ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

DENNIS M. GRIGSBY,

Appellant,

vs.

STATE OF NEVADA,

Respondent.

Case No. 53627

APPELLANT'S OPENING BRIEF

(Appeal from Jury Verdict)

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11-05340

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APPELLANT'S OPENING BRIEF

STATEMENT OF THE ISSUES

1. Did the district court err in not accommodating a full hearing for the defendant to air additional reasons for his motion to dismiss counsel?
2. Did the district court err in admitting evidence of the arson of the defendant's car?
3. Was it prosecutorial misconduct to elicit answers that bore upon the defendant's invocation of the right to remain silent?
4. Did the district court err in allowing demonstrative evidence of a gun when no gun was recovered?
5. Did the district court err in rejecting the defendant's proposed jury instructions?

STATEMENT OF THE CASE

On 4-4-08, the State charged Dennis Grigsby (hereinafter "Grigsby" "Defendant" "Appellant") by way of a Criminal Complaint with Murder (Open) as well as Ex-Felon in Possession of a Firearm. (AA Vol. 1, p. 1). After a preliminary hearing, Grigsby was bound over to the District Court where an Information charging the same was filed on 8-11-08. (AA Vol. 1, pp. 2-4). Prior to the jury trial, the State filed an Amended Information removing the Ex-Felon in Possession charge pursuant to caselaw. (AA Vol. 1, 69-70). There were numerous pre-trial motions including one involving other bad acts and a discovery motion. (AA Vol. 1, pp. 5-46). A jury trial commenced and prior to the second day of testimony, Mr. Grigsby filled a proper person motion requesting to dismiss counsel. (AA

Vol. 3, p. 311-315). An abbreviated hearing commenced whereupon the Motion was denied based on a deficiency of factual support from the Defendant. (AA Vol. 2, p. 158-166). Following the jury trial, Mr. Grigsby was found guilty of first degree murder with use of a deadly weapon and was ultimately sentenced by the jury to life in prison without the possibility of parole in the Nevada Department of Corrections with 330 days credit for time served. (AA Vol. 5, pp. 747-749).

Grigsby's Judgment of Conviction was filed on 4-6-09. (AA Vol. 5, pp. 748). Notice of Appeal was timely filed on 4-14-09. (AA Vol. 5, pp. 750-1). The instant appeal follows.

STATEMENT OF FACTS

In a mostly circumstantial case, the State alleged that Mr. Grigsby, driven by jealousy, confronted and shot dead the boyfriend of his very recently estranged wife. (AA Vol. 4, 575-577). Mrs. Grigsby "boyfriend" was named Anthony Davis (hereinafter "Davis") whose cause of death on or about April 2, 2008 was a gunshot to the head. (AA Vol. 1, p. 127). Mr. and Mrs. Grigsby had been married approximately two years and had a child in common. (AA Vol. 2, p. 216-7).

The State's theory began with the defendant's wife Tina Grigsby being with the decedent, Anthony Davis (hereinafter "Davis"), on the day of the shooting. (AA Vol. 2, p. 253-5). Both the decedent and Mr. Grigsby apparently lived in the same apartment complex which was the Lake Mead Estates located at 2068 North Nellis in Las Vegas, Nevada. (AA Vol. 1, p. 139-40; Vol. 2, p. 249). On the day in question, Mrs. Grigsby and Mr. Davis were at a nearby gas stop/taco shop where she spotted Mr. Grigsby. (AA Vol. 2, 250-53). There was no evidence that Mr. Grigsby saw them. Mrs. Grigsby and Mr. Davis left without getting food and went to Mr. Davis' nearby apartment. (AA Vol. 2, 253-6).

Mrs. Grigsby testified that Mr. Davis announced he was leaving the apartment allegedly to get a diaper bag from the car and get food. (AA Vol. 2, p. 256). There was no evidence introduced that he had car keys in his pocket. Indeed, Mrs. Grigsby testified he did not have the car keys when he left the apartment. (AA Vol. 2, p. 295, lines 13-14). However, there was evidence that Mr. Davis possessed a belt-buckle containing a box cutter described as "approximately 4 inches long. And it's one that folds open, and then it has a little razor blade at the end of it...." (AA Vol. 3, p. 341-343). Mr. Davis was also at or above the legal limit for alcohol while driving (.08) and had cocaine and marijuana metabolite in his blood at the time. (AA Vol. 1, pp. 125-6).

