IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

NARCUS WESLEY, Appellant, vs. THE STATE OF NEVADA, Respondent.	S.C. CASE NO. 57473

APPEAL FROM DENIAL PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)
EIGHTH JUDICIAL DISTRICT COURT
THE HONORABLE JUDGE JAMES BIXLER, PRESIDING

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

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ISSUES PRESENTED FOR REVIEW

I. STANDARD OF REVIEW FOR INEFFECTIVE ASSISTANCE OF COUNSEL.

II. MR. WESLEY RESPECTFULLY REQUESTS THIS COURT REVERSE HIS CONVICTIONS OR ALTERNATIVELY REMAND THE CASE TO THE DISTRICT COURT FOR PURPOSES OF HOLDING AN EVIDENTIARY HEARING ON THE POST-CONVICTION ISSUES.

III. MR. WESLEY RECEIVED INEFFECTIVE ASSISTANCE OF TRIAL AND APPELLATE COUNSEL FOR FAILURE TO ADDRESS ON APPEAL THE ISSUE OF ACTUAL CONFLICT OF INTEREST IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

IV. MR. WESLEY RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO PROPERLY INVESTIGATE IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

V. MR. WESLEY RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL BASED ON THE FAILURE TO ATTEMPT TO PRECLUDE SUGGESTIVE PRE-TRIAL IDENTIFICATION IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

VI. MR. WESLEY RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL BASED ON THE FAILURE OF TRIAL COUNSEL TO REQUEST DANIELLE BROWNING TO UNDERGO A PSYCHOLOGICAL EXAM.

VII. MR. WESLEY'S JURY WAS UNCONSTITUTIONAL BASED UPON THE FAILURE OF THE JURY TO REPRESENT A CROSS-SECTION OF THE COMMUNITY IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

VIII. COUNSEL FOR MR. WESLEY ADOPTS ALL ISSUES RAISED BY THE DEFENDANT IN HIS PRO PER PETITION FOR WRIT OF HABEAS CORPUS THAT ARE NOT BRIEFED ABOVE.

IX. MR. WESLEY'S CONVICTIONS MUST BE REVERSED BASED UPON A CUMULATIVE EFFECT OF THE ERRORS DURING TRIAL.

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STATEMENT OF THE CASE

The Statement of the Case stands as enunciated in Mr. Wesley's Opening Brief.

STATEMENT OF FACTS

The Statement of the Facts stands as enunciated in Mr. Wesley's Opening Brief.

ARGUMENT

I. STANDARD OF REVIEW FOR INEFFECTIVE ASSISTANCE OF COUNSEL.

This argument stands as enunciated in Mr. Wesley's Opening Brief.

II. MR. WESLEY RESPECTFULLY REQUESTS THIS COURT REVERSE HIS CONVICTIONS OR ALTERNATIVELY REMAND THE CASE TO THE DISTRICT COURT FOR PURPOSES OF HOLDING AN EVIDENTIARY HEARING ON THE POST-CONVICTION ISSUES.

A. DEFENSE COUNSEL CONCEDED MR. WESLEY'S GUILT IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Mr. Wesley did not authorize his attorneys to concede his guilt. On direct appeal, this Court declined to consider Mr. Wesley's claim because the Court does not address claims of ineffective assistance of counsel on direct appeal.

Throughout the trial, Mr. Wesley's attorney conceded the State had proved the elements of the crimes charged. Moreover, defense counsel conceded Mr. Wesley's guilt without his permission. In opening statement, trial counsel stated, "as the State said and they are correct, Danielle Browning was raped. Many of those kids were robbed. One of those kids was kidnapped. They were terrorized for upwards for two hours. They had guns waived in their faces. I'm not disputing that. I'm not disputing that" (A.A. Vol. 4 pp. 802). On direct appeal, this was the only cite provided to this court by appellate counsel.

However, the concession of guilt continued throughout the trial. Again, during opening argument, trial counsel stated, "at the end of this trial, all we ask you to do is to hold Narcus Wesley responsible for what he did, nothing more, and certainly nothing less. Thank you" (A.A. Vol. 4 pp. pp. 806). During cross-examination of Detective Curtis Weske, defense counsel stated, "I want to talk to you a little bit about Narcus Wesley's confession". The detective answered, "yes sir" (A.A. Vol. 6 pp. 1106). During closing argument, defense counsel told the jury, "what

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Narcus did was vile, it was disgusting. It was horrific. And Danielle didn't deserve that. She didn't deserve that. It was bad, and don't think that anybody in this room doesn't feel that way" (A.A. Vol. 6 pp. 1194). In the rebuttal closing argument, the prosecutor seized on defense counsel concessions explaining, "the guys a hero. He took one for the team. He stuck his finger in her vagina to save the world" (A.A. Vol. 6 pp. 1194-1195).

