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DATED this: June 13, 2023

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

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

## **TABLE OF AUTHORITIES**

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NRS 34.575.

- Direct Appeal Case Number in Nevada Supreme Court: 76774
- Appeal from denial of Petition for Post-Conviction Writ: 83516
- Transfer to Appeal to Court of Appeals: 83516-A

- 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;
- Appeal from denial of Post-Conviction Writ filed on September 16, 2021;
- Order Dismissing Appeal from denial of Post-Conviction Writ filed by Court of Appeals on August 29, 2021;
- Remittitur of Dismissal of Appeal from denial of Post-Conviction Writ filed on September 23, 2022;
- Amended District Order denying Post-Conviction Writ filed January 4, 2023;
- Notice of appeal from Amended District Order denying Post-Conviction Writ filed January 27, 2023

1  
2 D. This appeal is from a denial of a post-conviction writ of habeas corpus:

- 3
- 4 • Hearing held August 26, 2021
  - 5 • Order filed: September 30, 2021
  - 6 • Notice of appeal filed September 14, 2021.
  - 7 • Order Dismissing Appeal from denial of Post-Conviction Writ filed
  - 8 by Court of Appeals on August 29, 2021
  - 9 • Remittitur of Dismissal of Appeal from denial of Post-Conviction
  - 10 Writ filed on September 23, 2022
  - 11 • Amended District Order denying Post-Conviction Writ filed January
  - 12 4, 2023
  - 13 • Notice of appeal from Amended District Order denying Post-
  - 14 Conviction Writ filed January 27, 2023
  - 15
  - 16

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

19 This matter is presumptively assigned to the Supreme Court pursuant  
20 to NRAP 17(b)(1)(A) and (3).  
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**WAS HARRIS DENIED THE AUTONOMY TO MAKE  
FUNDAMENTAL CHOICES ABOUT HIS OWN DEFENSE  
THEREBY DENYING HIM EFFECTIVE REPRESENTATION OF  
APPELLATE COUNSEL**

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

## DID CUMULATIVE ERRORS OF TRIAL AND APPELLATE COUNSEL RENDER TRIAL AND APPELLATE COUNSEL INEFFECTIVE

Petitioner Barry Harris (“Harris”) appeals from an Order of the Honorable Justice Christy Craig of the Eighth Judicial District Court denying relief on his Post-Conviction Writ of Habeas Corpus challenging his restraint on conviction and sentence after jury trial and conviction.

# 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 in direct conflict



1 with the testimony given by his trial and appellate Counsel. Harris would have  
2 testified that his trial counsel and appellate counsel were ineffective. Specifically,  
3 Harris would have testified to meritorious legal issues not raised at the trial court  
4 level and on appeal, and that there were several cumulative errors that led trial and  
5 appellate counsel to be ineffective.  
6

7  
8 Due to these errors, it is respectfully requested that the Court grant the  
9 following relief: (1) consider the issue of the denial of the writ of mandamus and  
10 dismiss the case based on the State's disregard of Harris' rights at the preliminary  
11 hearing, (2) overturn his conviction based on ineffective assistance of trial counsel,  
12 and/or (3) remand back to district court and conduct an evidentiary hearing with  
13 Harris present to testify.  
14

### 15 **Justice Court Proceedings**

16  
17 On or about August 23, 2017, Appellant was charged in the Las Vegas Justice  
18 Court with nine counts, including burglary with use of a deadly weapon,  
19 kidnapping, assault with a deadly weapon, battery with use of a deadly weapon,  
20 domestic battery by strangulation, domestic battery resulting in substantial bodily  
21 harm, preventing, or dissuading a witness, carrying a concealed weapon, and  
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1 ownership of a gun by a prohibited person. (Volume 2, Appellant's Appendix, pp.  
2 461-4).<sup>1</sup>

3  
4 Following brief competency proceedings, a preliminary hearing was set on  
5 October 26, 2017, and November 3, 2017. The alleged victim, Nicole Dotson, failed  
6 to attend despite a valid subpoena. (2 AA, 454-60); (2 AA, 452-3). The State  
7 requested a material witness warrant, and Ms. Dotson was subsequently arrested.  
8  
9 The preliminary hearing was bifurcated into two hearings, taking place on  
10 December 14, 2017, and January 16, 2018. Appellant was bound over to the Eighth  
11 Judicial District Court on all charges. (2 AA, 332-434).

12  
13 On both prior dates set for the Preliminary Hearing, Harris was present in  
14 custody and ready to proceed, but the alleged victim failed to appear. The State  
15 moved to continue the case and requested a material witness warrant for the named  
16 victim. (2 AA, 454-60).

