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DATED this: 4/13/2022.

/s/ Dustin R. Marcello
Dustin R. Marcello, Esq.
Nevada Bar No.: 10134

TABLE OF CONTENTS

JURISDICTIONAL STATEMENT	iv
ISSUES PRESENTED FOR REVIEW	1
STATEMENT OF THE CASE	1
STATEMENT OF THE FACTS	2
Prologue	2
Justice Court Proceedings.....	2
District Court Proceedings.....	6
Direct Appeal.....	7
Pro Per Post-Conviction Petition	7
Evidentiary Hearing	8
Order Denying Petition	10
SUMMARY OF THE ARGUMENT	10
ARGUMENT	11
HARRIS WAS DENIED DUE PROCESS WHEN THE EVIDENTIARY HEARING ON HIS POST CONVICTION WRIT OF HABEAS CORPUS WAS PRESENTED WITHOUT HARRIS BEING PRESENT OR BEING ABLE TO TESTIFY.....	11
HARRIS WAS DENIED THE AUTONOMY TO MAKE FUNDAMENTAL CHOICES ABOUT HIS OWN DEFENSE AND THEREFORE WAS DENIED EFFECTIVE REPRESENTATION OF APPELLATE COUNSEL	14
Governing Law for Ineffective Claims	14
Ineffective Assistance of Appellate Counsel	15
TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PURSUE A WRIT OF MANDAMUS IN THE NEVADA SUPREME COURT REGARDING THE VIOLATION OF HARRIS' CONSTITUTIONAL RIGHTS IN JUSTICE COURT	18
Governing Law	18
CUMULATIVE ERRORS OF TRIAL AND APPELLATE COUNSEL RENDERED TRIAL AND APPELLATE COUNSEL INEFFECTIVE..	26

1	Trial Counsel Ineffective for Failing to Present Evidence	26
2	Trial Counsel Ineffective for Failing to Present Body Cam Evidence	26
3	CONCLUSION.....	29
4	CERTIFICATE OF COMPLIANCE	30
5	CERTIFICATE OF SERVICE	32

TABLE OF AUTHORITIES

CASES

8	<i>Brown v. State</i> , 877 P.2d 1071 (Nev. 1994)	31
9	<i>Bustos v. Sherriff</i> , 87 Nev. 622 (Nev. 1971).....	9, 22
10	<i>Clark v. Sheriff, Clark County</i> , 94 Nev. 364 (1978).....	24, 26
11	<i>Faretta v. California</i> , 422 U.S. 806, 834, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975)	
12	20
13	<i>Gallego v. State</i> , 117 Nev. 348, 367, 23 P.3d 227, 240 (2001).....	16
14	<i>Gonzalez v. United States</i> , 553 U.S. 242, 249, 128 S. Ct. 1765, 170 L. Ed. 2d 616	
15	(2008)	20
16	<i>Hernandez v. United States</i> , 202 F.3d 486 (2 nd Cir. 2000).....	21
17	<i>Hill v. Sherriff of Clark County</i> , 85 Nev. 234 (Nev. 1969)	9, 23
18	<i>Jones v. Barnes</i> , 463 U.S. 745, 751, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983) ..	20
19	<i>Kentucky v. Stincer</i> , 482 U.S. 730, 745, 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987)	
20	16
21	<i>Kirksey v. State</i> , 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).....	19
22	<i>Maes v. Sheriff, Clark County</i> , 86 Nev. 317, 318-19 (1970).....	24, 30
23	<i>McCoy v. Louisiana</i> , 138 S. Ct. at 1500, 1511 (2018)	20
24	<i>McNair v. Sheriff, Clark County</i> , 89 Nev. 434, 437, 514 P.2d 1175, 1176 (1973).....	23
25	<i>Nunnery v. State</i> , 127 Nev. 749, 263 P.3d 235 (2011)	16
26	<i>Ormound v. Sherriff</i> , 95 Nev. 173, 591 P.2d 258 (1979).	27
27	<i>Reeves v. State</i> , 113 Nev. 959, 960, 944 P.2d 795, 796 (1997).....	19
28	<i>Riley v. State</i> , 110 Nev. 638, 646, 878 P.2d 272, 277-78 (1995)	19
	<i>Salas v. State</i> , 91 Nev. at 802 (Nev. 2012).	29
	<i>Snyder v. Massachusetts</i> , 291 U.S. 97, 105-06, 54 S. Ct. 330, 78 L. Ed. 674	
	(1934)	16, 17
	<i>State of Nevada v. Terpstra</i> , 111 Nev. at 863, 899 P.2d at 550-551	27
	<i>State v. Austin</i> , 87 Nev. 81, 82-83 (1971).....	24
	<i>State v. Love</i> , 109 Nev. 1136 (Nev. 1993).....	32

1	<i>State v. Nelson</i> , 118 Nev. 399 (2002)	24
2	<i>Strickland v. Washington</i> , 466 U.S. 668, 687-88 (1984).....	19
3	<i>Warner v. State</i> , 102 Nev. 635 (Nev. 1986)	31

STAUTES

4	NRS 174.315(2)	28
5	NRS 174.315(3)	28
6	NRS 174.345	28

JURISDICTIONAL ROUTING STATEMENT

A. Statute which grants jurisdiction to review the judgment:

NRS 34.575.