The State admits defense counsel conceded the crimes occurred (State's Answering Brief pp. 11). However, the State claims that Mr. Wesley's counsel did not concede that he participated in any of these crimes (State's Answering Brief pp. 11). The State's argument is belied by portions of the trial transcript. Specifically, when defense counsel told the jury that Mr. Wesley's actions were vile, disgusting, horrific and that the victim did not deserve what occurred, defense counsel conceded Mr. Wesley's guilt. Defense counsel's argument made it clear to the jury Mr. Wesley had participated in the crimes which defense counsel admitted occurred. The State even mocked defense counsel's argument claiming that Mr. Wesley is a "hero" and that he "took one for the team".

Defense counsel referred to Mr. Wesley's statement as a "confession". The jury would recognize that defense counsel conceded that Mr. Wesley had confessed to the crimes which counsel admitted occurred. Hence, the State's contention that defense counsel had not admitted that Mr. Wesley participated in the crimes is contradicted by the record.

Next, the State argues that counsel's strategy was a tactical decision and reasonable under the circumstances. Thereafter, the State presents portions of Mr. Wesley's statements to the authorities (State's Answering Brief pp. 12). Uncontradicted State and federal case law support the proposition that trial counsel may not concede the defendant's guilt before a jury without consent from the defendant. When counsel concedes the defendant's guilt, counsel provides ineffective assistance of counsel regardless of the weight of the evidence or the wisdom of counsel's "honest approach". See, Francis v. Spraggins, 720 F.2d 1190 (11th Cir.1983) [, cert. denied, 470 U.S. 1059, 105 S.Ct. 1776, 84 L.Ed.2d 835 (1985)]; Wiley v. Sowders, 647 F.2d 642 (6th Cir.1981) [cert. denied, 454 U.S. 1091, 102 S.Ct. 656, 70 L.Ed.2d 630 (1981)], State v. Harbison, 315 N.C. 175, 337 S.E.2d 504 (N.C.1985)[cert. denied, 476 U.S. 1123, 106 S.Ct.

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1992, 90 L. Ed.2d 672 (1986)]. The case law is in opposite to the State's that counsel's approach was a reasonable tactical decision under the circumstances. The State attempts to convince this Court of overwhelming evidence existed. Yet, the weight of the evidence against Mr. Wesley should not be a consideration. No matter how overwhelming the evidence may seem, defense counsel is not permitted to concede the defendant's guilt. To do so is a break down in the adversarial system. This is for the jury to determine not defense counsel. Additionally, the "honest approach" of counsel in making a tactical decision to concede the crimes occurred and the defendant's acts were "vile" and "horrific" is unacceptable, pursuant to both federal and state case law.

The State claims that defense counsels use of the words "confession" did not amount to a concession of guilt. However, a review of the entire transcript appears to suggest that defense counsel was conceding that certain crimes were committed and the defendant's actions were "vile" and "horrific".

Next, the State contends Mr. Wesley conceded his own guilt when he confessed (State's Answering Brief pp. 14). The State may interpret Mr. Wesley's statement any way they want, however, defense counsel had no right to concede Mr. Wesley's guilt irregardless of the weight of the evidence.

It is true that Mr. Wesley sat through the entire trial and never proclaimed an objection to defense counsel's concessions. Mr. Wesley acted in a well behaved manner during trial (there is no indication that Mr. Wesley was admonished by the Court for disruption). Surely, defendant's are not required to object on the record in order to preserve this issue. The State cites no legal authority to support this argument.

"A lawyer may make a tactical determination of how to run a trial, but the due process clause does not permit the attorney to enter a guilty plea or admit facts that amount to a guilty plea without the client's consent." Brown v. Rice, 693 F. Supp. 381, 396 (W.D.N.C.1988), Brown v. Dixon, 891 F.2d 490 (4th Cir.1989), cert. denied, 495 U.S. 953, 110 S.Ct. 2220, 109 L.Ed.2d 545 (1990).