17  
18  
19 “Essentially what happened is we were in contact with her. She  
20 did, Nicole Dotson, the named victim, she did identify herself.  
21 She was informed of the court date, we did text her a copy of the  
22 subpoena and she verified the address that we mailed the  
23 subpoena to as well and then she refused to promise to appear  
24 and we lost contact with her and we weren't able to get a hold of  
25 her again.”

26  
27 (2 AA, 455).

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28  
29 <sup>1</sup> Hereinafter cited as: (Volume Number, AA, page number(s))

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

5 Mr. Ramsey from the Clark County Public Defender's Office was  
6 representing Harris during this hearing. Mr. Ramsey objected Mr. Ramsey argued  
7 that "[t]he State hasn't met their due diligence to serve her [Ms. Dotson] with a  
8 subpoena. There is no personal service." (2 AA, 456). Mr. Ramsey also argued that  
9 Nevada law does not support serving a subpoena via text message, and while there  
10 is some language in support of oral promises to appear, the alleged victim  
11 specifically told the State she would not appear. (2 AA, 456).  
12  
13  
14

15 Despite failing to submit a written affidavit pursuant to *Hill*, or being sworn  
16 under oath pursuant to *Bustos*, and over Harris' objection, the Judge Tobiassian  
17 granted the continuance, set an Order to Show Cause hearing for November 2, and  
18 reset the preliminary hearing for November 9, 2017. (2 AA, 459). Judge Tobiassian  
19 acknowledged the State's motion did not comply with *Hill* nor *Bustos*, nor did the  
20 State's attempts to serve the alleged victim constitute service as defined by statute.  
21  
22 (2 AA, 458).  
23  
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26 <sup>2</sup> *Hill v. Sheriff of Clark County*, 85 Nev. 234 (Nev. 1969).  
27  
28

<sup>3</sup> *Bustos v. Sheriff*, 87 Nev. 622 (Nev. 1971).

1 Harris had been in custody almost 60 days when the case was continued over  
2 his objection.

3  
4 **Writ of Mandamus**

5 On November 3, 2017, Mr. Ramsey filed a Writ of Mandamus in District  
6 Court Case No.: A-17-764110-W, based on the continuance granted by Judge  
7 Tobiassian in Justice Court. (2 AA, 440-51). The Writ of Mandamus was assigned  
8 to the Honorable Judge Douglas Williams. (2 AA, 435). Harris remained in custody  
9 while the Writ of Mandamus was pending. Judge Smith found the continuance was  
10 granted for good cause as outlined by the State at the October 26, 2017, hearing. (2  
11 AA, 438-9). On that basis, the Writ of Mandamus was denied. *Id.*

12  
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14  
15 **District Court Proceedings**

16 On January 17, 2018, Harris was charged by way of Information with the  
17 charges bound over from justice court. (2 AA, 466-7). On April 9, 2018, the State  
18 filed an Amended Information, removing Count 9 charging ex-felon in possession.  
19 (Id).

20  
21  
22 Harris invoked his right to a speedy trial within 60 days. However, Harris'  
23 Trial Counsel requested, and was granted, a short continuance over Harris'  
24 objection.  
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1 On April 9, 2018, the Petitioner proceeded to jury trial. After five (5) days of trial,  
2 on April 16, 2018, the jury returned its Verdict, as follows: Count 1 – Not Guilty;  
3 Count 2 – Guilty of First-Degree Kidnapping Resulting in Substantial Bodily Harm;  
4 Count 3 – Guilty of Assault; Count 4 – Guilty of Battery Constituting Domestic  
5 Violence; Count 5 – Not Guilty; Count 6 – Guilty of Battery Resulting in  
6 Substantial Bodily Harm Constituting Domestic Violence; Count 7 – Not Guilty;  
7 and Count 8 – Not Guilty.

10 On August 14, 2019, Petitioner appeared for sentencing. Petitioner was  
11 adjudged guilty, consistent with the jury's verdict, and was sentenced, as follows:  
12 Count 2 – LIFE in the Nevada Department of Corrections ("NDC"), with the  
13 possibility of parole after fifteen (15) years; Count 3 – six (6) months in the Clark  
14 County Detention Center ("CCDC"), concurrent with Count 2; Count 4 – six (6)  
15 months in CCDC, concurrent with Count 3; Count 6 – twenty-four (24) to sixty (60)  
16 months in NDC, concurrent with Count 2. The Court credited Petitioner with 351  
17 days' time served. Petitioner's Judgment of Conviction was filed on August 16,  
18 2018. (2 AA, 467).