**B. Original Criminal Case No: C-17-326569-1
Direct Appeal Case Number in Nevada Supreme Court: 76774**

**C. Judgment of Conviction filed August 16, 2018;
Direct Appeal Notice of Appeal filed: August 21, 2018;
Remittitur from direct appeal filed January 13, 2020;
Petition for Post-Conviction Writ filed on April 21, 2020.**

D. This appeal is from a denial of a post-conviction writ of habeas corpus:

**Hearing held August 26, 2021
Order filed: September 30, 2021
Notice of appeal filed September 14, 2021**

D. Pursuant to NRAP 17, is this matter presumptively assigned to the Court of Appeals?

This matter is presumptively assigned to the Supreme Court pursuant to NRAP 17(b)(1)(A) and (3)

WAS HARRIS DENIED HIS RIGHT TO BE PRESENT AT A CRITICAL STAGE OF THE PROCEEDING WHEN HIS COUNSEL WAIVED HIS RIGHT TO BE PRESENT AT THE EVIDENTIARY HEARING

**WAS APPELLATE COUNSEL INEFFECTIVE FOR FAILING TO
RAISE THE ISSUES OF ERROR RELATED TO THE JUSTICE
COURT PROCEEDINGS CONTRARY TO THE DIRECTION OF
HARRIS, OR OTHERWISE INEFFECTIVE FOR FAILING TO
RAISE OTHER LEGAL ISSUES ON DIRECT APPEAL**

STATEMENT OF THE CASE

///

STATEMENT OF THE FACTS

Prologue

Harris was not present at the evidentiary hearing on his Writ of Habeas Corpus and was unable to provide testimony that would have been direct conflict with the testimony given by his trial and appellate Counsel. Harris would have testified that his trial counsel and appellate counsel were ineffective. Specifically, Harris would have testified to meritorious legal issues not raised at the trial court level and on appeal; and, that there were several cumulative errors that led trial and appellate counsel to ineffective.

Due to these errors, it is respectfully requested the Court grant the following relief: (1) consider the issue of the denial of the writ of mandamus and dismiss the case based on the State's disregard of Harris' rights at preliminary hearing, (2) overturn his conviction based on ineffective assistance of trial counsel, and/or (3) remand back to district court and conduct an evidentiary hearing with Harris present to testify.

Justice Court Proceedings

On or about August 23, 2017, Appellant was charged in the Las Vegas Justice Court with the following 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

(Volume 2, Appellant's Appendix, pp. 432-5).¹

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 named individually in the case, Nicole Dotson, refused to attend despite a valid subpoena. (2 AA, 425-31); (2 AA, 423-4). The State requested a material witness warrant, and Ms. Dotson was subsequently arrested on the warrant. The Preliminary hearing was bifurcated into two hearing taking place on December 14, 2017 and January 16, 2018. (2 AA, 303-405).

Following the Preliminary Hearing. Appellant was bound over to the Eighth Judicial District Court on all charges.

On both prior dates set for the Preliminary Hearing, Harris was present in custody and ready to proceed, but the alleged victim failed to appear. Unable to

¹ Hereafter cited as: (Volume Number, AA, page number(s))

1 proceed with the hearing, the State moved to continue the case and requested a
2 material witness warrant for the named victim. (2 AA 425-31). In support of the
3 Motion, the State made the following representations:
4

5 “Essentially what happened is we were in contact with her. She
6 did, Nicole Dotson, the named victim, she did identify herself.
7 She was informed of the court date, we did text her a copy of the
8 subpoena and she verified the address that we mailed the
9 subpoena to as well and then she refused to promise to appear
and we lost contact with her and we weren’t able to get a hold of
her again.”

10 (2 AA, 426).
11

12 At no point was the prosecutor under oath. Additionally, the prosecutor
13 neither previously submitted an affidavit pursuant to *Hill*,² nor did the Defendant
14 stipulate to an oral motion for a continuance pursuant to *Bustos*³.
15

16 Mr. Ramsey from the Clark County Public Defender’s Office was
17 representing Harris during this hearing. Mr. Ramsey objected Mr. Ramsey argued
18 that “[t]he State hasn’t met their due diligence to serve her [Ms. Dotson] with a
19 subpoena. There is no personal service.” (2 AA, 427). Mr. Ramsey also argued that
20 Nevada law does not support serving a subpoena via text message, and while there
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26 ² *Hill v. Sherriff of Clark County*, 85 Nev. 234 (Nev. 1969)

27 ³ *Bustos v. Sherriff*, 87 Nev. 622 (Nev. 1971)
28

1 is some language in support of oral promises to appear, the alleged victim
2 specifically told the State she would not appear. (2 AA, 427).

3
4 Despite failing to submit a written affidavit pursuant to *Hill*, or being sworn
5 under oath pursuant to *Bustos*, and over Harris' objection, the Judge Tobiassian
6 granted the continuance, set an Order to Show Cause hearing for November 2, and
7 reset the preliminary hearing for November 9, 2017. (2 AA, 430). Judge Tobiassian
8 acknowledged the State's motion did not comply with *Hill* nor *Bustos*, nor did the
9 State's attempts to serve the alleged victim constitute service as defined by statute.
10 (2 AA, 429).

11
12
13 Harris had been in custody almost 60 days when the case was continued over
14 his objection.

