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**IN THE SUPREME COURT OF THE STATE OF NEVADA**

MARCUS CAMPBELL,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent. /

**FILED**

CASE NO. 51021

JUN 02 2008

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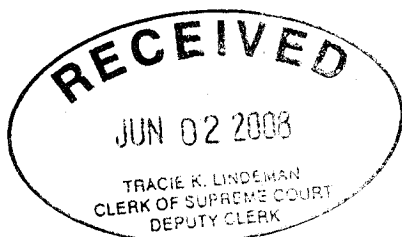
**Appeal from:**

**Eighth Judicial District Court**

**Judge Valerie Adair**

**APPELLANT'S OPENING BRIEF**

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**STATEMENT OF THE ISSUES**

- I. Whether prosecutorial misconduct during the opening arguments amounted to a deprivation of the appellant's right to confrontation.
- II. Whether the district court abused its discretion when it allowed a transcript prepared by the state's gang expert to be provided to the jury as a listening aid without also issuing a limiting instruction that the transcript itself is not evidence.



## **STATEMENT OF THE CASE**

Marcus Campbell ("MARCUS") comes before this Court to appeal his convictions for murder in the first degree with the use of a deadly weapon with intent to promote, further or assist a criminal gang; attempted murder with the use of a deadly weapon with the intent to promote, further or assist a criminal gang; and discharging a firearm at or into a vehicle with the intent to promote, further or assist a criminal gang. This Court should reverse Campbell's convictions because the State made references to the testimony expected from the victim's mother, which was followed by the district court's preclusion of such testimony. These remarks in the State's opening suggested that Campbell repeatedly threatened and harassed the victim prior to his murder. As a result of the State's misconduct, and the district court's subsequent ruling, Campbell was denied his right to confrontation.

In addition to the State's misconduct during opening argument, the district court abused its discretion when it allowed the jury to review a transcript of a MySpace video, prepared by the State's gang expert, during a screening of the MySpace video. The district court, over an objection by Campbell's counsel, allowed the jury to review this pre-prepared transcript by State's witness, and failed to give the jury a limiting instruction that the transcript itself was not evidence. Therefore, for the above reasons, Campbell files this appeal requesting a reversal of his convictions.

## **FACTS**

Marcus Campbell was arrested and charged with the following crimes: murder in the first degree with the use of a deadly weapon with intent to promote, further or assist a criminal gang; attempted murder with the use of a deadly weapon with the intent to promote, further or assist a criminal gang; and discharging a firearm at or into a vehicle with the intent to promote,



1 further or assist a criminal gang. At his arraignment hearing on May 3, 2007, Campbell pled  
2 not guilty to all charges.

3 A trial by jury was held beginning November 7, 2007 and continued for five days, until  
4 November 14, 2007. At trial, witnesses testified to the facts surrounding the events that  
5 transpired on January 28, 2007. Witnesses for the State testified that on January 28, 2007,  
6 Marcus Campbell traveled to Hassell Street in Las Vegas and shot into a vehicle driven by  
7 Devlon Mason. There were two other individuals in this vehicle, one of whom was the victim  
8 Patrick Russum. Mr. Russum died from his injuries. Billy Ray Jones, Sr., who also provided  
9 testimony, was injured as a result of this shooting.  
10

11 The State also produced one eyewitness, Devlon Mason, and one witness who identified  
12 Campbell as having been in the area of the shooting on that particular day, Billy Ray Jones, Sr.  
13 The State also produced several witnesses who testified to the fact that Campbell was a  
14 member of a gang named Squad Up, and that the victim Mr. Russum belonged to a rival gang  
15 by the name of The Wood. These witnesses also provided testimony relating to the history of  
16 bad relations between these two gangs, specifically regarding a "triggering" event resulting in  
17 the shooting of January 28, 2007. The State called Mr. Russum's mother, Angela Conway, to  
18 the stand to provide testimony that she knew Campbell had called her son and threatened him  
19 in the months before the January 28, 2007 shooting. The State called a series of witnesses who  
20 testified to forensic evidence.  
21  
22

23 Finally, the State called a gang expert, James Fink, to provide testimony regarding the  
24 gang culture in Las Vegas. Specifically, Mr. Fink provided testimony regarding a rap song  
25 written by Campbell, as well as testimony regarding a MySpace video starring Campbell and  
26 another individual, in which Campbell makes statements about his gang affiliation, and the fact  
27  
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1 that he knew how to find Mr. Russum. Mr. Fink testified to his interpretations of the comments  
2 made by Campbell in both the rap song and the MySpace video. Mr. Fink also prepared a  
3 transcript of the MySpace video for use by the jury when viewing the video during trial.