26 ///

1                   **Direct Appeal**

2                   On August 21, 2018, the petitioner filed a pro per Notice of Appeal. On  
3 December 19, 2020, the Nevada Supreme Court affirmed the petitioner's  
4 conviction. The remittitur was issued on January 16, 2020.  
5

6                   On February 7, 2020, the petitioner filed a second Notice of Appeal.  
7 However, on March 6, 2020, the Nevada Supreme Court dismissed the petitioner's  
8 second appeal. The remittitur for the second appeal was issued on April 1, 2020.  
9

10                   **Pro Per Post-Conviction Petition**

11                   On August 21, 2018, Petitioner filed a pro per Notice of Appeal. On  
12 December 19, 2020, the Nevada Supreme Court affirmed Petitioner's conviction.  
13 Remittitur issued on January 16, 2020. (2 AA, 295-303).  
14

15                   On February 7, 2020, Petitioner filed a second Notice of Appeal. On March  
16 6, 2020, the Nevada Supreme Court dismissed Petitioner's second appeal.  
17 Remittitur issued on April 1, 2020. (1 AA, 268-70); (2 AA, 467).  
18  
19

20                   **Evidentiary Hearing**

21                   On August 26, 2021, an evidentiary hearing was conducted before Judge  
22 Christy Craig. (1 AA, 42-100). Prior to the hearing, Harris (the petitioner) filed a  
23 motion requesting to be transported to the hearing, but he was not transported, and  
24 no arrangements were made for him to appear by telephone. (1 AA, 101-3). Judge  
25 Craig offered petitioner's counsel, Mr. Lichtenstein, the option to bifurcate the  
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1 hearing so that Harris could testify separately, but counsel expressed readiness to  
2 proceed without Harris being present and believed a bifurcated hearing was  
3 unnecessary. (1 AA, 44-6).  
4

5 During the evidentiary hearing, three witnesses were called to testify: Scott  
6 Ramsey, Damian Sheets, and Kelsey Bernstein. (1 AA, 43). Scott Ramsey, who  
7 works for the Public Defender's Office, represented Harris in Justice Court and was  
8 the attorney who filed the original Writ of Mandamus to District Court. (1 AA, 94-  
9 5). Damian Sheets represented Harris in District Court and during the trial. (1 AA,  
10 78-82). Kelsey Bernstein represented Harris on the direct appeal. (1 AA, 83-4).  
11  
12

13 Mr. Ramsey testified that he was ready to file an appeal of Judge Smith's  
14 denial of the Writ of Mandamus, challenging the decision of Judge Tobiassian in  
15 Justice Court for granting multiple continuances to the State, which Mr. Ramsey  
16 believed violated the principles established in the *Bustos* and *Hill* cases. However,  
17 Harris informed Mr. Ramsey that he did not want to pursue an appeal of Judge  
18 Smith's order denying the Writ of Mandamus.  
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22 Mr. Sheets took over as Harris' representative in the District Court. He  
23 testified that Harris did not express a desire to pursue an appeal or seek a Writ of  
24 Mandamus to the Nevada Supreme Court. (1 AA, 77-8). Instead, Harris wanted to  
25 proceed to trial as quickly as possible. Mr. Sheets stated that he provided Harris  
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1 with discovery materials, including police reports and witness statements with  
2 personally identifying information redacted. (1 AA, 78). However, he did not  
3 provide Harris with the body cam evidence directly, although he did inform Harris  
4 about its contents. (*Id.*).

6 Ms. Bernstein, who prepared the direct appeal for Harris, also testified. (1  
7 AA, 84-7). She explained that it was her strategic decision not to include a claim  
8 in the direct appeal related to the Writ of Mandamus or any error related to the  
9 Justice Court proceedings. (1 AA, 84).

12 Ms. Bernstein testified that she believed it was not appropriate to challenge  
13 Judge Smith's denial of the Writ of Mandamus in the direct appeal from the  
14 Judgment of Conviction. (1 AA, 85). She thought that there were more significant  
15 issues to focus on in the direct appeal, so she chose not to include errors in the  
16 Justice Court proceedings in the appeal. (1 AA, 84).

19 After considering the testimony of the witnesses and the arguments presented  
20 by Petitioner Counsel, the court ultimately denied the Petition. (1 AA, 98-100). A  
21 written order reflecting this decision was filed on September 30, 2021. (1 AA, 33-  
22 41).

### 24 **Order Denying Petition**

26 In denying Harris' claim of ineffective assistance of trial counsel, the District  
27 Court considered the testimony of Mr. Sheets and Mr. Ramsey, who both stated that  
28



1 Harris expressed a desire to proceed to trial quickly and did not wish to appeal the  
2 denial of the writ of mandamus. (1 AA, 39).

