Friday?

18 THE COURT: Do we already have one on that
19 Friday the 15th?

20 THE CLERK: No.

21 THE COURT: I'll set it September 15th at
22 11:00 o'clock and expect that she's going to be
23 uncooperative. So you might want to have an
24 investigator on it today. All right. So it's
25 \$600,000 total bail and we'll see you on the 15th at

1 11:00. All right. Thank you.

2 MS. KIERNY: Thank you, your Honor.

3
4 * * * * *

5 Attest: Full, true, accurate transcript of
6 proceedings.

7 /s/Donna J. McCord

8 DONNA J. MCCORD - CR #337
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Location : District Court Criminal Images Help

CASE No. C-17-326569-1

Case Type:	Felony/Gross Misdemeanor
Date Filed:	09/19/2017
Location:	Department 32
Cross-Reference Case Number:	C326569
Defendant's Scope ID #:	1946231
ITAG Booking Number:	1700172078
ITAG Case ID:	1911556
Lower Court Case # Root:	17F15265
Lower Court Case Number:	17F15265X
Metro Event Number:	1708224075
Supreme Court No.:	76774
	80578

RELATED CASE INFORMATION

A-20-813935-W (Writ Related Case)

PARTY INFORMATION

Lead Attorneys
Damian R. Sheets
Court Appointed
702-988-2600(W)

Steven B Wolfson
702-671-2700(W)

CHARGE INFORMATION

Statute COMPETENCY	Level Other	Date 09/19/2017
205.060.4	Felony	08/22/2017
200.310.1	Felony	08/22/2017
200.471.2b	Felony	08/22/2017
200.481.2e	Felony	08/22/2017
200.485.2	Felony	08/22/2017
200.481	Felony	08/22/2017
199.305	Felony	08/22/2017
202.350.1d1	Felony	08/22/2017
202.360.1	Felony	08/22/2017

EVENTS & ORDERS OF THE COURT

01/18/2018	Plea (Judicial Officer: Johnson, Eric) 1. BURGLARY WHILE IN POSSESSION OF A FIREARM Not Guilty 2. FIRST DEGREE KIDNAPPING RESULTING IN SUBSTANTIAL BODILY HARM Not Guilty 3. ASSAULT Not Guilty 4. BATTERY CONSTITUTING DOMESTIC VIOLENCE Not Guilty 5. BATTERY CONSTITUTING DOMESTIC VIOLENCE - STRANGULATION Not Guilty 6. BATTERY RESULTING IN SUBSTANTIAL BODILY HARM CONSTITUTING DOMESTIC VIOLENCE
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Not Guilty
7. PREVENTING OR DISSUADING WITNESS OR VICTIM FROM REPORTING CRIME OR COMMENCING PROSECUTION
Not Guilty
8. CARRYING CONCEALED FIREARM OR OTHER DEADLY WEAPON
Not Guilty

04/09/2018 **Disposition** (Judicial Officer: Johnson, Eric)
9. OWNERSHIP OR POSSESSION OF FIREARM BY PROHIBITED PERSON
Amended Information Filed/Charges Not Addressed

04/18/2018 **Disposition** (Judicial Officer: Johnson, Eric)
1. BURGLARY WHILE IN POSSESSION OF A FIREARM
Not Guilty
5. BATTERY CONSTITUTING DOMESTIC VIOLENCE - STRANGULATION
Not Guilty
7. PREVENTING OR DISSUADING WITNESS OR VICTIM FROM REPORTING CRIME OR COMMENCING PROSECUTION
Not Guilty

04/18/2018 **Disposition** (Judicial Officer: Johnson, Eric)
8. CARRYING CONCEALED FIREARM OR OTHER DEADLY WEAPON
Not Guilty

08/14/2018 **Disposition** (Judicial Officer: Johnson, Eric)
2. FIRST DEGREE KIDNAPPING RESULTING IN SUBSTANTIAL BODILY HARM
Guilty
3. ASSAULT
Guilty
4. BATTERY CONSTITUTING DOMESTIC VIOLENCE
Guilty
6. BATTERY RESULTING IN SUBSTANTIAL BODILY HARM CONSTITUTING DOMESTIC VIOLENCE
Guilty

08/14/2018 **Sentence** (Judicial Officer: Johnson, Eric)
2. FIRST DEGREE KIDNAPPING RESULTING IN SUBSTANTIAL BODILY HARM
Sentenced to Nevada Dept. of Corrections
Term: Life with the possibility of parole after:15 Years

08/14/2018 **Sentence** (Judicial Officer: Johnson, Eric)
3. ASSAULT
Sentenced to CCDC
Term: 6 Months
Concurrent: Charge 2

08/14/2018 **Sentence** (Judicial Officer: Johnson, Eric)
4. BATTERY CONSTITUTING DOMESTIC VIOLENCE
Sentenced to CCDC
Term: 6 Months
Concurrent: Charge 3

08/14/2018 **Sentence** (Judicial Officer: Johnson, Eric)
6. BATTERY RESULTING IN SUBSTANTIAL BODILY HARM CONSTITUTING DOMESTIC VIOLENCE
Sentenced to Nevada Dept. of Corrections
Term: Minimum:24 Months, Maximum:60 Months
Concurrent: Charge 2
Credit for Time Served: 351 Days
Fee Totals:
Administrative
Assessment Fee \$25 \$25.00
AA Fee - Battery \$35.00
Domestic Violence \$35
Genetic Marker \$3.00
Analysis AA Fee \$3
Fee Totals \$ \$63.00
\$150 DNA Fee Waived as previously imposed.