15 **Writ of Mandamus**

16
17 On November 3, 2017, Mr. Ramsey filed a Writ of Mandamus in District
18 Court Case No.: A-17-764110-W, based on the continuance granted by Judge
19 Tobiassian in Justice Court. (2 AA, 411-22). The Writ of Mandamus was assigned
20 to the Honorable Judge Douglas Williams. (2 AA, 406). Harris remained in
21 custody while the Writ of Mandamus was pending. Judge Smith found the
22 continuance was granted for good cause as outlined by the State at the October 26,
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1 2017, hearing. (2 AA, 409-10). On that basis, the Writ of Mandamus was denied.

2 *Id.*

3 **District Court Proceedings**

4
5 On January 17, 2018, Harris was charged by way of Information with the
6 charges bound over from justice court. (2 AA 437-8). On April 9, 2018, the State
7 filed an Amended Information, removing Count 9 charging ex-felon in possession.
8
9 (*Id.*)

10
11 Harris invoked his right to a speedy trial within 60-days. However, Harris'
12 Trial Counsel requested, and was granted, a short continuance over Harris'
13 objection.

14
15 On April 9, 2018, Petitioner proceeded to jury trial. After five (5) days of
16 trial, on April 16, 2018, the jury returned its Verdict, as follows: Count 1 – Not
17 Guilty; Count 2 – Guilty of First Degree Kidnapping Resulting in Substantial
18 Bodily Harm; Count 3 – Guilty of Assault; Count 4 – Guilty of Battery Constituting
19 Domestic Violence; Count 5 – Not Guilty; Count 6 – Guilty of Battery Resulting
20 in Substantial Bodily Harm Constituting Domestic Violence; Count 7 – Not Guilty;
21 and Count 8 – Not Guilty.

22
23
24 On August 14, 2019, Petitioner appeared for sentencing. Petitioner was
25 adjudged guilty, consistent with the jury's verdict, and was sentenced, as follows:
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1 Count 2 – LIFE in the Nevada Department of Corrections (“NDC”), with the
2 possibility of parole after fifteen (15) years; Count 3 – six (6) months in the Clark
3 County Detention Center (“CCDC”), concurrent with Count 2; Count 4 – six (6)
4 months in CCDC, concurrent with Count 3; Count 6 – twenty-four (24) to sixty
5 (60) months in NDC, concurrent with Count 2. The Court credited Petitioner with
6 351 days time served. Petitioner’s Judgment of Conviction was filed on August 16,
7 2018. (2 AA, 438).

8 **Direct Appeal**

9 On August 21, 2018, Petitioner filed a pro per Notice of Appeal. On
10 December 19, 2020, the Nevada Supreme Court affirmed Petitioner’s conviction.
11 Remittitur issued on January 16, 2020. (2 AA, 266-74).

12 On February 7, 2020, Petitioner filed a second Notice of Appeal. On March
13 6, 2020, the Nevada Supreme Court dismissed Petitioner’s second appeal.
14 Remittitur issued on April 1, 2020. (1 AA, 209-11); (2 AA, 438).

15 **Pro Per Post-Conviction Petition**

16 On April 21, 2020, Petitioner filed a pro per Petition for Writ of Habeas
17 Corpus (Postconviction) and Ex Parte Motion for Appointment of Counsel and
18 Request for Evidentiary Hearing. (1 AA, 190-206). The State filed its Response on
19 October 2, 2020. (1 AA, 163-87). On November 3, 2020, the Court granted

1 Petitioner's Motion for Appointment of Counsel, and on November 24, 2020, Mr.
2 Allen Lichtenstein, Esq. confirmed as counsel for Petitioner. (1 AA, 126).

3 On April 8, 2021, Petitioner, through counsel, filed his Supplemental Petition for
4 Writ of Habeas Corpus (Postconviction) (his "Supplement"). On June 10, 2021, the
5 State filed its Response. On August 26, 2021, the District Court held an evidentiary
6 hearing.
7
8

9 **Evidentiary Hearing**

10
11 An evidentiary hearing was heard before the Honorable Christy Craig on
12 August 26, 2021. (1 AA, 13-71). Prior to that time, Harris filed a Pro Per motion
13 to request to be transported to the hearing. (1 AA, 72-4). However, Harris was not
14 transported to the evidentiary hearing and no arrangements were made for him to
15 appear by telephone. Judge Craig gave Petitioner Counsel, Mr. Lichtenstein, the
16 option to bifurcate the hearing for Harris to testify, but Petition Counsel indicated
17 he was prepared to go forward without Harris being present and did not believe a
18 bifurcated hearing was needed. (1 AA, 15-7).
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22 Three witnesses were called during the evidentiary hearing: Scott Ramsey,
23 Damian Sheets and Kelsey Bernstein. (1 AA, 14) Mr. Ramsey works for the Public
24 Defender's Office and represented Harris in Justice Court and was the attorney
25 who filed the original Writ of Mandamus to District Court. (1 AA, 65-6) Mr.
26
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1 Sheets represented Harris in District Court and at trial. (1 AA, 49-53) Ms.
2 Bernstein represented Harris on direct appeal. (1 AA, 54-5)

3 Mr. Ramsey testified that he was prepared to file an appeal of Judge Smith's
4 denial of the Writ of Mandamus challenging the decision of Judge Tobiassian in
5 Justice Court granting multiple continuances to the State in violation of *Bustos* and
6 *Hill*. Mr. Ramsey stated that Harris told him he did not wish to pursue an appeal
7 of Judge Smith's order denying the Writ of Mandamus.
8