4 The jury found Campbell guilty of all charges. At the conclusion of the penalty phase,  
5 the district court judge sentenced Campbell as follows: with respect to Count One - murder in  
6 the first degree, life with the possibility of parole when a minimum of twenty (20) years has  
7 passed, plus an equal and consecutive term for the deadly weapon enhancement; with respect to  
8 Count Two - attempted murder, a minimum term of seventy-two (72) months and a maximum  
9 of two-hundred-forty (240) months, plus an equal and consecutive term for the criminal gang  
10 enhancement, to run concurrently with the sentence for Count One; with respect to Count Three  
11 - discharging a firearm at or into a vehicle, a minimum term of twelve (12) months and a  
12 maximum term of sixty (60) months, plus an equal and consecutive term for the criminal gang  
13 enhancement, to run consecutively with the sentence for Counts One and Two. See, Sentencing  
14 Transcript dated January 8, 2008, pages 13-14.

#### 15 SUMMARY OF THE ARGUMENT

16 Campbell asserts that: 1) his conviction should be overturned because the State's  
17 misconduct during opening arguments prevented him from exercising his right of  
18 confrontation; and 2) the district court abused its discretion when it permitted the jury to review  
19 a transcript of a MySpace video, prepared by the State's expert witness, and subsequently failed  
20 to issue a limiting instruction to the jury that the transcript itself was not evidence.

21 ///

22 ///

23 ///



## ARGUMENT

### **I. CAMPBELL'S CONVICTION SHOULD BE OVERTURNED BECAUSE THE STATE'S MISCONDUCT DURING OPENING ARGUMENTS RESULTED IN THE VIOLATION OF CAMPBELL'S RIGHT TO CONFRONTATION**

Where an appeal involves "questions of prosecutorial misconduct involving mixed questions of fact and law are reviewed *de novo*." United States v. Eric B., 86 F.3d 869, 877 (1996), (citing United States v. DeRosa, 783 F.2d 1401, 1404 (9<sup>th</sup> Cir. 1986)).

"In determining whether prosecutorial misconduct has deprived a defendant of a fair trial, we inquire as to 'whether the prosecutor's statements so infected the proceedings with unfairness as to make the results a denial of due process.'" Rudin v. State, 120 Nev. 121, 136-137; 86 P.3d 572 (2004). A criminal conviction will be overturned if, viewing the improper behavior of the prosecutor as a whole, in the context of the record, the prosecutorial misconduct denied the defendant a fair trial. Id., (citing United States v. Young, 470 U.S. 1, 11 (1985)). Prosecutorial misconduct can not be considered harmless unless the court is convinced that it "was harmless beyond a reasonable doubt." Id., at 137, (quoting Witherow v. State, 104 Nev. 721, 724; 765 P.2d 1153, 1155 (1988)). Therefore, in cases where an appellant alleges prosecutorial misconduct, the Nevada Supreme Court applies a harmless error standard of review. Williams v. State, 103 Nev. 106, 734 P.2d 700 (1987).

In Frazier v. Cupp, Warden, the United States Supreme Court held that there was no deprivation of the right to confrontation as a result of a prosecutor's opening statement where the trial court instructed the jury that the statements by the prosecutor were not evidence and where the prosecutor acted in good faith in his expectation that a witness would testify in a certain way. 394 U.S. 731, 736 (1969).