OTHER EVENTS AND HEARINGS

09/19/2017 **Commitment and Order** Doc ID# 3
[3]

10/06/2017 **Further Proceedings: Competency** (9:00 AM) (Judicial Officer Togliatti, Jennifer)
Parties Present
Minutes
Result: Found Competent

10/17/2017 **Order** Doc ID# 4
[4] Order of Competency

10/18/2017 **Criminal Order to Statistically Close Case** Doc ID# 5
[5] Criminal Order to Statistically Close Case

01/16/2018 **Criminal Bindover Packet Justice Court** Doc ID# 6
[6]

01/16/2018 **Criminal Bindover - Confidential** Doc ID# 7
[7]

01/17/2018 **Information** Doc ID# 8
[8] Information

01/17/2018 **Notice of Witnesses and/or Expert Witnesses** Doc ID# 9

Appellant's Appendix #000437

01/18/2018 [\[9\] State's Notice Of Expert Witnesses](#)
Initial Arraignment (10:00 AM) (Judicial Officer De La Garza, Melisa)
[Parties Present](#)
[Minutes](#)
 Result: Plea Entered

01/21/2018 [Reporters Transcript](#) **Doc ID# 10**
[\[10\] Reporter's Transcript of Preliminary Hearing 12/14/2017- Volume 1](#)

01/21/2018 [Reporters Transcript](#) **Doc ID# 11**
[\[11\] Reporter's Transcript of Preliminary Hearing 1/16/2018- Volume 2](#)

02/13/2018 [Order](#) **Doc ID# 12**
[\[12\] Order Releasing Medical Records](#)

02/13/2018 [Order](#) **Doc ID# 13**
[\[13\] Order Releasing Medical Records](#)

02/13/2018 [Ex Parte Motion](#) **Doc ID# 14**
[\[14\] Ex Parte Motion For Release Of Medical Records](#)

02/13/2018 [Ex Parte Motion](#) **Doc ID# 15**
[\[15\] Ex Parte Motion For Release Of Medical Records](#)

02/27/2018 [Calendar Call](#) (8:30 AM) (Judicial Officer Johnson, Eric)
[Parties Present](#)
[Minutes](#)
 Result: Matter Heard

03/08/2018 [Notice of Witnesses and/or Expert Witnesses](#) **Doc ID# 16**
[\[16\] State's Notice of Witnesses](#)

03/16/2018 [Overflow](#) (9:00 AM) (Judicial Officer Villani, Michael)
 Overflow (20) G. Craggs / D. Sheets - D. Lippmann / 7-9 Witnesses / 5 days
[Parties Present](#)
[Minutes](#)
 Result: Referred

03/19/2018 **CANCELED Jury Trial** (9:00 AM) (Judicial Officer Johnson, Eric)
 Vacated

03/27/2018 [Status Check](#) (8:30 AM) (Judicial Officer Johnson, Eric)
 STATUS CHECK: RESETTING OF TRIAL
[Parties Present](#)
[Minutes](#)
 Result: Trial Date Set

04/02/2018 [Notice of Witnesses and/or Expert Witnesses](#) **Doc ID# 17**
[\[17\] State's Supplemental Notice of Witnesses](#)

04/03/2018 [Calendar Call](#) (8:30 AM) (Judicial Officer Johnson, Eric)
[Parties Present](#)
[Minutes](#)
 Result: Matter Heard

04/04/2018 [Notice of Witnesses and/or Expert Witnesses](#) **Doc ID# 18**
[\[18\] State's Second Supplemental Notice of Witnesses](#)

04/06/2018 **CANCELED Overflow** (9:00 AM) (Judicial Officer Miley, Stefany)
 Vacated
 Overflow (20) M. Sudano / D. Sheets / 4-5 Days / 7-9 Witnesses

04/09/2018 **CANCELED Jury Trial** (9:00 AM) (Judicial Officer Johnson, Eric)
 Vacated

04/09/2018 [Jury Trial](#) (9:00 AM) (Judicial Officer Johnson, Eric)
04/09/2018, 04/10/2018, 04/11/2018, 04/12/2018, 04/16/2018
[Parties Present](#)
[Minutes](#)
 04/09/2018 Reset by Court to 04/09/2018

04/09/2018 Result: Trial Continues
[Amended Information](#) **Doc ID# 19**
[\[19\]](#)

04/09/2018 [Jury List](#) **Doc ID# 20**
[\[20\]](#)