3 Similarly, in rejecting Harris' claim of ineffective assistance of appellate  
4 counsel, the District Court relied on Ms. Bernstein's testimony, where she explained  
5 that her decision not to appeal the denial of the writ of mandamus was a strategic  
6 choice. (1 AA, 39).  
7  
8

9 Based on this testimony, the District Court found that Harris actively  
10 participated in the decision-making process and made specific choices regarding  
11 the appeals, which led to the denial of his claims of ineffective assistance of counsel.  
12  
13

#### 14 **Prior Appeal Of Order Denying Petition Under SC Case No.: 83516**

15

16 On September 16, 2021, Harris filed a notice of appeal challenging the  
17 District Court's order denying his Post-Conviction Writ of Habeas Corpus.  
18 (*Nevada Appellate Court Case No.:* 83516, Dkt. #21-26889). The matter was  
19 remanded for appointment of counsel on October 11, 2021. (Dkt. #21-29139).  
20 Current Counsel was appointed shortly thereafter in the District Court on October  
21 21, 2021.  
22  
23

24 The opening brief was filed on April 18, 2022. (*Case No.:* 83516: Dkt. #22-  
25 12176). The matter was transferred to the Court of Appeals on August 15, 2022.  
26 (*Case No.:* 83516: Dkt. #22-25459). On August 29, 2022, the appeal was dismissed  
27  
28

1 by the Court of Appeals based on a finding of a jurisdictional defect. (1 AA, 27-9).  
2 Specifically, the Court of appeals ruled that the District Court's order denying  
3 Harris' Petition did not address all the claims raised by Harris. (1 AA, 27-9); (*Court*  
4 *of Appeals Case No.:* 83516-A, Dkt. #22-27038).  
5

6 The matter was transferred back to the Nevada Supreme Court and remittitur  
7 was issued on September 29, 2022. (*Case No.:* 83516: Dkt. #22-29893).  
8

9 **Subsequent District Court Proceedings**  
10

11 On October 28, 2022, Harris filed a Motion for Amended Order or to Place  
12 on Calendar for Further Proceedings in front of Judge Craig in the District Court.  
13 (1 AA, 23-6). The motion was heard on December 15, 2022, at which time Judge  
14 Craig ordered the State to submit an Amended Order Denying Petition to chambers  
15 for filing.  
16  
17

18 On January 4, 2023, an Amended Order and Entry of Findings of Fact,  
19 Conclusions of Law denying Harris' Petition was filed. (1 AA, 3-22). The Notice  
20 of Appeal was filed on January 25, 2023. (1 AA, 1-2). This appeal follows.  
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## ARGUMENT

### **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**

#### **Governing Law**

Criminal defendants generally have a right to be present at all levels of legal proceedings (*Gallego v. State*, 117 Nev. 348, 367, 23 P.3d 227, 240 (2001), abrogated on other grounds by *Nunnery v. State*, 127 Nev. 749, 263 P.3d 235 (2011)); *see also*, *Kentucky v. Stincer*, 482 U.S. 730, 745, 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987) (holding that a defendant has a due process right "to be present in his own person whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge") (*quoting Snyder v. Massachusetts*, 291 U.S. 97, 105-06, 54 S. Ct. 330, 78 L. Ed. 674 (1934))).

However, this right is not absolute, and violations of the right to be present are reviewed for harmless error (*Gallego*, 117 Nev. at 367, 23 P.3d at 240; *Rose v. State*, 123 Nev. 194, 208, 163 P.3d 408, 417 (2007)).

A defendant must demonstrate that their absence prejudiced them (*Kirksey v. State*, 112 Nev. 980, 1001, 923 P.2d 1102, 1115 (1996)). The due process aspect of the right to be present is implicated when the defendant's absence would hinder a fair and just hearing (*Kirksey*, 112 Nev. at 1000, 923 P.2d at 1115). However, the

1 right is not violated when the defendant's presence would be useless or provide only  
2 a nominal benefit (*Stincer*, 482 U.S. at 745, *quoting Snyder*, 291 U.S. at 106-07).

3  
4 **Waiver of Appearance**

5 In this case, Harris was not present for the evidentiary hearing (1 AA, 101-  
6 3). The denial of the grounds raised in his Writ was primarily based on the  
7 unchallenged testimony of his trial counsel, Mr. Ramsey and Mr. Sheets, as well as  
8 appellate counsel, Ms. Bernstein (1 AA, 98-101; 1 AA, 39). Harris argues that his  
9 attorney, Mr. Lichtenstein, waived his appearance without his authorization. (1 AA,  
10 44-7). This claim is supported by the record, as Harris expressed a clear desire and  
11 intention to be present at the hearing through his motions requesting transportation  
12 or a telephonic appearance. (1 AA, 212; 1 AA, 101).