The State argues that Mr. Wesley cannot demonstrate prejudice. Prejudice is rarely

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presumed. See, United States v. Cronic, 466 U.S. 648, 104, Sup. Ct. 2039, 80 L. Ed. 2d 657 (1984) (State's Answering Brief pp. 16). However, in Cronic, the United States Supreme Court explained,

> Of course, the sixth amendment does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one, and may disserve the interests of his client by attempting a useless charade" See, Nickols v. Gagnon, 454 F.2d 467, 472 (CA. 7, 1971) cert denied, 408 U.S. 925 (1972).
>
> At the same time, even where no theory of defense is available, if the decision to stand trial has been made, counsel must hold the prosecution to it's heavy burden of proof beyond a reasonable doubt. And, of course, even when there is a bona fide defense, counsel may still advise his client to plead guilty if that advice falls within the range of reasonable competence under the circumstances. See, Tollett v. Henderson, 411 U.S. at 411 Us. 266-268; Parker v. North Carolina, 397 U.S. 797-798.

In Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974), the United States Supreme Court reasoned if counsel's failure to subject the prosecution to meaningful adversarial testing, then there has been a complete denial of the sixth amendment rights that make the adversarial process presumptively unreliable. No specific showing of prejudice is required.

In the instant case, defense counsel conceded the State had proven serious crimes. Defense counsel conceded Mr. Wesley's guilt to those crimes. This resulted in a complete breakdown of the adversarial system. The State's argument regarding the weight of the evidence is of no consequence.

Mr. Wesley received ineffective assistance of counsel in violation of the sixth and fourteenth amendments to the United States Constitution and is entitled to a reversal of his convictions.

B. MR. WESLEY RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL BASED ON COUNSEL'S STRATEGIC DECISION TO INTRODUCE THE CO-DEFENDANT'S STATEMENTS WHICH DIRECTLY IMPLICATED MR. WESLEY IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

On direct appeal, appellant counsel complained the district court admitted the co-defendant's hearsay statements and guilty plea. This Court held that the co-defendant's confession and guilty plea were admitted by the defense over the State's objection. This Court

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reasoned that a party who participates in the alleged error is estopped from raising any objection on appeal (Order of Affirmance pp. 1-2). At trial, the prosecutor expressed reservations regarding trial counsel's strategy. The prosecutor informed the court that Mr. Wesley had not confronted the co-defendant and now, defense counsel is playing the very tape that implicates Mr. Wesley (A.A. Vol. 6 pp. 1099). Defense counsel even admitted he was concerned about "Bruton issues" (A.A. Vol. 6 pp. 1099). Neither the State nor defense counsel should have been permitted to introduce Mr. Wilson's statements to the police which provided significant incriminating evidence against Mr. Wesley.

In Bruton v. United States, 391 U. S. 123; 88 S.Ct. 620; 20 L.E.2d 476 (1968), the United States Supreme Court reversed the conviction of the Petitioner based on the trial judge admitting evidence of the non testifying co-defendant. Id. In Bruton, the United States Supreme Court held that,

> The court held that despite the limiting instruction, the introduction of the accomplices out of court confession at Petitioner's trial violated Petitioner's right protected by the United States Constitution Amendment Six, to cross-examine witnesses.

First, the State contends this issue was decided on direct appeal and is therefore law of the case (State's Answering Brief pp. 16-17). The State contends Mr. Wesley cannot argue the issue because it is barred by law of the case (State's Answering Brief pp. 17). Here, Mr. Wesley argues that he received ineffective assistance of trial counsel based on the admission of highly incriminating evidence. This issue was not addressed on direct appeal and is therefore ripe for review. Interestingly enough, the State argues that Mr. Wesley's reliance on Bruton is misplaced (State's Answering Brief pp. 17). Yet, in trial, the prosecutor expressed concern that Mr. Wesley had been deprived of the right to confront Mr. Wilson and now the defense was introducing Mr. Wilson's statements.