9
10 Mr. Sheets took over representation of Harris in the District Court. (1 AA,
11 44-5). Mr. Sheets testified that Harris did not wish to pursue an appeal or seek a
12 Writ of Mandamus to the Nevada Supreme Court. (1 AA, 48-9). Instead, Mr.
13 Sheets stated that Harris wanted to go to trial as quickly as possible.
14

15
16 Mr. Sheets stated that he gave Harris is discovery including police reports
17 and witnesses statements subject to redaction of personally identifying
18 information. (1 AA, 49) Mr. Sheets further stated that he did not provide body cam
19 evidence to Harris, but he did make Harris aware of the contents of the body cam
20 footage. (*Id.*)
21

22
23 Ms. Bernstein testified that she prepared the direct appeal for Harris. (1 AA,
24 55-8) She stated it was her strategic decision not to include a claim in the direct
25 appeal related to the Writ of Mandamus or any error related to the Justice Court
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1 proceedings. (1 AA, 55) Ms. Bernstein further testified that she believed a
2 challenge to Judge Smith's denial of the Writ of Mandamus could not be raised in
3 the direct appeal from the Judgment of Conviction. (1 AA, 56). Moreover, there
4 were better issues to present on direct appeal and so she chose to focus on those
5 issues at the exclusion of errors in the Justice Court proceedings. (1 AA, 55).
6

7
8 Following testimony of the witnesses and arguments by Petitioner Counsel,
9 the Court denied the Petition. (1 AA, 69-71). A written order was filed on
10 September 30, 2021. (1 AA, 4-12).
11

12 **Order Denying Petition**

13 To deny Harris' claim that Trial Counsel(s) were ineffective, the District
14 Court relied on the testimony of Mr. Sheets and Mr. Ramsey that Harris did not
15 wish to appeal the denial of the writ of mandamus and instead chose to go to trial
16 as a quickly as possible. (1 AA, 10).
17
18

19 To deny Harris' claim that Appellate Counsel(s) were ineffective the District
20 Court relied on the testimony Ms. Bernstein stating that it was a strategic decision
21 to not appeal the denial of the writ of mandamus. (1 AA, 10).
22

23 **SUMMARY OF THE ARGUMENT**

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1 The district court erred in denying Harris' claims that his trial and appellate
2 counsel were ineffective. Moreover, the district court compounded this error by
3 not requiring Harris to be present to give testimony at the evidentiary hearing.
4

5 ARGUMENT

6

7 8 **HARRIS WAS DENIED DUE PROCESS WHEN THE EVIDENTIARY** 9 **HEARING ON HIS POST CONVICTION WRIT OF HABEAS** 10 **CORPUS WAS PRESENTED WITHOUT HARRIS BEING PRESENT** 11 **OR BEING ABLE TO TESTIFY**

12 Criminal defendants generally have a right to be present at all levels of legal
13 proceedings. *See Gallego v. State*, 117 Nev. 348, 367, 23 P.3d 227, 240 (2001),
14 [*4] abrogated on other grounds by *Nunnery v. State*, 127 Nev. 749, 263 P.3d 235
15 (2011); see also *Kentucky v. Stincer*, 482 U.S. 730, 745, 107 S. Ct. 2658, 96 L. Ed.
16 2d 631 (1987) (holding that a defendant has a due process right "to be present in
17 his own person whenever his presence has a relation, reasonably substantial, to the
18 fulness of his opportunity to defend against the charge") (*quoting Snyder v.*
19 *Massachusetts*, 291 U.S. 97, 105-06, 54 S. Ct. 330, 78 L. Ed. 674 (1934)). But that
20 right is not absolute. *Gallego*, 117 Nev. at 367, 23 P.3d at 240. "Violations of the
21 right to be present are reviewed for harmless error." *Rose v. State*, 123 Nev. 194,
22 208, 163 P.3d 408, 417 (2007).
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1 A defendant must show that being absent prejudiced him or her. *Kirksey v.*
2 *State*, 112 Nev. 980, 1001, 923 P.2d 1102, 1115 (1996). The due process aspect
3 of the right to be present is implicated when "a fair and just hearing would be
4 thwarted by the defendant's absence." *Id.* at 1000, 923 P.2d 1115. But this right is
5 not violated when such "presence would be useless, or the benefit but a shadow."
6 *Stincer*, 482 U.S. at 745 (*quoting Snyder*, 291 U.S. at 106-07).
7

8
9 Here, Harris was not present for the evidentiary hearing. (1 AA, 72-4).
10 Denial of the grounds raised in his Writ was based almost exclusively on the
11 unchallenged testimony of his Trial Counsel(s), Mr. Ramsey and Mr. Sheets, and
12 appellate counsel, Ms. Bernstein. (1 AA, 69-71); (1 AA, 10).
13

14
15 Harris contends that Mr. Lichtenstein waived his appearance without his
16 authority. (1 AA, 15-8). This would appear to be supported by the record, because
17 Harris had clearly shown a desire and intention to be present for the evidentiary
18 hearing by filing two Pro Se motions to allow him to be transported or appear
19 telephonically. (1 AA, 183); (1, AA 72).
20

21
22 Harris contends his proposed testimony would be in direct contradiction of
23 his trial counsel(s) and appellate counsel. Specifically, Harris would have offered
24 the following testimony:
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1. That Harris did wish to file a writ of mandamus to the Nevada Supreme Court and that his counsel told him he would do so, stated to the district court that he would do so, and that no appeal was filed;
2. That Harris was told he could not invoke his speedy trial rights and independently pursue a Writ of Mandamus;
3. That his trial counsel did not provide certain body cam footage so he could be prepared for trial and/or make an informed decision whether to testify; and,
4. That he specifically directed his appellate counsel to raise the issue of the the State's *Bustos* violations granting of continuances.
5. That he specifically directed his appellate counsel to raise the issue of his denial of a speedy trial and perjury claim (Grounds 8 and 9 of his Pro Per Petition).