13  
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16 Harris maintains that his proposed testimony would directly contradict the  
17 statements of his trial and appellate counsel. Specifically, he would have offered  
18 the following testimony:  
19

- 20 1. That Harris did wish to file a writ of mandamus to the Nevada  
21 Supreme Court and that his counsel told him he would do so, stated  
22 to the district court that he would do so, and that no appeal was  
23 filed.  
24 2. That Harris was told he could not invoke his speedy trial rights and  
25 independently pursue a Writ of Mandamus.  
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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.
4. That he specifically directed his appellate counsel to raise the issue of 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 uncontested testimony in denying the Petition. Accordingly, relief is warranted, and the matter should be remanded back to District Court for Harris to testify.

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

### **Governing Law**

In order to establish that counsel was ineffective, a defendant must show that: counsel's performance was deficient because it fell below an objective standard of reasonableness measured by prevailing professional norms; and counsel's deficient

1 performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668,  
2 687-88 (1984); *Riley v. State*, 110 Nev. 638, 646, 878 P.2d 272, 277-78 (1995). The  
3 Court may consider both prongs in any order and need not consider them both when  
4 a defendant's showing on either prong is insufficient. *Kirksey v. State*, 112 Nev.  
5 980, 987, 923 P.2d 1102, 1107 (1996). A defendant demonstrates that Counsel's  
6 performance was deficient when he can establish that counsel made errors so grave  
7 that counsel was not functioning as the counsel guaranteed by the Sixth  
8 Amendment. *Strickland v. Washington, supra*, 466 U.S. at 687. To satisfy the  
9 prejudice prong of the Strickland standard, the Defendant must establish a  
10 reasonable probability that but for counsel's errors, the defendant would not have  
11 pleaded guilty and would have insisted on going to trial. *Reeves v. State*, 113 Nev.  
12 959, 960, 944 P.2d 795, 796 (1997). A reasonable probability means a probability  
13 sufficient to undermine confidence in the outcome of the proceeding. *Kirksey v.*  
14 *State, supra*, 112 Nev. at 988.

### 20 **Ineffective Assistance of Appellate Counsel**

21 Autonomy claims, meanwhile, are premised on violations of a defendant's  
22 "right to make the fundamental choices about his own defense." *McCoy v.*  
23 *Louisiana*, 138 S. Ct. at 1500, 1511 (2018). The "right to defend" granted to the  
24 defendant "personally" in the Sixth Amendment protects not only his right to self-  
25 representation, see *Faretta v. California*, 422 U.S. 806, 834, 95 S. Ct. 2525, 45 L.  
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1 Ed. 2d 562 (1975), but also ensures that if the defendant chooses to be represented  
2 by counsel he retains the "[a]utonomy to decide . . . the objective of the defense."  
3 *McCoy*, 138 S. Ct. at 1508. A represented defendant surrenders control to counsel  
4 over tactical decisions at trial while retaining the right to be the "master" of his own  
5 defense. *See id.*; *Faretta*, 422 U.S. at 820. Counsel can make decisions over matters  
6 of trial management, such as "the objections to make, the witnesses to call, and the  
7 arguments to advance." *Gonzalez v. United States*, 553 U.S. 242, 249, 128 S. Ct.  
8 1765, 170 L. Ed. 2d 616 (2008). But the defendant has "the ultimate authority to  
9 make certain fundamental decisions regarding the case." *Jones v. Barnes*, 463 U.S.  
10 745, 751, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983).

11  
12 The latter category of decisions "are not strategic choices about how best to  
13 achieve a client's objectives; they are choices about what the client's objectives in  
14 fact are." *McCoy*, 138 S. Ct. at 1508. Those autonomous decisions that are reserved  
15 exclusively for the defendant include whether to plead guilty, waive the right to a  
16 jury trial, testify in one's own behalf, take an appeal, and admit guilt of a charged  
17 crime. *See id.*; *Jones*, 463 U.S. at 751.

18  
19 As with deprivation claims, usurpation of a defendant's autonomy is a  
20 structural error, obviating the need to show prejudice. *See McCoy*, 138 S. Ct. at  
21 1511.

1           Autonomy to decide that the objective of the defense is to assert innocence  
2 and raise issues affecting Due Process rights belongs in the category of decisions  
3 reserved for the client. These are not strategic choices about how best to achieve a  
4 client's objectives; they are choices about what the client's objectives in fact are. It  
5 is clear from the Pro-Per filings on appeal, post-conviction, and in district court that  
6 Harris wanted to raise numerous legal issues affecting important Due Process rights.  
7 A defendant must be allowed to make his own choices about the proper way to  
8 protect his own liberty.  
9