The State would not have been permitted to introduce any of this evidence. Numerous states have recognized that a co-defendant's guilty plea is inadmissible. "A guilty plea or conviction of a co-defendant may not be used as substantive evidence of another defendant's guilt" People v. Brunner, 797 P.2d 788 (Colo. App. 1990). The State of Wyoming has ruled that the right to a fair trial embraces the right not to be convicted in whole or in part upon the guilty

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plea of co-conspirators. Capshaw v. State, 11 P.3d 905 (Wyo. 2000); (See also, Hall v. State, 109 P.3d 499 (2005 Wy. 35). In Waldon v. State, 113 Nev. 853, 944 P.2d 762 (1997), this Court reversed the murder conviction where the inadmissible evidence was presented. This Court has determined that a co-defendants change of plea statement and penalty hearing statement in which the co-defendant admitted to stabbing the victim was not admissible during the guilt phase of defendant's murder trial. Here, defense counsel decided to introduce Mr. Wilson's guilty plea and canvass which directly implicated Mr. Wesley. Interestingly enough, the guilty plea and canvass of Mr. Wilson would have provided significant credibility to Mr. Wilson. Mr. Wilson was accepting responsibility for serious crimes and telling the court that he committed the crimes with Mr. Wesley.

The State is unable to illustrate a reasonable rational for the defense to introduce the co-defendant's plea agreement. The introduction of the co-defendant's plea agreement is objectively unreasonable.

In United States v. Cronic, 466 U.S. 648, 80 L. Ed 2d 657, 104 Sup. Ct. 2039 (1984), decided on the same day as Strickland, "the United States Supreme Court created an exception to the Strickland standard for ineffective assistance of counsel and acknowledged that certain circumstances are so egregiously prejudicial that ineffective assistance of counsel will be presumed" Stano v. Dugger, 921 F.2d 1125, 1152 (11th Cir. 1991) (En Banc) (Citing Cronic, 466 U.S. at 658.). "Cronic presumes prejudice when there has been an actual breakdown in the adversarial process at trial" Toomey v. Bunnell, 898 F.2d 741, 744 n. 2 (9th Cir.).

Mr. Wesley would request that this Court reverse his convictions based upon a violation of the fifth, sixth and fourteenth amendments to the United States Constitution. Alternatively, Mr. Wesley would respectfully request that this Court remand the matter for an evidentiary hearing.

III. MR. WESLEY RECEIVED INEFFECTIVE ASSISTANCE OF TRIAL AND APPELLATE COUNSEL FOR FAILURE TO ADDRESS ON APPEAL THE ISSUE OF ACTUAL CONFLICT OF INTEREST IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Mr. Wesley's trial counsel failed to withdraw prior to trial, even though an actual conflict

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of interest existed. The following occurred during the examination of Detective Weske:

> Q: And did you discover something while you were in the house at some point?
> A: Yes.
> Q: What did you discover?
> A: A rifle (A.A. Vol. 6 pp. 1077).

At a hearing outside the presence of the jury, defense counsel made the following statement:

> Judge, I've been scared to death of the issue for the entire trial, and so scared to death of this issue that I actually mentioned it to Ms. Collins during jury selection and I mentioned it to Ms. Luzaich during jury selection. I mentioned it again I believe it was Friday, last week Friday. We have actually had conferences at the bench about it. And that is, that there was a rifle that was found pursuant to the search warrant at the Gay Lane address (A.A. Vol. 6 pp. 1079).

Defense counsel further explained,

> This is the particular and precise issue that I've addressed with counsel. It's been my fear that if this, God forbid, comes into evidence, which it now has, and that's why I've tried to give everybody a heads up numerous times, if it comes into evidence I got a real problem. My stomach is in knots because we've got a gun found at my client's residence, and I got no way that I can defend that without throwing my other client, Narcus Wesley under the bus. That is the problem. That is the problem that I've made clear from jump street (A.A. Vol. 6 pp. 1079).

Defense counsel believed that there was a conflict of interest. The State recognized an attorney has an actual conflict of interest if there is a situation of divided loyalties (State's Answering Brief pp. 20). The State contends that Narvus' (the defendant's father) case had been dismissed prior to trial. The State claims trial counsel was unaware of the issue prior to trial. However, defense counsel explained to the court he was "scared to death" of the issue and mentioned to the prosecutor's the concerns during voir dire. The district court declined to hold an evidentiary hearing on the petition. It is difficult to ascertain when defense counsel became aware of the issue. However, defense counsel had the concern as early as voir dire. Usually, the public defender's office reviews their cases for potential conflicts of interests. It is difficult to understand how the actual conflict was not known prior to trial. Mr. Wesley recognizes the issue, of when trial counsel became aware of the actual conflict, is supposition. This is why an evidentiary hearing was mandated.