It is speculation whether such testimony would ultimately result in a different ruling, but what is clear is that Harris had a fundamental right to testify to these matters as it related to his Petition. A fair and just hearing cannot be had without Harris at least having the opportunity to testify in opposition to that of his Trial and Appellate Counsel. Especially, when the District Court relied on their

1 uncontested testimony in denying the Petition. Accordingly, relief is warranted,
2 and the matter should be remanded back to District Court for Harris to testify.
3

4 **HARRIS WAS DENIED THE AUTONOMY TO MAKE**
5 **FUNDAMENTAL CHOICES ABOUT HIS OWN DEFENSE AND**
6 **THEREFORE WAS DENIED EFFECTIVE REPRESENTATION OF**
7 **APPELLATE COUNSEL**

8 **Governing Law for Ineffective Claims**
9

10 In order to establish that counsel was ineffective, a defendant must show
11 that: (1) counsel's performance was deficient because it fell below an objective
12 standard of reasonableness measured by prevailing professional norms; and, (2)
13 counsel's deficient performance prejudiced the defendant. *Strickland v.*
14 *Washington*, 466 U.S. 668, 687-88 (1984); *Riley v. State*, 110 Nev. 638, 646, 878
15 P.2d 272, 277-78 (1995). The Court may consider both prongs in any order and
16 need not consider them both when a defendant's showing on either prong is
17 insufficient. *Kirksey v. State*, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).
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21 A defendant demonstrates that Counsel's performance was deficient when
22 he can establish that counsel made errors so grave that counsel was not functioning
23 as the counsel guaranteed by the Sixth Amendment. *Strickland v. Washington*,
24 *supra*, 466 U.S. at 687. To satisfy the prejudice prong of the Strickland standard,
25 the Defendant must establish a reasonable probability that but for counsel's errors,
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1 the defendant would not have pleaded guilty and would have insisted on going to
2 trial. *Reeves v. State*, 113 Nev. 959, 960, 944 P.2d 795, 796 (1997). A reasonable
3 probability means a probability sufficient to undermine confidence in the outcome
4 of the proceeding. *Kirksey v. State*, *supra*, 112 Nev. at 988.

6 **Ineffective Assistance of Appellate Counsel**

7
8 Autonomy claims, meanwhile, are premised on violations of a defendant's
9 "right to make the fundamental choices about his own defense." *McCoy v.*
10 *Louisiana*, 138 S. Ct. at 1500, 1511 (2018). The "right to defend" granted to the
11 defendant "personally" in the Sixth Amendment protects not only his right to self-
12 representation, *see Faretta v. California*, 422 U.S. 806, 834, 95 S. Ct. 2525, 45 L.
13 Ed. 2d 562 (1975), but also ensures that if the defendant chooses to be represented
14 by counsel he retains the "[a]utonomy to decide . . . the objective of the defense."
15 *McCoy*, 138 S. Ct. at 1508. A represented defendant surrenders control to counsel
16 over tactical decisions at trial while retaining the right to be the "master" of his
17 own defense. *See id.*; *Faretta*, 422 U.S. at 820. Counsel can make decisions over
18 matters of trial management, such as "the objections to make, the witnesses to call,
19 and the arguments to advance." *Gonzalez v. United States*, 553 U.S. 242, 249, 128
20 S. Ct. 1765, 170 L. Ed. 2d 616 (2008).
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1 But the defendant has "the ultimate authority to make certain fundamental
2 decisions regarding the case." *Jones v. Barnes*, 463 U.S. 745, 751, 103 S. Ct. 3308,
3 77 L. Ed. 2d 987 (1983). The latter category of decisions "are not strategic choices
4 about how best to achieve a client's objectives; they are choices about what the
5 client's objectives in [*16] fact are." *McCoy*, 138 S. Ct. at 1508. Those
6 autonomous decisions that are reserved exclusively for the defendant include
7 whether to plead guilty, waive the right to a jury trial, testify in one's own behalf,
8 take an appeal, and admit guilt of a charged crime. *See id.*; *Jones*, 463 U.S. at 751.
9 As with deprivation claims, usurpation of a defendant's autonomy is a structural
10 error, obviating the need to show prejudice. *See McCoy*, 138 S. Ct. at 1511.

14
15 Autonomy to decide that the objective of the defense is to assert innocence
16 and raise issues affecting Due Process rights belongs in the category of decisions
17 reserved for the client. These are not strategic choices about how best to achieve
18 a client's objectives; they are choices about what the client's objectives in fact are.
19 It is clear from the Pro-Per filings on appeal, post-conviction, and in district court
20 that Harris wanted to raise numerous legal issues affecting important Due Process
21 rights. A defendant must be allowed to make his own choices about the proper
22 way to protect his own liberty. Our system of laws generally presumes that the
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1 criminal defendant, after being fully informed, knows his own best interests and
2 does not need them dictated by the State.