10           Our system of laws generally presumes that the Failing to preserve an issue  
11 for examination and failing to properly present an issue on appeal that results in  
12 dismissal of the claim constitutes ineffective assistance of counsel. *Hernandez v.*  
13 *United States*, 202 F.3d 486 (2nd Cir. 2000) (finding that failure to take steps to  
14 ensure adjudication of a claim on the merits on appeal constitutes ineffective  
15 assistance of counsel). Harris has consistently raised the following issues in Pro Per  
16 filings which evidences that he believed they were the objectives he wished to  
17 pursue in the case: (1) denial of his speedy trial rights, (2) perjury of Ms. Dotson,  
18 (3) sufficiency of the evidence relating to the kidnapping charge, (4) failure to  
19 request rehearing, and (5) denial of the Writ of Mandamus. (1 AA, 227-232). The  
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1 issues were raised in Harris Pro Per Petition. (*Id*). They were also raised in the Pro  
2 Per appeal Harris attempted to file. (2 AA 295-303).

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4 It is clear these have consistently been issues Harris wished to challenge and  
5 objectives he wished to achieve through litigation. Domestic violence cases are  
6 unique cases in that they are often proven through negative inference rather than  
7 direct evidence. Harris rightfully perceived that his Due Process rights were being  
8 negatively affected throughout the case and wanted his defense to be focused on  
9 protecting those rights. Failure to pursue the object of representation of Harris  
10 constituted ineffective assistance of counsel.  
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14 **TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PURSUE**  
15 **A WRIT OF MANDAMUS IN THE NEVADA SUPREME COURT**  
16 **REGARDING THE VIOLATION OF HARRIS' CONSTITUTIONAL**  
17 **RIGHTS IN JUSTICE COURT**

18 **Governing Law**

19 The State has the burden of proving good cause if its witnesses are missing  
20 at the time set for the preliminary hearing. *See generally Bustos*, 87 Nev. 622; *see*  
21 *also Hill v. Sheriff of Clark County*, 85 Nev. 234 (1969). "Good cause" is shown  
22 through filing a written *Hill* motion or orally requesting a *Bustos* motion be granted.  
23 *See generally Bustos*, 87 Nev. 622; *see also Hill v. Sheriff of Clark County*, 85 Nev.  
24 234 (1969). In *Hill*, the Nevada Supreme Court held the State acts in good faith  
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1 when it asks for a continuance based on a missing essential witness as long as the  
2 State timely files an affidavit outlining:  
3

- 4 1. The identity of the missing witness,
- 5 2. The diligence used to procure the witness' presence,
- 6 3. A summary of the expected testimony of the witness and whether there  
7 are other witnesses who could testify to the same information,
- 8 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.

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

10 The Court warned prosecutors that "they must either proceed to a preliminary  
11 hearing at the appointed time or show good cause for a continuance by affidavit."  
12

13 *See McNair v. Sheriff, Clark County*, 89 Nev. 434, 437, 514 P.2d 1175, 1176 (1973).  
14

15 In *Bustos*, the Supreme Court held there are circumstances in which there is no time  
16 for the State to file a written affidavit, and therefore, would be permitted to make  
17 the motion orally while sworn under oath. *See Bustos*, 87 Nev. at 623. The Supreme  
18 Court explained there are two exceptions to the *Hill* rule that the good cause must  
19 be established through a written affidavit: 1. defense counsel stipulates to an oral  
20 argument or 2. the State was "surprised" by the witness' nonappearance. *Id.* In that  
21 case, the Court held there was a "surprise" as the State had valid subpoena returns  
22 and did not know the witness would be absent until the time of the hearing. *Id.* at  
23 624.  
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1           Condoning the State's willful failure to comply with the directives of *Hill*  
2 would effectively make the Supreme Court's precedent meaningless. *See Maes v.*  
3 *Sheriff, Clark County*, 86 Nev. 317, 318-19 (1970). "Willful" is not only intentional  
4 dereliction but also a conscious indifference on behalf of the State toward important  
5 procedural rules that affect a defendant's rights. *See State v. Austin*, 87 Nev. 81, 82-  
6 83 (1971).  
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9           In cases where the State neither submitted a written affidavit nor provided  
10 sworn testimony in support of its motion to continue, the Supreme Court held the  
11 appropriate response was to deny the State's motion and dismiss the case against  
12 the defendant. *See Clark v. Sheriff, Clark County*, 94 Nev. 364 (1978) (reversing  
13 the denial of the defendant's habeas petition for failure to submit an affidavit or be  
14 sworn under oath); *see also Reason v. Sheriff, Clark County*, 94 Nev. 300 (1978)  
15 (reversing the denial of the defendant's habeas petition based on the State's failure  
16 to submit an affidavit or be sworn under oath); compare with *State v. Nelson*, 118  
17 Nev. 399 (2002) (holding there was sufficient evidence based on the prosecutor's  
18 sworn testimony that the State was surprised by the witness' nonappearance).  
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23           While the State did identify the named witness, and there is no dispute that  
24 said witness would be necessary as she is the named victim, the State failed to meet  
25 the other four requirements outlined in *Hill*. (2 AA, 455). At no point during the  
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1 State's motion was it indicated the expected testimony of the missing witness. (2  
2 AA, 456-7). At the time of the motion, the State argued it had previously contact  
3 with the missing witness and knew of her current address but had since lost contact.  
4 (2 AA, 457). Despite knowing the witness' address, the State never attempted to  
5 personally serve the missing witness. (2 AA, 455-9).  
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8 Additionally, the State never informed defense counsel nor the court of the  
9 date in which it last had contact with the missing witness or when the State learned  
10 the missing witness would be absent from the preliminary hearing. (2 AA, 455-9).  
11 Finally, the State never argued that the motion for a continuance was made in good  
12 faith and not for the purpose of delay. (2 AA, 455-7).  
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15 The State also failed to meet the standard required for "good cause" under  
16 *Bustos*. The State would have needed to show it was "surprised" by the missing  
17 witness' nonappearance; however, the State did not and could not argue it was  
18 surprised as the missing victim had previously informed the State she "refused to  
19 promise to appear." (2 AA, 455). Unlike *Bustos* where the prosecutor had valid  
20 subpoena returns, the State made no representations indicating it received any  
21 confirmation that the missing witness ever received the subpoena sent via the mail.  
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1 Most importantly, the Court stated it was not granting the State's motion  
2 under *Hill* or *Bustos*. (2 AA, 455) ("it wasn't technically a Bustos or a Hill ...  
3 Although I understand it doesn't technically fit under *Hill* or *Bustos*...").  
4