Contemporaneous with Mr. Davis leaving the apartment allegedly to get "food and the diaper bag," Mrs. Grigsby testified she heard the voice of Mr. Grigsby shouting. She heard this prior to Mr. Davis leaving the apartment and testified she told him not to go out. He went anyway. She also testified she caught a glimpse of a "red hoodie" consistent with a piece of apparel she knew Mr. Grigsby to wear. She never physically saw Mr. Grigsby outside. (AA Vol. 2, pp. 256-8).

Approximately 10-15 minutes later, a witness named Gilbert Arenas testified he heard a loud "altercation" followed by three gun shots. (AA Vol. 2, p. 187-8). It is a reasonable conclusion that one of those gunshots was the cause of Mr. Davis' death. The record reflects that there were no eyewitnesses to the shooting itself. One witness however identified seeing a person in a "red-hoodie" piece of apparel in an area near the shooting a significant time prior to the time of the shooting who was arguing with two other people. (AA Vol. 2, p. 204). That witness, Luis Gomez, did NOT identify the Defendant in court as one of the people in the argument. (AA Vol. 2, p. 206-7).

Police responded and found shell casings but no gun. They also found a bag of tacos (AA Vol. 3, p. 348) purportedly (but not proven to be) belonging to Mr. Davis and thereby the suggestion was made that Mr. Davis had returned to the neighborhood taco shop to get the food he sought and was returning to his home. The record is devoid of any other testamentary or physical evidence linking tacos found nearby to Mr. Davis.

Police developed Mr. Grigsby as a suspect because of Mrs. Grigsby's suggestion that Mr. Grigsby was nearby prior to the shooting, that he owned a gun and that there were the ostensible "jealousy" issues. Mr. Grigsby, however, was not found at or near the scene. The State introduced evidence that he had left the jurisdiction shortly after Mr. Davis was shot as consciousness of guilt. Mr. Grigsby was actually arrested in Sacramento, California on or about April 23, 2008. (AA Vol. 4, p. 494). Mr. Grigsby's car was found in Seattle, Washington and had been burned as a result of alleged arson. The fact of the arson was introduced over the Defense objection. (AA Vol. 3, pp. 470-80). There was also evidence admitted to suggest that Mr. Grigsby was attempting to change his identity. (AA Vol. 4, p. 541-2). There was also evidence adduced that Mr. Grigsby missed work. (AA Vol. 3, p. 438).

Upon searching a residence Mr. Grigsby was purported to live at, the police found ammunition that was of a "consistent" characteristic with that found at the scene of Mr. Davis' shooting. (AA Vol. 4, pp. 514-20). No gun was ever found, though the State over objection was allowed to admit a picture of a gun that was capable of discharging the bullets that killed Mr. Davis. No such photo appears to have been produced in discovery (AA Vol. 4, pp. 502-505).

Mr. Grigsby made no incriminating statements and there was no testimony that he had confessed to this crime. During the trial, however, Mr. Grigsby did attempt to have his

appointed counsel discharged and filed a motion in support of that position. A very brief hearing ensued whereupon Mr. Grigsby expressed hesitancy to disclose the exact nature of the alleged "breakdown in communication and irreconcilable differences" for fear of losing of the attorney-client privilege. The judge summarily dismissed the motion based on inadequacy of grounds for dismissal of counsel and trial proceeded. (AA Vol. 2, p. 158-166).

At closings the defense argued inadequacy of physical evidence and lack of compete and thorough investigation by the police. (AA Vol. 4, pp. 607-630). The State argued that Mr. Grigsby had the motive (jealousy), opportunity and ability to kill Mr. Davis and heavily emphasized that his "flight" to another jurisdiction was consciousness of his guilt. There was also a suggestion that Mr. Grigsby was "lying in wait" for Mr. Davis premised on the time lapse between exiting the apartment and shooting as well as the idea that the tacos found belonged to Mr. Davis and therefore he had made it to the taco shop and was heading back when he was shot. (AA Vol. 4, 574-607). Mr. Grigsby objected to the instruction given and offered the Court a jury instruction regarding "lying in wait" that was rejected. (AA Vol. 4, p. 565-569; Vol. 5, p. 681).

The jury found Mr. Grigsby guilty of first-degree murder and sentenced him to life in prison without the possibility of parole. (Vol. 5, pp.742-747).