3 Failing to preserve an issue for examination and failing to properly present
4 an issue on appeal that results in dismissal of the claim constitutes ineffective
5 assistance of counsel. *Hernandez v. United States*, 202 F.3d 486 (2nd Cir. 2000)
6 (finding that failure to take steps to ensure adjudication of a claim on the merits
7 on appeal constitutes ineffective assistance of counsel). Harris has consistently
8 raised the following issues in Pro Per filings which evidences that he believed they
9 were the objectives he wished to pursue in the case: (1) denial of his speedy trial
10 rights, (2) perjury of Ms. Dotson, (3) sufficiency of the evidence relating to the
11 kidnapping charge, (4) failure to request rehearing, and (5) denial of the Writ of
12 Mandamus. (1 AA, 198-203). The issues were raised in Harris Pro Per Petition.
13 (*Id*). They were also raised in the Pro Per appeal Harris attempted to file. (2 AA
14 266-74).

15 It is clear these have consistently been issues Harris wished to challenge and
16 objective he wished to achieve through litigation. Domestic violence cases are
17 unique cases in that they are often proven through negative inference rather than
18 direct evidence. Harris rightfully perceived that his Due Process rights were being
19 negatively affected throughout the case and wanted his defense to be focused on
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1 protecting those rights. Failure to pursue the object of representation of Harris
2 constituted ineffective assistance of counsel.

3
4 **TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO**
5 **PURSUE A WRIT OF MANDAMUS IN THE NEVADA SUPREME**
6 **COURT REGARDING THE VIOLATION OF HARRIS'**
7 **CONSTITUTIONAL RIGHTS IN JUSTICE COURT**

8 **Governing Law**

9 The State has the burden of proving good cause if its witnesses are missing
10 at the time set for the preliminary hearing. *See generally Bustos*, 87 Nev. 622; *see*
11 *also Hill v. Sheriff of Clark County*, 85 Nev. 234 (1969). “Good cause” is shown
12 through filing a written Hill motion or orally requesting a *Bustos* motion be
13 granted. *See generally Bustos*, 87 Nev. 622; *see also Hill v. Sheriff of Clark County*,
14 85 Nev. 234 (1969). In *Hill*, the Nevada Supreme Court held the State acts in good
15 faith when it asks for a continuance based on a missing essential witness as long
16 as the State timely files an affidavit outlining:
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19 1. the identity of the missing witness,
20 2. the diligence used to procure the witness’ presence,
21 3. a summary of the expected testimony of the witness and whether there are
22 other witnesses who could testify to the same information,
23 4. when the State learned the witness would not be present, and
24 5. the motion was made in good faith and not for purposes of delay.

25 *Hill*, 85 Nev. at 235-36.

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

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

13 While the State did identify the named witness, and there is no dispute that
14 said witness would be necessary as she is the named victim, the State failed to
15 meet the other four requirements outlined in *Hill*. (2 AA, 426). At no point during
16 the State's motion was it indicated the expected testimony of the missing witness.
17 (2 AA, 427-8). At the time of the motion, the State argued it had previously contact
18 with the missing witness and knew of her current address but had since lost
19 contact. (2 AA, 428). Despite knowing the witness' address, the State never
20 attempted to personally serve the missing witness. (2 AA, 426-30). Additionally,
21 the State never informed defense counsel nor the court of the date in which it last
22 had contact with the missing witness or when the State learned the missing witness
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1 would be absent from the preliminary hearing. (2 AA, 426-30). Finally, the State
2 never argued that the motion for a continuance was made in good faith and not for
3 the purpose of delay. (2 AA, 426-8).

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5 The State also failed to meet the standard required for “good cause” under
6 *Bustos*. The State would have needed to show it was “surprised” by the missing
7 witness’ nonappearance; however, the State did not and could not argue it was
8 surprised as the missing victim had previously informed the State she “refused to
9 promise to appear.” (2 AA, 426). Unlike *Bustos* where the prosecutor had valid
10 subpoena returns, the State made no representations indicating it received any
11 confirmation that the missing witness ever received the subpoena sent via the mail.
12 Most importantly, the Court stated it was not granting the State’s motion under
13 *Hill* or *Bustos*. (2 AA, 429) (“it wasn’t technically a *Bustos* or a *Hill* ... Although
14 I understand it doesn’t technically fit under *Hill* or *Bustos*...”).
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19 While the evidence is clear that the State’s motion in this case was
20 insufficient under *Hill* and *Bustos* and its progeny, Nevada law requires that either
21 an affidavit or sworn testimony support the State’s motion for a continuance. *See*
22 *Clark*, 94 Nev. at 364; *see also Reason*, 94 Nev. at 300. In both of those cases, the
23 Nevada Supreme Court held that the State’s failure to submit an affidavit or
24 provide sworn testimony required a denial of the State’s motion for a continuance.
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1 *See Clark*, 94 Nev. at 364; *see also Reason*, 94 Nev. at 300. While the State did
2 make representations on the record, at no point during this motion was the
3 prosecutor under oath. In any of the above cited cases where “good cause” was
4 found, the prosecutors had at least submitted an affidavit or swore under oath as
5 to the requisite “surprise.” In this case, as the State failed to comply with either of
6 these requirements.
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9 The State did not comply with the requirements of *Hill* and *Bustos*, so it must
10 demonstrate good cause through other means for the Court to grant a continuance.
11 “What constitutes ‘good cause’ is not amenable to a bright-line rule. The justice's
12 court must review the totality of the circumstances to determine whether ‘good
13 cause’ has been shown.” *Terpstra*, 111 Nev. at 863, 899 P.2d at 550. Under the
14 totality of the circumstances, the State did not demonstrate good cause to continue
15 Harris’ preliminary hearing.
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19 In *Ormound v. Sherriff*, Clark County the Nevada Supreme Court reversed
20 a district court’s denial of a petition for a writ of habeas corpus based on the
21 improper continuance of a preliminary hearing. 95 Nev. 173, 591 P.2d 258 (1979).
22 In that case, the prosecutor mailed a subpoena to an out-of-state witness, but did
23 not utilize the Uniform Act to Secure the Attendance of Witnesses From Without
24 a State in Criminal Proceeding. *Id.* The Court found the failure to use the Uniform
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1 Act was a willful disregard of procedural rules and ordered the case to be
2 dismissed. *Id.*