04/16/2018 [Verdict](#) **Doc ID# 21**
[\[21\]](#)

04/16/2018 [Instructions to the Jury](#) **Doc ID# 22**
[\[22\]](#)

04/16/2018 [Amended Jury List](#) **Doc ID# 23**
[\[23\]](#)

05/17/2018 [PSI](#) **Doc ID# 24**
[\[24\]](#)

05/17/2018 [PSI - Victim Impact Statements](#) **Doc ID# 25**
[\[25\]](#)

06/07/2018 [Sentencing](#) (9:00 AM) (Judicial Officer Johnson, Eric)
[Parties Present](#)
[Minutes](#)
 Result: Matter Continued

07/24/2018 [Sentencing](#) (8:30 AM) (Judicial Officer Johnson, Eric)
[Parties Present](#)
[Minutes](#)

	Result: Matter Continued	
08/14/2018	Sentencing (8:30 AM) (Judicial Officer Johnson, Eric)	
	Parties Present	
	Minutes	
	Result: Defendant Sentenced	
08/16/2018	Judgment of Conviction Doc ID# 26	
	[26] JUDGMENT OF CONVICTION (JURY TRIAL)	
08/21/2018	Notice of Appeal (Criminal) Doc ID# 27	
	[27] Notice of Appeal	
08/22/2018	Case Appeal Statement Doc ID# 28	
	[28] Case Appeal Statement	
08/23/2018	Criminal Order to Statistically Close Case Doc ID# 29	
	[29] Criminal Order to Statistically Close Case	
09/13/2018	Motion Doc ID# 30	
	[30] Motion of Ineffective Assistance of Counsel	
09/27/2018	Status Check (9:00 AM) (Judicial Officer Johnson, Eric)	
	Status Check: Supreme Court Order of Limited Remand for Designation of Counsel	
	Parties Present	
	Minutes	
	Result: Matter Heard	
10/29/2018	Application to Proceed in Forma Pauperis Doc ID# 31	
	[31] Application to Proceed in Forma Pauperis	
11/16/2018	Motion for Production of Transcript Doc ID# 32	
	[32] Request for Transcripts of Proceedings	
11/21/2018	Recorders Transcript of Hearing Doc ID# 33	
	[33] Recorders Transcript of Hearing Re: Initial Arraignment	
11/26/2018	Order to Proceed In Forma Pauperis Doc ID# 34	
	[34]	
12/17/2018	Recorders Transcript of Hearing Doc ID# 35	
	[35] Calendar Call, February 27, 2018	
12/17/2018	Recorders Transcript of Hearing Doc ID# 36	
	[36] Status Check: Resetting of Trial, March 27, 2018	
12/17/2018	Recorders Transcript of Hearing Doc ID# 37	
	[37] Calendar Call, April 3, 2018	
12/17/2018	Recorders Transcript of Hearing Doc ID# 38	
	[38] Sentencing, June 7, 2018	
12/17/2018	Recorders Transcript of Hearing Doc ID# 39	
	[39] Sentencing, July 24, 2018	
12/17/2018	Recorders Transcript of Hearing Doc ID# 40	
	[40] Sentencing, August 14, 2018	
03/04/2019	Transcript of Proceedings Doc ID# 41	
	[41] Jury Trial - Day 1, April 9, 2018	
03/04/2019	Transcript of Proceedings Doc ID# 42	
	[42] Jury Trial - Day 2, April 10, 2018	
03/04/2019	Transcript of Proceedings Doc ID# 43	
	[43] Jury Trial - Day 3, April 11, 2018	
03/04/2019	Transcript of Proceedings Doc ID# 44	
	[44] Jury Trial - Day 4, April 12, 2018	
03/04/2019	Transcript of Proceedings Doc ID# 45	
	[45] Jury Trial - Day 5, April 16, 2018	
01/16/2020	NV Supreme Court Clerks Certificate/Judgment - Affirmed Doc ID# 46	
	[46] Nevada Supreme Court Clerk's Certificate/Remittitur Judgment - Affirmed	
02/07/2020	Notice of Appeal (Criminal) Doc ID# 47	
	[47] Notice of Appeal	
02/10/2020	Case Appeal Statement Doc ID# 48	
	[48] Case Appeal Statement	
04/01/2020	NV Supreme Court Clerks Certificate/Judgment - Dismissed Doc ID# 49	
	[49] Nevada Supreme Court Clerk's Certificate/Remittitur Judgment - Dismissed	
06/03/2020	Memorandum Doc ID# 50	
	[50] Memorandum to the Court	
01/04/2021	Case Reassigned to Department 32	
	Judicial Reassignment to Judge Christy Craig	
12/14/2021	Request Doc ID# 51	
	[51] Request for Rough Draft Transcripts	

FINANCIAL INFORMATION

	Defendant Harris, Barry	
	Total Financial Assessment	63.00
	Total Payments and Credits	0.00
	Balance Due as of 04/17/2022	63.00
11/15/2018	Transaction Assessment	63.00