1 In Frazier, the appellant argued that arguments made during the State's opening  
2 argument were prejudicial. Id., at 733. Specifically, the State included in its opening a  
3 summary of testimony expected from a witness who had previously pled guilty to the same  
4 offense as the appellant. Id., at 733-734. The witness was expected to testify to the appellant's  
5 confession, as well as other details relating to the alleged crime. The State included a summary  
6 of these details in its opening argument. Id. Subsequently, when the witness took the stand for  
7 direct examination, the witness invoked the privilege of the Fifth Amendment and refused to  
8 testify. Id. Appellant argued on appeal that the State's summary of anticipated testimony and  
9 the witness' subsequent failure to testify and avoid cross examination prevented appellant from  
10 his right to confrontation of that witness. Id. The Court ruled that the appellant was not denied  
11 his right to confrontation because the State had a good faith expectation that the witness would  
12 testify in a certain way; and because the district court had instructed the jury that opening  
13 statements were not considered evidence. Id., at page 735. Specifically, the Court stated that  
14 "certainly not every variance between the advance description and the actual presentation  
15 constitutes reversible error, when a proper limiting instruction has been given." Id., at page  
16 736.

20 This standard of review was further elucidated by the Court in Furman v. Wood, where  
21 the Court held that "prosecutorial misconduct does not automatically invalidate a conviction. It  
22 is a ground for relief if it 'so infected the trial with unfairness as to make the resultant  
23 conviction a denial of due process.'" 190 F.3d 1002, 1006 (1999) (citing Darden v.  
24 Wainwright, 477 U.S. 168, 181 (1986)).

26 In Miller v. State of Nevada, the Court held that "failure to object during trial generally  
27 precludes appellate consideration of an issue." 110 P.3d 53, 57 (2005) (citing Gallego v. State  
28



1 118 Nev. 348, 365, 23 P.3d 227 (2001)). Where there is a failure to object, the court may still  
2 utilize the plain error standard of review “affecting [the defendant’s] substantial rights.” *Id.*, at  
3 pg. 58 (citing N.R.S. 178.602, which states “plain errors or defects affecting substantial rights  
4 may be noticed although they were not brought to the attention of the court”). In applying the  
5 “plain error” standard of review, the Court must determine whether the plain error affected the  
6 substantial rights of the defendant. *Id.* Specifically, “A plain error affects substantial rights if it  
7 ‘had a prejudicial impact on the verdict when viewed in context of the trial as a whole.’” *Id.*,  
8 (citing Rowland v. State, 118 Nev. 31, 38, 39 P. 3d 114, 118 (2002)).

9  
10 During opening statements, the State referenced a video which had been posted onto  
11 MySpace in October, 2006 and its content. Campbell can be seen in this video with another  
12 individual, and one phrase spoken in this video references “PT” (aka Patrick Russum), the fact  
13 that he’s in Arizona, and that he will be called long distance. See Trial Transcript (hereinafter  
14 “TT”) at Day 2, page 81, lines 11-13. Prejudicial prosecutorial misconduct occurred in this  
15 case when the State referenced testimony expected from the victim’s mother, Angela Conway,  
16 in its opening statement. Specifically, the State stated “in fact, you’ll hear from Angela  
17 Conway that in 2006, they had sent Patrick Russum to Arizona because they were afraid for  
18 him because he had been receiving threats.” *Id.*, at lines 14-16. At the time these statements  
19 were made by the State, Campbell’s counsel did not object. Cumulatively, these statements by  
20 the State resulted in great prejudice against Campbell.

21  
22  
23 When Angela Conway took the stand on Day Three of trial, Campbell’s counsel  
24 objected to the content of Ms. Conway’s testimony, specifically arguing that the statements  
25 going to be provided by Ms. Conway constituted hearsay. See, TT at Day 3, page 6-7. As a  
26 result of counsel’s objection, the district court judge brought in Ms. Conway outside the  
27  
28



1 presence of the jury, but on the record, and allowed the prosecutor to question her regarding the  
2 content of her testimony. Ms. Conway provided testimony regarding the fact that she was the  
3 victim Patrick Russum's mother, and that she and her son were driving together when her son  
4 received a telephone call. Id., at page 9, lines 16-18. She further testified that her son made  
5 several statements to the caller to the effect of "stop calling me." Id., at lines 19-23. After  
6 asking her son who it was on the phone, Patrick stated that "Muck keep calling me and  
7 threatening me, he was calling me and threatening me again." Id., at lines 23-25, page 10 at line  
8 1. Patrick then showed Ms. Conway his phone, and she testified that she saw Muck's name on  
9 the phone's screen. Id., at page 10, lines 3-4. Through testimony by other witnesses at trial, it  
10 came to be known that Campbell also went by the name of "Muck."

