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DATED this: 7/11/2022.

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

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REPLY

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

Harris incorporates the factual statements and arguments as stated in the Opening Brief and addresses the arguments made by Respondents as follows:

Harris is not bound by the unauthorized actions of his attorney. Harris did not authorize Mr. Lichenstein to waive his presence at the evidentiary hearing.

1 Any contention by the State making this argument is belied by the extensive
2 records that Harris wished to be present and wanted to testify at the evidentiary
3 hearing. (1 AA, 183); (1, AA 72) (filing two Pro Se motions to allow him to be
4 transported or appear telephonically).
5

6 Harris wanted to testify. Harris has filed numerous Pro Per briefs, requests,
7 memorandums, and appeals stating what issues he wanted to raise, but more
8 importantly stating what testimony he wished to give in contradiction of his Trial
9 Counsel and Appellate Counsel. In the Opening Brief, Harris states exactly what
10 testimony he wished to give as an offer of proof and how that testimony contradicts
11 the uncontested evidence presented at the Evidentiary Hearing. It would be a
12 fundamental Due Process violation to allow the unauthorized waiver of Harris'
13 presence at the Evidentiary Hearing to testify.
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18 The State conflates two related errors together to reach an incorrect
19 conclusion. A defendant has certain statutory and Constitutional rights to be
20 present at certain hearings; however, here the issue here is that the evidentiary
21 hearing lacked an element of Due Process because Harris was prevented from
22 testifying by the unauthorized waiver of his appearance. As such, this Court should
23 not consider the State's arguments as to rights to appear at hearings generally and
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1 instead focus on the State's arguments as to the Due Process implications of Harris
2 not being permitted to be present at the Evidentiary Hearing to testify.

3 To this later point, the State seems to acknowledge that preventing Harris
4 from testifying at the evidentiary would amount to a Due Process violation.
5 (Respondent's Answering Brief, at p. 11, *citing Gerbers v. State*, 118 Nev. 500
6 (2002). The issue then turns on whether there was prejudice to Harris by him being
7 prevented from testifying.
8

9
10 Harris was prejudiced. His testimony was in direct contradiction to the
11 testimony relied upon by the District Court in deciding the Petition. The prejudice
12 is not in the potential outcome, it is in the opportunity to be fully heard. The State
13 argues that no one would believe Harris, and maybe so, but that is not the same
14 issue has being precluded from having an opportunity to be heard at all.
15

16
17 The State spends multiple pages arguing against Harris' proposed testimony,
18 but simultaneously argues that was irrelevant and that he didn't show a clear
19 intention to testify. The State doesn't really argue or say why the filings by Harris
20 before the Evidentiary Hearing asking to appear and asking to appear
21 telephonically were insufficient to show his intention. Moreover, the State doesn't
22 indicate what more Harris could have done to indicate he wished to testify.
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1 There is no Pro Per document titled “I WANT TO TESTIFY, STOP
2 WAIVING MY RIGHTS”. All we can do is look at the context of the purpose of
3 the Evidentiary Hearing, what took place in the case up to that point, and the filings
4 on record which clearly show Harris wished to testify.
5

6 Finally, the State argues that Harris should “file a second petition”. This is
7 a bizarre remedy to be proposed by the State. The State has argued on countless
8 occasions that subsequent and successive petitions are barred for numerous
9 statutory and Constitutional reasons. Counsel would agree that a possible remedy
10 would be to put proceedings in this Court on hold and remand to the District Court
11 to permit Harris to testify and render a new decision. The State seems to be
12 proposing this but in a wildly different way through a successive or subsequent
13 petition they would almost certainly argue Harris is precluded from filing.
14 Accordingly, the Court should instead grant the relief requested by Harris.
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19 **HARRIS WAS DENIED THE AUTONOMY TO MAKE**
20 **FUNDAMENTAL CHOICES ABOUT HIS OWN DEFENSE AND**
21 **THEREFORE WAS DENIED EFFECTIVE REPRESENTATION OF**
22 **APPELLATE COUNSEL**

23 Harris would rely on the original argument contained the Opening Brief as
24 Harris believes it adequately raises the issue. The State presents opposition to
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1 those arguments, but a reply would simply reiterate the arguments made by Harris
2 in the Opening Brief.
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 Harris would rely on the original argument contained the Opening Brief as
9 Harris believes it adequately raises the issues. The State presents opposition to
10 those arguments, but a reply would simply reiterate the arguments made by Harris
11 in the Opening Brief.
12

13 However, Harris would like this Court to be aware that at the District Court
14 level, Mr. Sheets had requested a continuance of the invoked speedy trial in order
15 to file a Writ of Mandamus. (See Supplemental Appendix “SA, at 1). This matter
16 was originally sent to “Overflow” in District Court on March 16, 2018 for trial.
17 Mr. Sheets stated on the record that he wanted a 30-day continuance to file “pre-
18 trial motions”. Harris would have testified and indicates that the “pretrial motion”
19 referenced was the Writ of Mandamus. Judge Villani sent the matter to the matter
20 back to Judge Johnson where the case originated. (SA, at 1)
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23 On March 27, 2018, the matter was heard in front of Judge Johnson. (SA at
24 2). Mr. Sheets reiterated his request granted the request over the objection of
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1 Harris – who remained invoked - finding that there was good cause due to Mr.
2 Sheet's stating he would file a writ of mandamus. (SA at 2). However, the Writ
3 of Mandamus was never filed.
4

5 This would seem to counter any argument by the State indicating that it was
6 a "tactical decision" not to file the Writ of Mandamus. The State argues in its
7 Opposition that Harris decided to forgo the Writ of Mandamus to ensure his speedy
8 trial. (Respondent's However, the record clearly indicates Mr. Sheets specifically
9 requested and was granted a continuance to pursue a Writ of Mandamus, which
10 was never done.
11
12

13 **CUMULATIVE ERRORS OF TRIAL AND APPELLATE COUNSEL**
14 **RENDERED TRIAL AND APPELLATE COUNSEL INEFFECTIVE**

15 Harris would rely on the original argument contained the Opening Brief as
16 Harris believes it adequately raises the issues. The State presents opposition to
17 those arguments, but a reply would simply reiterate the arguments made by Harris
18 in the Opening Brief.
19
20

21 Respectfully submitted,

22 **DUSTIN R. MARCELLO, ESQ.**

23
24 /s/ DUSTIN R. MARCELLO
25 DUSTIN R. MARCELLO
26 Nevada Bar No.: 10134
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CERTIFICATE OF COMPLIANCE

1. I hereby 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 TIMES NEW ROMAN in 14 size font.

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

- Proportionately spaced, has a typeface of 14 points or more and contains 1744 out of the 7,000 word limit of NRAP 32 (a)(7)(A)(i).

3. Finally, 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(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Respectfully submitted,

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/s/ DUSTIN R. MARCELLO

DUSTIN R. MARCELLO

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