ARGUMENT

I. THE DISTRICT COURT ERRED IN NOT ACCOMMODATING A FULL HEARING FOR THE DEFENDANT TO AIR ADDITIONAL REASONS FOR HIS MOTION TO DISMISS COUNSEL

The Sixth Amendment right to effective assistance of counsel applies at all critical stages of a criminal proceeding unless competently waived. **Faretta v.. California**, 422 U.S. 806, 807 (1975). To compel a criminal defendant to undergo a trial with the assistance of an attorney with

whom he has become embroiled in irreconcilable conflict is to deprive the defendant of any counsel whatsoever. **United States v. Moore,** 159 F.3d 1154, 1159-60 (9th Cir.1998). In **Moore**, the 9th Circuit Court of Appeals stated, "if the relationship between lawyer and client completely collapses, the refusal to substitute new counsel violates Moore's Sixth Amendment right to effective assistance of counsel." citing **Brown v. Craven**, 424 F.2d 1166, 1170 (9th Cir.1970).

In the present case, Mr. Grigsby raised the issue, but upon the insistence by the trial court to specifically define the "irreconcilable differences" averred in his Motion, he literally froze and felt that somehow he would lose the benefit of the attorney client privilege. Even though the Court attempted to explain (once the prosecutors had left the room), that any privilege would be maintained, the circumstances and the impatient tone of Judge Mosley screams from the pages of the record that more accommodating proceeding needed to commence. While the trial judge did allow a short recess to confer with his attorneys, it must be noted that these are the same attorneys Mr. Grigsby indicated he had irreconcilable differences with. At a minimum, the trial court should have given Mr. Grigsby independent, conflict-free counsel with whom to consult.

An indigent defendant exerting his right to have effective and/or conflict-free counsel must be afforded at least minimal accommodation to be able to address the specific queries of the court in a hearing of such potential magnitude. The record however reveals Mr. Grigsby desirous of explaining the conflict to the court, but unsure of the import on his rights. Whatever accommodations can be gleaned from the record as being made available, they were woefully inadequate and a violation of his Sixth Amendment rights. **Id**.

II. THE DISTRICT COURT ERRED IN ADMITTING EVIDENCE OF THE ARSON OF THE DEFENDANT'S CAR

Generally speaking, **NRS 48.045(2)** provides that "Evidence of other crimes, wrongs or *acts* is not admissible to prove the character of a person in order to show that the person acted in conformity therewith." (Emphasis added).

Whether or not an actual crime, evidence was admitted over objection that suggested that Mr. Grigsby set his own car ablaze and changed identification upon that car. Mr. Grigsby had briefed the matter (A. App. Vol. 1, 21-25, 42-46) and believed that he was going to get a full-blown so-called *Petrocelli* hearing wherein the rule of exclusion would be in effect and the State would have to show by clear and convincing evidence that Mr. Grigsby was responsible for the act, as well as that the probative value outweighed the prejudicial impact of the evidence. See **Walker v. State,** 116 Nev. 442, 997 P.2d 803 (2000).

The State, however, argued that since the burning of one's own car is not a crime that a *Petrocelli* hearing is not necessary (AA Vol. 1, p. 78) and the Court agreed (AA Vol. 1, p. 79, lines 7-8).

First, intentionally setting fire to an automobile in a public place must be conceded to be abhorrent and disturbing behavior. The chances that the jury believing that a person who sets intentionally sets fire to a vehicle with value in a public place is capable of violence seems self-evident. It is virtually common knowledge that acts of setting fire to objects is the sign of a troubled mind, for their can be no other reason to commit such an act. And that is the key – it an "another act" covered by **NRS 48.045(2).** Next, the record is devoid of the Court considering whether the Defendant was by clear and convincing evidence responsible for the act. Even if the Court did hold the required hearing (though it did not), there is no direct evidence that Mr. Grigsby was responsible for the torching of the car. There certainly were no eyewitnesses or video, nor was their genetic or other scientific evidence linked to Mr. Grigsby. Finally, the probative value of this bizarre and arguably violent act of intentionally torching a

vehicle was neither necessary nor relevant enough to establish an outweighing probative value. Ostensibly, the State (who argued the point *ad nauseum* in its closing arguments), intended to show it as evidence of flight and so-called consciousness of guilt. However, on the necessity point, the State already had shown the Defendant was a no-show at work, was in a different jurisdiction and had even attempted to change his identity. (AA Vol. 3, p. 438, Vol. 4, p. 494, 541-2).