11  
12 As a result of this testimony outside the presence of the jury, the district court judge  
13 ruled that Ms. Conway could testify to what she heard Patrick say on the telephone that day,  
14 and she could testify to what she saw on the telephone screen. See, TT at Day 3, page 12, lines  
15 1-14. When Ms. Conway did take the stand in the presence of the jury, her testimony was much  
16 more limited. Ms. Conway stated on the record that a couple of months before Patrick's death,  
17 she observed him receive a phone call. Id., at page 16, lines 21-25. Ms. Conway testified that  
18 her son stated during the telephone conversation "man, stop calling me and threatening me."  
19 Id., at page 17, lines 18-24. Ms. Conway also stated that she saw the screen of the cell phone  
20 upon the conclusion of the telephone call, and the name on the screen was "Muck." Id., at page  
21 18, lines 2-6.  
22  
23  
24

25 At no point during either examination of Ms. Conway did she testify that her son was in  
26 Arizona for any period of time, nor did she testify that her son was in Arizona as a direct result  
27 of threats having been directed at him. As a result, Campbell did not have the opportunity to  
28



1 cross examine Ms. Conway on the issue of whether Mr. Russum was in Arizona for a period of  
2 time, and the reason for his stay in Arizona. The district court's limitation of Ms. Conway's  
3 testimony deprived Campbell of the right to confront Ms. Conway on the issues of the prior  
4 threats and Mr. Russum's need to flee the state. Campbell could not confront the issues  
5 brought to light in the State's opening argument.

6  
7 The instant case differs from Frazier in that the State did call Ms. Conway to the stand,  
8 however, the State never directly questioned Ms. Conway about her son's receipt of threats, nor  
9 did the State directly question Ms. Conway about her son's stay in Arizona. While it is true that  
10 Campbell's counsel successfully limited Ms. Conway's testimony regarding the prior threats,  
11 there were no limiting instructions by the district court with respect to Mr. Russum's stay in  
12 Arizona, or why he had to leave the state of Nevada. The State had no reasonable good faith  
13 expectation that Ms. Conway would testify to the fact that her son had fled to the state of  
14 Arizona, because the State did not even ask the questions of Ms. Conway upon direct  
15 examination that would have elicited such testimony.

16  
17 Campbell's counsel did not object at the conclusion of Ms. Conway's testimony, nor  
18 did Campbell's counsel request a limiting instruction be issued to the jury with respect to the  
19 comments made by the State during opening argument. Therefore, the plain error analysis  
20 should be applied by the Court.

21  
22 The statements made by the State in opening argument alluded that Campbell had been  
23 threatening Mr. Russum in the months before he was killed. Such were the threats that Mr.  
24 Russum was sent by his family to Arizona. Evidence and testimony presented during trial  
25 further supported the theory that Campbell was the token member of Squad Up to eliminate a  
26 member of the Wood, and the MySpace video presented Campbell making threatening  
27  
28



1 statements about Mr. Russum, a member of the Wood. Taken in context of the entire trial, the  
2 statements by the State in opening argument prejudiced the verdict rendered against the  
3 defendant. The evidence against Campbell was circumstantial at best, and of the many people  
4 present at the scene at the time the crime was committed, only one individual provided  
5 eyewitness testimony. The jury was undoubtedly influenced by the statements made by the  
6 State in opening argument regarding the threats made against the victim, and the victim's need  
7 to flee the state of Nevada.  
8

9 Campbell's right to confrontation was precluded when the State spoke of Ms. Conway's  
10 anticipated testimony during opening argument, but upon direct examination no such testimony  
11 was elicited. Campbell was not able to cross examine Ms. Conway with respect to the  
12 statements made by the State during opening argument, and as a result, Campbell's rights were  
13 substantially affected, and he suffered great prejudice in the final verdict. Therefore,  
14 Campbell's convictions should be reversed.  
15