The State argues a conflict did not exist. Yet, trial counsel specifically informed the court

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that an actual conflict did exist. Obviously, trial counsel felt that he had divided loyalty. In fact, defense counsel described his concern as a "fear" and the "fear scared [him] to death". Defense counsel described the conflict and his concerns leaving "my stomach is in knots...". Defense counsel further described how the situation placed him in a conflict where he would have to throw one of the clients "under the bus". The State may feel that trial counsel did not have an actual conflict. However, Mr. Wesley's trial attorney specifically enunciated the dilemma he was experiencing, representing Mr. Wesley based on the actual conflict.

Conflicts of interest can be placed into three categories. The first category describes those conflicts that are so severe that they are deemed per say violations of the sixth amendment. Such violations are unwaivable and do not require of showing that the defendant was prejudiced by his representation. See, United States v. Fulton, 5 F.3d 605, 611 (2nd Cir. 1993); United States v. John Doe # 1, 272 F.3d. 116, 125 (2nd Cir. 2000); Finlay v. United States, 537 U.S. 851, 154 L.Ed. 2d 82, 123 Sup. Ct. 204 (2002); Armienti v. United States, 234 F.3d 820, 823 (2nd Cir. 2000). By contrast when an actual conflict of interest occurs when the interest of the defendant and his attorney "diverge with respect to a material factual or legal issue or to a course of action" United States v. Schwarz, 283 F.3d 76, 91 (2nd Cir. 2002). To violate the sixth amendment, such conflicts must adversely affect the attorney's performance. See, United States v. Levy, 25 F.3d 146, 152 (2nd Cir. 1994). Lastly, a clients representation suffers from a potential conflict of interest if "the interest of the defendant may place the attorney under inconsistent duties at some time in the future" United States v. Kliti, 156 F.3d 150, 153 (2nd Cir. 1998). To violate the sixth amendment such conflicts must result in prejudice to the defendant. Levy, 25 F.3d at 152.

While a defendant is generally required to demonstrate prejudice to prevail on a claim of ineffective assistance of counsel. See, Strickland v. Washington, 466 U.S. 668, 687, 80 L.Ed. 2d 674, 104 Sup. Ct. 2052 (1984), this is not so when counsel is burdened by an actual conflict of interest. Id. 466 U.S. at 692. Prejudice is presumed under such circumstances. See also, United States v. Malpiedi, 62 F.3d 465, 469 (2nd Cir. 1995); United States v. Iorizzo, 786 F.2d 52, 58 (2nd Cir. 1986). Therefore, a defendant claiming he was denied a right to conflict free counsel based on an actual conflict need not establish a reasonable probability that, but for the conflict or

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a deficiency in counsel's performance caused by the conflict, the outcome of the trial would have been different. Rather, he need only establish 1) an actual conflict of interest that 2) adversely affected his counsel's performance. See, Cuyler v. Sullivan, 446 U.S. 335, 348, 64 L.Ed 2d 333, 100 Sup. Ct. 1708 (1908); See also, Levy, 25 F.3d at 152.

It appeared that counsel recognized the conflict of interest that existed between Narcus Wesley and his father. Both were represented by the public defenders office. Trial counsel was left with divided loyalties between Narcus and his father. Mr. Wesley had a right to conflict free counsel which did not exist in this case. Mr. Wesley would respectfully request that this Court reverse his convictions and permit him to proceed to trial with conflict free counsel.

IV. MR. WESLEY RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO PROPERLY INVESTIGATE IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

This argument stands as enunciated in Mr. Wesley's Opening Brief.

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IX. MR. WESLEY'S CONVICTIONS MUST BE REVERSED BASED UPON A CUMULATIVE EFFECT OF THE ERRORS DURING TRIAL.

This argument stands as enunciated in Mr. Wesley's Opening Brief.

CONCLUSION

Based on the foregoing, Mr. Wesley respectfully requests this Court order reversal of his convictions. Alternatively, Mr. Wesley requests this Court remand this matter for an Evidentiary Hearing.

DATED this 9th day of May, 2012.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using 14 point font of the Times New Roman style.

I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7). Pursuant to NRAP 32(7)(d), this appellate brief complies because excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it does not contain more than 7,000 words nor 15 pages.

Finally, I certify that I have read this amended 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), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. 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 9th day of May, 2012.

Respectfully submitted by,

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on May 9th, 2012. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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