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

12 In this case, the State had a legal means available to compel the attendance
13 of the witness, and failed to use it. NRS 174.315(2) permits a prosecutor to issue
14 a subpoena to compel the attendance of a witness at a preliminary hearing. NRS
15 174.345 mandates that “service of a subpoena must be made by delivering a copy
16 thereof to the person named” (emphasis added) unless an exception applies. The
17 only exception applicable to the witness in this case is NRS 174.315(3), which
18 states that a “witness may accept delivery of a subpoena in lieu of service, by a
19 written or oral promise to appear given by the witness.”
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1 In this case, there is no indication that the State even attempted to make
2 personal service upon the witness. Furthermore, the witness actually “refused to
3 promise to appear.” (2 AA, 429). As the witness did not accept the mailed
4 subpoena by oral promise to appear, the exception to personal service in NRS
5 174.315(3) does not apply in this case. The State argued at the date of preliminary
6 hearing that it sent the witness a subpoena via text, but no statute permits service
7 by text message; to the contrary, the statute specifies that personal service is
8 required.
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12 Under the holding in *Terpsta*, the State’s failure to even attempt to properly
13 serve the witness requires dismissal of the case. Although not dispositive, the
14 State’s failure to personally serve the missing witness, despite knowing where she
15 lived, is significant and shows a willful disregard for important procedures. In
16 *Bustos*, the prosecutor had properly subpoenaed the missing witness and was truly
17 surprised the witness’ nonappearance; in comparison, in *Salas v. State*, the
18 prosecutor had not even issued a subpoena. In that case, the court held that failing
19 to issue a subpoena was not good cause for a continuance. *See Salas*, 91 Nev. at
20 802. In this case, the State did not even attempt proper service. While the State did
21 mail a subpoena to the witness, without an oral promise to appear, simply mailing
22 a subpoena is not proper service. The State had various opportunities and methods
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1 in which it could have attempted to guarantee the missing witness's presence, yet
2 failed to do so. As such, the State did not have good cause to request a continuance
3 and Harris' case should be dismissed with prejudice.
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5 "A new proceeding for the same offense (whether by complaint, indictment
6 or information) is not allowable when the original proceeding has been dismissed
7 due to the willful failure of the prosecutor to comply with important procedural
8 rules." *See Maes*, 86 Nev. at 319, 468 P.2d at 333. The Nevada Supreme Court
9 continues to strictly adhere to the important procedural rules regarding
10 continuances. The State had a duty to prepare for the preliminary hearing, and had
11 a legal means to compel the presence of the witness, but failed to do so. The State
12 failed to follow the statutory requirements in serving a subpoena, and failed to
13 follow the basic procedural precepts by submitting a written affidavit or sworn
14 testimony supporting its request for the continuance.
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19 As the State's request failed to meet the standards outlined in *Hill* and
20 *Bustos*, the State should not have received a continuance and the case against
21 Harris should have been dismissed. At the very least, the issue should have been
22 presented to this Court for review at the direction of Harris to his Trial and
23 Appellate Counsel. Failure to do so, deprived Harris of important control over the
24 objectives of his defense and protection from State's willful disregard of his
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1 constitutional right to Due Process under the 5th and 14th Amendments to the
2 United States Constitution.

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4 **CUMULATIVE ERRORS OF TRIAL AND APPELLATE COUNSEL**
5 **RENDERED TRIAL AND APPELLATE COUNSEL INEFFECTIVE**

6 **Trial Counsel Ineffective for Failing to Present Evidence**

7 As a point of error, Harris stated in his Pro Per petition that Counsel was
8 ineffective for failing to adequately cross examine the named witness, Nicole
9 Dotson. Specifically, Harris points out that Ms. Dotson gave conflicting versions
10 of events during her arrest, at the preliminary hearing, and during trial. Harris
11 contends that his trial counsel failed to adequately impeach Ms. Dotson with her
12 prior inconsistent statements. Trial counsel indicated that his trial strategy was to
13 impeach Ms. Dotson with her inconsistent testimony (hearing page 367). Harris
14 contends that failure to adequately impeach Ms. Dotson amounts to a failure to
15 effectively cross examine the witness in furtherance of the defense strategy and
16 therefore constitutes ineffective assistance of counsel. *See Brown v. State*, 877 P.2d
17 1071 (Nev. 1994); *Warner v. State*, 102 Nev. 635 (Nev. 1986).
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22 **Trial Counsel Ineffective for Failing to Present Body Cam Evidence**