16 **II. THE DISTRICT COURT ABUSED ITS DISCRETION IN ALLOWING THE**  
17 **JURY TO REVIEW A TRANSCRIPT PREPARED BY THE STATE'S EXPERT**  
18 **WITHOUT ISSUING A LIMITING INSTRUCTION TO THE JURY THAT THE**  
19 **TRANSCRIPT ITSELF WAS NOT EVIDENCE**

20 A district court's ruling on an evidentiary matter is reviewed for an abuse of discretion.  
21 United States v. Weller, 238 F.3d 1215, 1220 (10<sup>th</sup> Cir. 2001). "In order to reverse a district  
22 court judgment of an evidentiary ruling, [an appellant] must make a clear showing [he] suffered  
23 prejudice, and the ruling was inconsistent with substantial justice or affected his substantial  
24 rights." Coletti v. Cudd Pressure Control, 165 F.3d 767, 773 (10<sup>th</sup> Cir. 1999).

25 When determining whether a transcript can be utilized as a listening aid the standard of  
26 review is for an abuse of discretion. United States v. Oscar Acosta Delgado, 357 F. 3d 1061,  
27 1070 (2004), (citing United States v. Armijo, 5 F.3d 1229, 1234 (9<sup>th</sup> Cir. 1993)) [hereinafter  
28



1 Delgado]. This review includes, in relevant part, an analysis of the following: “the steps taken  
2 to ensure the accuracy of the transcripts...whether the jury was instructed that the tape, rather  
3 than the transcript, was evidence...” Id.

4 In Delgado, the jury was presented with transcripts of telephone calls and a video tape  
5 recording of the defendant engaging with another individual in drug transactions. Id., at page  
6 1070. This Court did not admit the transcripts into evidence, nor did the Court allow the jury to  
7 review these transcripts during deliberations. Id. However, the Court “specifically instructed  
8 the jury that the transcripts were provided only to help the jurors understand the recordings and  
9 that the recordings themselves constituted the evidence.” Id. The Court of Appeals affirmed  
10 the lower court’s ruling that allowed the transcripts to be utilized as a listening aid, even where  
11 there were issues regarding the accuracy of the prepared transcripts, and where the jury had  
12 ample time to review the transcripts and compare the transcripts to the actual recordings. Id., at  
13 page 1071.

14 In Loren v. State of Florida, the Court held that it is not cause for reversal where the  
15 court allows a jury to read an authenticated transcript of a recorded conversation where the  
16 court also issues a limiting instruction to the jury that the transcript is only to be used as a  
17 listening aid, and is not to be considered evidence. 518 So. 2d 342, 347-348 (1987).

18 In Loren, the State provided transcripts of recorded conversations between the  
19 defendant and another individual to the jury for review. The transcripts were authenticated by  
20 lengthy testimony, and the court issued a limiting instruction to the jury, ruling that the  
21 transcript “could be used by the jury, as the court instructed the jury ‘only as an aid to your  
22 understanding and viewing’ during the playing of the tapes, but the transcript would not be  
23 allowed to be taken by them into the jury room.” Id., at page 347-348.



1 In State v. Griffin, the Court held that “a transcript of a tape may be given to a jury  
2 where the jury is instructed that the tape, and not the transcript is the actual evidence.” 2003  
3 Tenn. Crim. App. LEXIS 46 (citing State v. Barnard, 899 S.W.2d 617, 623-624 (Tenn. Crim  
4 App. 1994)).

5  
6 In the instant case, a MySpace video starring Campbell and another individual was  
7 entered into evidence and shown to the jury. The jury saw the video on Day 3 of the trial during  
8 the testimony of Jason Darr. See, TT at Day 3, page 142, line 16. Mr. Darr did not testify as to  
9 the meaning of this video, nor did he testify to any specific statements made by the participants  
10 of this video. It was simply shown to the jury.

11  
12 On Day 4 of trial, James Fink was presented as an expert witness for the State. Mr. Fink  
13 testified as to his credentials and experience, and was certified as a gang expert. He provided  
14 lengthy testimony regarding the existence of gangs in Las Vegas, as well as an explanation of  
15 the cultures of the gangs Campbell and the victim belonged to. See, TT at Day 4, generally.  
16 During the course of his analysis of these particular gangs, and his work with the Las Vegas  
17 Metropolitan Police Department in the Gang Unit, Mr. Fink had occasion to review a MySpace  
18 video featuring Campbell and one other individual. See, TT at Day 4, page 89, lines 14-16. Mr.  
19 Fink further testified that he prepared a transcript of the contents of this MySpace Video after  
20 reviewing the video several times. Id., at lines 17-21. The State then offered a transcript for the  
21 jury to review while the MySpace video was being played. Id., at lines 22-24.