The use of this questionable "other act" was not necessary for the State to make its point, in fact it was redundant and given the prejudicial impact it was improper to admit. Additionally, it's not even good consciousness of guilt evidence and the Defendant disputes that point. Destroying ones own car (which Mr. Grigsby maintains was not a proven fact), does not make more probative that he killed Mr. Davis; in the light most favorable to the State it arguably shows a desire to rid himself of an item from his past. At any rate, to the extent that the State had already ample evidence of flight and actual change of identity in evidence, it was error to admit this evidence, but it was reversible error to do so without even a *Petrocelli* hearing.

III. IT WAS PROSECUTORIAL MISCONDUCT TO ELICIT ANSWERS THAT BORE UPON THE DEFENDANT'S INVOCATION OF THE RIGHT TO REMAIN SILENT

This Court has recognized that a "direct reference to a defendant's decision not to testify is always a violation of the **Fifth Amendment**." **Harkness v. State**, 107 Nev. 800, 803, 820 P.2d 759, 761 (1991)(emphasis added). Similarly, the State may not comment on or elicit testimony that comments on a defendant's post-arrest silence. **Murray v. State**, 113 Nev. 11, 17, 930 P.2d 121, 124 (1997) (holding that the prosecution is forbidden to comment at trial upon a defendant's election to remain silent following his arrest and after being advised of his rights as required under *Miranda*).

In the case, *sub judice*, the prosecutor cleverly, but transparently, elicited from Mr.

Grigsby's arresting officer that during his post-custodial status, Mr. Grigsby did not offer a statement expressing surprise at being arrested. The exchange reveals a prosecutor obviously aware of the absolute prohibition of eliciting post-arrest silence engaging in gamesmanship with the Defendant's Constitutional rights, to wit:

Q: Would you have also included if he would have made statements at the time he was taken into custody? (AA Vol. 4, page 497 (trans. 49, lines 7-9)).

The prosecutor, however, knew that the defendant did NOT make ANY statements post-arrest. (The record is devoid of any suggestion that Mr. Grigsby made any post-arrest statements to anyone). Therefore, the prosecutor was trying to comment by the lack of statement in the officer report that he must have remained silent. There is NO relevancy whatsoever of Mr. Grigsby's post-arrest silence and indeed the suggestion that he chose to remain silent as making more probative his guilt is and blatant and offensive Constitutional violation. And when the officer did not respond to the question (in the way the prosecutor wanted), the unsatisfied prosecutor did not let it go, to wit:

Q: Is there anything in your report, or do you recall anything about whether or not the defendant expressed surprise about being taken into custody?

THE DEFENSE: I'm going to object your Honor. Can we approach?

(whereupon a conference was held at the bench)

Q: Agent Serra, is it reflected in your report at the time the defendant was taken into custody if he expressed surprise at being arrested?

A: It's not reflected in my report.

Q: Is it reflected in your report whether or not the defendant asked why he was being arrested?

A: It's not reflected in my report.

THE STATE: I have no further questions. (AA Vol. 4, p. 497).

Clearly, the State with this dramatic flurry to end its direct examination could only have one goal in mind – show the jury that by there being no statement of Mr. Grigsby in the officer's record (i.e. his silence!) that he must be guilty of the offense. In other words, through his clever backdoor eliciting of silence, the State was able to communicate to the jury that if he was truly innocent he would have spoke after being arrested. Such is a fundamental violation of due process and supports reversal.

Additionally, and while contemporaneously preserved, the Defense made further record and asked for a mistrial which was denied. (AA Vol. 4, pp. 504-5). "[I]t is as much [a prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." **Berger v. United States**, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935).

IV. THE DISTRICT COURT ERRED IN ALLOWING "DEMONSTRATIVE EVIDENCE" OF A GUN WHEN NO GUN WAS RECOVERED

During the ballistic testing in the case, *sub judice*, the State's expert used a firearm not in any way connected to the instant offense or the Defendant. It is apparently uncontested that a photograph of this weapon which was offered over objection at trial was presented to the defense during the discovery process. (AA Vol. 4, pp. 502-4). Indeed, the Defendant had filed a Motion for Discovery which was not contested by the State. (AA Vol. 1, pp. 5-20). Specifically, the Defendant had requested "any photographs the State intends to introducing as evidence." (AA Vol. 1, p. 6, lines 3-6).