23 As a second point of error, Harris stated in his Pro Per petition that Counsel
24 was ineffective for failing to adequately cross examine the officers regarding body
25 cam of their interview with Ms. Dotson. Specifically, Harris states that the officers
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1 coerced Ms. Dotson into making her statement against Harris. Again, Harris
2 contends that failure to adequately impeach the Officers or present evidence of
3 officer coercion of Ms. Dotson amounts to a failure to effectively cross examine the
4 witness in furtherance of the defense strategy and therefore constitutes ineffective
5 assistance of counsel. *See Brown v. State*, 877 P.2d 1071 (Nev. 1994).
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8 **Trial Counsel Ineffective for Failing to Provide Body Cam Evidence to**
9 **Harris**

10 As a third point of error, Harris stated in his Pro Per petition that Counsel did
11 not adequately prepare Harris for trial because he did not arrange for Harris to view
12 the body cam footage of the officers. This was confirmed by trial counsel at the
13 evidentiary hearing. (1 AA, 49). Harris contends that had he been provided the
14 evidence he would have been in a better position to insist on presenting the evidence
15 at trial or how or whether to testify. Harris contends that failure to provide the body
16 cam footage to him in custody hindered Harris from putting forth a coherent and
17 adequate defense and is objectively unreasonable. *See State v. Love*, 109 Nev. 1136
18 (Nev. 1993).
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22 **Appellate Counsel was Ineffective for Failing to Raise Arguments on**
23 **Harris' Behalf**

24 As a fourth point of error, Harris stated in his Pro Per petition that Appellate
25 Counsel did not adequately present arguments he wished to raise on direct appeal.
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Specifically, Harris states that Appellate Counsel should have raised the issue of insufficient evidence, violation of his speedy trial rights, and failure to challenge the justice court proceedings. (1 AA, 198-203). Moreover, Harris states he was prejudiced because failure to raise those issues may prevent him from seeking review in Federal court. (*Id*).

Trial Counsel confirmed that the trial was continued past the statutory required 60-days over the objection of Harris. He contends this was a clear violation of his rights. Moreover, Harris contends the basis for continuance was so Trial Counsel could file an appeal of the Writ of Mandamus, which was never done. Harris contends that failure of his Appellate Counsel and Trial Counsel to present meritorious arguments fails below an objective standard of reasonableness.

Appellate counsel was ineffective for failing to raise meritorious legal claims

As a fifth point of error, Harris stated in his Pro Per Petition that Appellate Counsel was ineffective for failing to raise sufficiency of the evidence claims and denial of his right to speedy trial. Ms. Bernstein stated that she chose to forgo those claims to focus arguments on more favorable appeal issues. However, Harris contends that in doing so he was denied the objective of his defense on appeal and denied the ability to protect his Due Process rights. Moreover, Harris contends that had the issues been presented this Court would have granted relief due to his speedy

1 trial rights being violated the inconsistent testimony of Ms. Dotson underlying his
2 conviction.
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5 **CONCLUSION**

6 In summary, and as set forth above and in the referenced exhibits to the
7 Petition, Harris was clearly denied effective assistance of counsel during the
8 pretrial stage of the proceedings, at trial, and on appeal. Additionally, Harris was
9 denied his right to due process when he was not permitted to be present and testify
10 at the evidentiary hearing on his post-conviction writ. Accordingly, it is
11 respectfully requested the Court grant the following relief: (1) consider the issue
12 of the denial of the writ of mandamus and dismiss the case based on the State's
13 disregard of Harris' rights at preliminary hearing, (2) overturn his conviction
14 based on ineffective assistance of trial counsel, and/or (3) remand back to district
15 court and conduct an evidentiary hearing with Harris present to testify.
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20 Respectfully submitted,

21 **DUSTIN R. MARCELLO, ESQ.**

22 /s/ DUSTIN R. MARCELLO

23 DUSTIN R. MARCELLO

24 Nevada Bar No.: 10134
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CERTIFICATE OF COMPLIANCE

1
2 1. I hereby certify that this brief complies with the formatting
3 requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and
4 the type style requirements of NRAP 32(a)(6) because:

6 This brief has been prepared in a proportionally spaced typeface using
7 TIMES NEW ROMAN in 14 size font.
8

9 2. I further certify that this brief complies with the page or type-
10 volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief
11 exempted by NRAP 32(a)(7)(C), it is either:
12

13 Proportionately spaced, has a typeface of 14 points or more and
14 contains 11,814 out of the 14,000 word limit of NRAP 32 (a)(7)(A)(i).
15

16 3. Finally, I hereby certify that I have read this appellate brief, and to
17 the best of my knowledge, information and belief, it is not frivolous or interposed
18 for any improper purpose. I further certify that this brief complies with all
19 applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1),
20 which requires every assertion in the brief regarding matters in the record to be
21 supported by a reference to the page and volume number, if any, of the transcript
22 or appendix where the matter relied on is to be found. I understand that I may be
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1 subject to sanctions in the event that the accompanying brief is not in conformity
2 with the requirements of the Nevada Rules of Appellate Procedure.

3 DATED this Monday, April 18, 2022

4
5 **PITARO & FUMO, CHTD.**

6 /s/ DUSTIN R. MARCELLO
7 DUSTIN R. MARCELLO, Esq.
8 Nevada Bar No.: 10134
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ADAM LAXALT
STEVE WOLFSON

BARRY HARRIS NDOC No. 95363
c/o ELY STATE PRISON
P.O. Box 1989
4569 North State Route 490
Ely, Nevada 89301

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