5 While the evidence is clear that the State's motion in this case was insufficient  
6 under *Hill* and *Bustos* and its progeny, Nevada law requires that either an affidavit  
7 or sworn testimony support the State's motion for a continuance. *See Clark*, 94 Nev.  
8 at 364; *see also Reason*, 94 Nev. at 300. In both of those cases, the Nevada Supreme  
9 Court held that the State's failure to submit an affidavit or provide sworn testimony  
10 required a denial of the State's motion for a continuance. *See Clark*, 94 Nev. at 364;  
11 *see also Reason*, 94 Nev. at 300. While the State did make representations on the  
12 record, at no point during this motion was the prosecutor under oath. In any of the  
13 above-cited cases where "good cause" was found, the prosecutors had at least  
14 submitted an affidavit or swore under oath as to the requisite "surprise." In this case,  
15 the State failed to comply with either of these requirements.  
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20 The State did not comply with the requirements of *Hill* and *Bustos*, so it must  
21 demonstrate good cause through other means for the Court to grant a continuance.  
22 "What constitutes 'good cause' is not amenable to a bright-line rule. The justice's  
23 court must review the totality of the circumstances to determine whether 'good  
24 cause' has been shown." *Sherriff v. Terpstra*, 111 Nev. 860, 863, 899 P.2d 548, 550  
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1 (1995). Under the totality of the circumstances, the State did not demonstrate good  
2 cause to continue Harris' preliminary hearing.

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

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

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, 458). As the witness did not accept the mailed subpoena  
4 by an oral promise to appear, the exception to personal service in NRS 174.315(3)  
5 does not apply in this case. The State argued at the date of the preliminary hearing  
6 that it sent the witness a subpoena via text, but no statute permits service by text  
7 message; to the contrary, the statute specifies that personal service is required.  
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10 Under the holding in *Terpstra*, the State's failure to even attempt to properly  
11 serve the witness requires dismissal of the case. Although not dispositive, the State's  
12 failure to personally serve the missing witness, despite knowing where she lived, is  
13 significant and shows a willful disregard for important procedures. In *Bustos*, the  
14 prosecutor had properly subpoenaed the missing witness and was truly surprised by  
15 the witness' nonappearance; in comparison, in *Salas v. State*, the prosecutor had not  
16 even issued a subpoena. In that case, the court held that failing to issue a subpoena  
17 was not good cause for a continuance. *See Salas v. Sherriff*, 91 Nev. 802, 543 P.2d  
18 1343 (1975).  
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23 In this case, the State did not even attempt proper service. While the State did  
24 mail a subpoena to the witness, without an oral promise to appear, simply mailing  
25 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.  
4

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*, P.2d at 318. The Nevada Supreme Court continues to strictly  
9 adhere to the important procedural rules regarding continuances. The State had a  
10 duty to prepare for the preliminary hearing and had a legal means to compel the  
11 presence of the witness but failed to do so. The State failed to follow the statutory  
12 requirements in serving a subpoena and failed to follow the basic procedural  
13 precepts by submitting a written affidavit or sworn testimony supporting its request  
14 for the continuance.  
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19 As the State's request failed to meet the standards outlined in *Hill* and *Bustos*,  
20 the State should not have received a continuance, and the case against Harris should  
21 have been dismissed. At the very least, the issue should have been presented to this  
22 Court for review at the direction of Harris to his Trial and Appellate Counsel.  
23 Failure to do so deprived Harris of important control over the objectives of his  
24 defense and protection from the State's willful disregard of his Constitutional right  
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1 to Due Process under the 5th and 14th Amendments to the United States  
2 Constitution.