Upon the attempted introduction of the photo, the Defense objected offering two grounds including failure to produce during discovery as well as the prejudicial impact outweighing the probative impact and the likelihood of confusing the jury in violation of **NRS 48.035.** (AA Vol.

4, pp. 502-4).

Simply stated, there was no gun recovered in this case. As such, and while its undisputed that a gun was used to kill Mr. Davis, there was no good reason to show a picture of the gun used by the State's expert. There was testimony that there were NUMEROUS types of guns that could have shot the bullet that killed Mr. Davis. To physically make a representation of that unknown weapon runs the risk of a strong attribution to Mr. Davis or worse that perhaps the State did find the gun, but that the jury is not being told for some evidentiary reason of its existence. One could speculate endlessly what goes through the minds of the jury when presented a non-relevant photo of a gun only "possibly" related to actual murder weapon and why they are receiving it. So why are they receiving it? What fact is made more likely to occur than not by the use of the photograph as is required for the introduction of evidence under **NRS 48.015**, et. al.? There is none.

Moreover, the Defense was taken by surprise by this piece of evidence as it was not provided prior to trial, and it was the subject of the Defense's uncontested motion.

A trial court is vested with broad discretion in fashioning a remedy when, during the course of the proceedings, a party is made aware that another party has failed to comply fully with a discovery order. See **Langford v. State**, 95 Nev. 631, 600 P.2d 231 (1979) citing **NRS 174.295**. "Remedies available to the district court include the power to 'permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances.'" **Id**. Here, the district court did nothing except allow admission. Such was unnecessary and prejudicial to the Defendant.

V. THE DISTRICT COURT ERRED IN REJECTING THE DEFENDANT'S PROPOSED JURY INSTRUCTIONS

NRS 200.030(a) defines first degree murder, in relevant part, as:

> Perpetrated by means of poison, lying in wait, torture or child abuse, or by any other kind of willful, deliberate and premeditated killing;

One of the alternative theories of the State's prosecution was First Degree Murder by means of lying in wait. (AA Vol. 1, p. 70, line 2). This despite that the record is absolutely devoid of any actual evidence of actual "lying in wait[1]."

Nonetheless, the Defendant challenged the propriety of the State's lying in wait instruction and offered a more viable one that did not lessen the State's burden of proof or otherwise violate the Defendant's due process rights.

Instruction 10 defined lying in wait as: "watching, waiting, and concealment from the person killed with the intention of killing or inflicting serious bodily injury upon such person." (AA Vol. 5, p. 659).

The proposed lying in wait instruction by the Defense additionally required the jury to find, in relevant part, a "duration" (of time) "such to show a state of mind equivalent to premeditation or deliberation." (AA Vol. 5, p. 682).

A jury instruction that shifts the burden of proof on an element of the crime to the defendant violates due process. **Sandstrom v. Montana**, 442 U.S. 510, 523-24, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

"Lying in wait" however is not further defined by statute and the risk that without defining some manner of time gap necessary to trigger this alternate means of murder that the Defendant be required to prove to the jury that if there was a wait, watch and concealment that it wasn't for a sufficient period of time to constitute first degree murder. In other words, how long does one need to wait, watch and conceal? Can it be for a scintilla of time measurement in order

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[1] An instruction will be not be deemed proper if it is inconsistent with reasonable inferences that the jury might draw from the evidence. cf. **Moser v. State**, 91 Nev. 809, 544 P.2d 424 (1975). The record is devoid of any evidence of lying-in-wait and therefore the verdict must fail on grounds of insufficiency as well. **Carl v. State**, 100 Nev. 164, 165, 678 P.2d 669, (1984) (citing **In Re Winship**, 397 U.S. 358 (1970)

to create culpability for first-degree murder? Absent a burden to show some reasonably time gap, clearly the burden falls on the Defendant, which would be unconstitutional.