22  
23 Campbell’s counsel objected to the use of this transcript. While the objection is not  
24 clear on the record, counsel did ask for a bench conference regarding this issue. See, TT at Day  
25 4, page 89, line 25. The district court did not rule on this objection on the record. However,  
26 upon information provided by Campbell’s trial counsel, the transcript of the MySpace video  
27  
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1 was presented to the jury to assist in the viewing of the MySpace video. The district court judge  
2 did not issue a limiting instruction to the jury on the record with respect to this transcript. This  
3 transcript was not offered into evidence, and therefore, was not admitted as an exhibit.

4 The State played the MySpace video for the jury, and paused intermittently so that Mr.  
5 Fink could offer his expert opinion as to what the participants in the video were talking about in  
6 layman's terms. See, TT at Day 4, pages 90-98. While Mr. Fink does not read into the record  
7 the transcript itself, at times he does quote verbatim what he believes the participants in the  
8 video are saying. See, TT at Day 4, page 91, lines 12, 23-25; page 92, lines 2-8; page 93, lines  
9 4-5, 23-24; page 94, lines 5-6; page 95, lines 4-5, 19-25; page 97, lines 1-7. In fact, the State  
10 stopped and re-started the playing of the video *ten* times during this portion of Mr. Fink's direct  
11 examination.

12 The district court abused its discretion in allowing the jury to review a transcript  
13 prepared by the State's own gang expert while watching a video. By providing the jury with a  
14 transcript of the video's contents, the State effectively substituted it's own mind for the minds  
15 of the jurors. The jury was not shown the video in its entirety before Mr. Fink began is  
16 dissection of the video's meaning. The jury was not permitted even a spare moment between  
17 watching portions of the video and then being told by the expert what the video's participants  
18 intended to say. All the while the jury was supposed to be watching the video and weighing its  
19 credibility and veracity, the jury had a written transcript to review instead. And, after the  
20 conclusion of this portion of Mr. Fink's testimony, the judge did not issue any sort of limiting  
21 instruction to the jury regarding the fact that the *video* was the evidence, and the transcript was  
22 not.  
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1 In contrast to the rulings in Loren, Delgado, and Griffin above, the district court judge  
2 in the instant case did not specifically state on the record that the jury was not to consider the  
3 transcript of the MySpace video as evidence. This limiting instruction, as given in the cases  
4 cited above, is a necessity in order to preserve substantial justice and prevent undue prejudice  
5 to the defendant.  
6

7 Because the jury was unable to properly evaluate the video on its own merit, and the  
8 transcript substituted for the judgment of the jurors, Campbell suffered great prejudice, and the  
9 district court's ruling allowing the jury to review the transcript during the showing of the video  
10 was inconsistent with substantial justice. Therefore, Campbell's convictions should be  
11 reversed.  
12

### 13 CONCLUSION

14 Campbell convictions should be reversed because the State's misconduct during  
15 opening arguments prevented him from exercising his right of confrontation. Additionally,  
16 Campbell's convictions should be reversed because the district court abused its discretion when  
17 it permitted the jury to review a transcript of a MySpace video, prepared by the State's expert  
18 witness, and subsequently failed to issue a limiting instruction to the jury that the transcript  
19 itself was not evidence.  
20

21 DATED THIS 29 day of MAY, 2008.

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ATTORNEY'S CERTIFICATE OF COMPLIANCE

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

Dated this 29 day of MAY, 2008.

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**CERTIFICATE OF SERVICE**

I certify that on the 29<sup>th</sup> day of May, 2008, I served a copy of this completed Appellant's Opening Brief upon all counsel of record:

\_\_\_\_\_ by personally serving it upon him/her; or  
X by mailing it by first class mail with sufficient postage prepaid to the following address(es):

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DATED this 29<sup>th</sup> day of May, 2008.

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