3 In denying relief on this ground, the Amended Order states that the decision  
4 to proceed to trial rather than pursue a Writ of Mandamus was a “tactical decision”.  
5 However, Harris would like this Court to be aware that at the District Court level,  
6 Mr. Sheets had requested a continuance of the invoked speedy trial to file a Writ of  
7 Mandamus. (2 AA, 470). This matter was originally sent to “Overflow” in District  
8 Court on March 16, 2018, for trial. Mr. Sheets stated on the record that he wanted  
9 a 30-day continuance to file “pre-trial motions”. Harris would have testified and  
10 indicated that the “pretrial motion” referenced was the Writ of Mandamus. Judge  
11 Villani sent the matter to the matter back to Judge Johnson where the case  
12 originated. (2 AA, 470)  
13

14 On March 27, 2018, the matter was heard in front of Judge Johnson. (2 AA,  
15 471). Mr. Sheets reiterated his request granted the request over the objection of  
16 Harris – who remained invoked - finding that there was good cause due to Mr.  
17 Sheet’s stating he would file a writ of mandamus. (2 AA, 471). However, the Writ  
18 of Mandamus was never filed.  
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20 This would seem to counter the argument of a “tactical decision” not to file  
21 the Writ of Mandamus. Mr. Sheets specifically requested and was granted a  
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1 continuance to pursue a Writ of Mandamus, which was never done. Accordingly,  
2 Harris should be entitled to relief.

3  
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 of  
10 events during her arrest, at the preliminary hearing, and during trial. Harris contends  
11 that his trial counsel failed to adequately impeach Ms. Dotson with her prior  
12 inconsistent statements. Trial counsel indicated that his trial strategy was to  
13 impeach Ms. Dotson with her inconsistent testimony (1 AA, 77-8). Harris contends  
14 that failure to adequately impeach Ms. Dotson amounts to a failure to effectively  
15 cross examine the witness in furtherance of the defense strategy and therefore  
16 constitutes ineffective assistance of counsel. *See Brown v. State*, 877 P.2d 1071  
17 (Nev. 1994); *Warner v. State*, 102 Nev. 635 (Nev. 1986).  
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23 **Trial Counsel Ineffective For Failing to Present Body Cam Evidence**

24 As a second point of error, Harris stated in his Pro Per petition that Counsel  
25 was ineffective for failing to adequately cross examine the officers regarding the  
26 body cam of their interview with Ms. Dotson. Specifically, Harris states that the  
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1 officers 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. Harris contends that had he been provided the evidence he  
14 would have been in a better position to insist on presenting the evidence at trial or  
15 how or whether to testify. Harris contends that failure to provide the body cam  
16 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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23 **Appellate Counsel was Ineffective For Failing to Raise Arguments on**  
24 **Harris' Behalf**

25 As a fourth point of error, Harris stated in his Pro Per petition that Appellate  
26 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. Moreover, Harris states he was prejudiced because failure to raise those issues may prevent him from seeking review in Federal court.

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 by the inconsistent testimony of Ms. Dotson underlying  
2 his conviction.  
3

#### 4 **CONCLUSION**

5 In summary, and as set forth above and in the referenced exhibits to the  
6 Petition, Harris was clearly denied effective assistance of counsel during the pretrial  
7 stage of the proceedings, at trial, and on appeal. Additionally, Harris was denied his  
8 right to due process when he was not permitted to be present and testify at the  
9 evidentiary hearing on his post-conviction writ. Accordingly, it is respectfully  
10 requested the Court grant the following relief: consider the issue of the denial of the  
11 writ of mandamus and dismiss the case based on the State's disregard of Harris'  
12 rights at preliminary hearing, overturn his conviction based on ineffective  
13 assistance of trial counsel, and/or remand back to district court and conduct an  
14 evidentiary hearing with Harris present to testify.  
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20 DATED this: June 13, 2023

21 **DUSTIN R. MARCELLO, CHTD.**

22 /s/ Dustin R. Marcello

23 Dustin R. Marcello, Esq.  
24 Nevada Bar No.: 10134  
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Proportionately spaced, has a typeface of 14 points or more, and contains 7,898 out of the 14,000 word limit of NRAP 32(a)(7)(A)(i).

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.

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