Furthermore, to the extent that this Court deems that there need not be a finding of any time gap whatsoever and that "lying in wait" can rest upon a scintilla of delay between thought and action, the Defendant would suggest that **NRS 200.030** is void for vagueness especially as applied. A statute is void for vagueness, and therefore facially unconstitutional, "if the statute both: (1) fails to provide notice sufficient to enable ordinary people to understand what conduct is prohibited; and (2) authorizes or encourages arbitrary and discriminatory enforcement." **City of Las Vegas v. Dist. Ct.**, 118 Nev. 859, 862, 59 P.3d 477, 480 (2002). While normally a jury can understand what terms like "waiting" and "watching" might mean, it's clear that the State's emphasis of "lying in wait" as its primary theory of first degree murder expose an exploitation of the vagueness inherent in the statute.

For example, in the case, *sub judice*, no one saw the Defendant waiting for the decedent and no one observed him watching the decedent and clearly there was no credible evidence that he concealed himself. Indeed, to the contrary the one "earwitness" indicated a loud altercation and confrontation prior to the sound of gunshots. (AA Vol. 2, p. 187-8). Indeed, in all likelihood there are sufficient facts (though not argued and certainly not adopted by the Defendant at this time), that this was actually a typical confrontation that merely escalated. The record actually supports the idea that Mr. Davis knowing that a potential foe was outside, took a weapon outside (the box cutter) and was prepared for a confrontation. (See AA Vol. 3, p. 341-343). This is supported by the improbability that he exited the house with the stated desire to get the diaper bag from the car when he did not take the keys with him. (AA Vol. 2, p. 295, lines 13-14). Finally, he was also under the influence of drugs and alcohol when he made the decision to go

outside where the Mr. Grigsby (according to the State's witness) was just seen (not secreted). (AA Vol. 1, pp. 125-6; Vol. 2, pp. 256-8).

As applied, the mere fact that the State could produce no witnesses who saw the shooting it then follows that it must have been a "lying in wait" and therefore a first-degree murder (as opposed to a provocation, or a crime of passion, or other non-first degree dispositions). Such is a flaw as applied of the statute and a clear violation of the doctrine against vagueness.

Finally, there must be some clear, unequivocal and non-arbitrary mental state reflected in "lying in wait" so as to create a distinction between first- and second-degree murders. See generally, **Polk v. Sandoval**, 503 F.3d 903 (9th Cir.2007). The use of "lying in wait" as a substitute for premeditation, deliberation, and willfulness therefore also violates the federal and state constitutions especially as applied in the unique facts of the case at bar. See generally, **In re Winship**, 397 U.S. 358, 364 (1970).

CONCLUSION

Based on the foregoing, Mr. Grigsby asks this Court to find that the trial court erred in denying him the protections secured by the Nevada and U.S. Constitutions. In such a largely circumstantial case as this, the various errors outlined by both the District Court and the prosecution cannot be held to be harmless. Reversal is warranted.

DATED this 11 of February, 2011.

Respectfully Submitted,

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By _____

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ATTORNEY'S CERTIFICATE

I hereby certify that I have read this opening 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 N.R.A.P. 28(e), 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 11 day of February 2011.

BUNIN & BUNIN, LTD.

By _____
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AFFIDAVIT OF MAILING

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

I Leanna Wells, being first duly sworn, deposes and says: That affiant is, and was when the herein described mailing took place, a citizen of the United States, over 21 years of age, and not a party to, nor interested in, the within action; that on the _____ day of February, 2011; affiant deposited in the Post Office at Las Vegas, Nevada, a copy of the within APPELLANT'S OPENING BRIEF AND APPENDIX enclosed in a sealed envelope upon which first class postage was fully prepaid, addressed to:

David J.J. Roger
Clark County District Attorney
200 Lewis Avenue
Las Vegas, Nevada 89101

Catherine Cortez Masto
Attorney General of the State of Nevada
555 E. Washington Avenue, Ste. 3900
Las Vegas, Nevada 89101

And the original and two (2) copies, served via U.S. Mail, addressed as follows:

SUPREME COURT CLERK
STATE OF NEVADA
Capitol Complex
Carson City, Nevada 89701

That there is a regular communication by mail between the place of mailing and the place so addressed.

Leanna Wells
An employee of BUNIN & BUNIN, LTD.

SUBSCRIBED and SWORN to before
me this 11th day of February, 2011.

Patricia A. Linden
NOTARY PUBLIC in and for said
County and State.

Patricia A Linden
NOTARY PUBLIC STATE OF NEVADA
My Appointment Expires 09/15/2013
Appointment No. 09-11085-1