IN THE SUPREME COURT OF THE STATE OF NEVADA

JAQUEZ DEJUAN BARBER, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 62649

RESPONDENT'S ANSWERING BRIEF

Appeal From Judgment of Conviction
Eighth Judicial District Court, Clark County

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STATEMENT OF THE CASE

Jaquez Dejuan Barber ("Appellant") was charged by way of Petition-Delinquency with Count 1 - Burglary (Category B Felony - NRS 205.060) and Count 2 - Grand Larceny (Category C Felony - NRS 205.220). 4 AA 652-53. On August 10, 2010, the State filed a Certification Petition to transfer the case to adult court. 4 AA 655-65. The Juvenile Division of the Eighth Judicial District Court ("Juvenile Court") held a hearing on September 27, 2010. 4 AA 681-95. Appellant waived certification. 4 AA 691-692. The order transferring Appellant's case to adult court was filed on September 27, 2010. 4 AA 696-99.

On September 30, 2010, Appellant was charged in adult court by way of Criminal Complaint. 1 AA 1. Appellant planned on entering an Alfred Plea to Grand Larceny. 1 AA 2a. The State filed an Information on October 25, 2010. 1 AA 3-4. Appellant declined to honor his negotiation and an Amended Information was filed on November 4, 2010, conforming the Counts to the original Criminal Complaint. 1 AA 5-6. On November 18, 2010, Appellant invoked the 60 rule and trial was set for January 18, 2011. 1 AA 120, 170.

However, Appellant requested a continuance on December 14, 2010, citing counsel's schedule. 1 AA 14-16. Appellant's motion waived the sixty-day rule. Id. At the hearing, defense counsel stated that Appellant "waive[d] the sixty-day rule for the purpose of resetting this trial date." 1 AA 173. The Court instructed defense counsel to obtain a written waiver from Appellant and reset the trial date for March 21, 2011. 1 AA 174.

On March 14, 2011, the State requested a continuance due to an out of state expert. 1 AA 37-39. The trial date was reset to June 20, 2011 over Appellant's objection. 1 AA 124-25, 178, 181-82. On June 14, 2011, the trial date was reset again with Appellant agreeing to October 31, 2011. 1 AA 131, 195.

On June 2, 2011, Appellant asked to fire counsel. 1 AA 128, 192. The Court advised Appellant to file a motion. Id. Appellant filed a motion on July 15, 2011. 1 AA 55-63. The motion merely cited the statutory language of NRS 7.055 and failed to give any reason why counsel should be dismissed. 1 AA 158. At the August 25, 2011, hearing Appellant complained that he had little contact with counsel outside of court appearances and was not receiving discovery. 1 AA 202. The Court determined that because defense counsel had filed a number of motions Appellant was unaware of, the problem was a correctable communication issue. 1 AA 205-06. The Court noted that part of the difficulty was that Appellant was

housed at High Dessert Prison and requested that defense counsel update Appellant on the case. 1 AA 206-207.

At the October 25, 2011, hearing on Appellant's Motion for Discovery, the State requested a continuance because the lead detective was on vacation. 1 AA 210. Defense counsel did not object and trial was set for January 9, 2010. Id. Appellant complained that he never waived the sixty-day rule. 1 AA 211. The court responded that Appellant waived it on December 14, 2010. Id. Defense counsel confirmed that the court was right. Id.

On November 28, 2011, Appellant filed another Motion to Withdraw Counsel. 1 AA 64-70. Again, Appellant cited NRS 7.055 and provided no reason to discharge his counsel. 1 AA 66. Due to difficulty transporting Appellant to court, Appellant's second motion was not heard until January 3, 2012. 1 AA 212-14, 215-17. At the hearing, Appellant complained that he was having trouble contacting counsel. 1 AA 219. Again, the court determined that Appellant was expressing an issue with communication. 1 AA 220. The Court offered to deal with the communication issue and trail the trial date, but when defense counsel announced ready, Appellant stated he was "absolutely" ready to go to trial with current counsel. Id.

Appellant again asked for a continuance on January 10, 2012. 1 AA 223. Appellant asked for an October 2012, trial date to accommodate defense counsel's

pregnancy. Id. At the hearing, Appellant asked to represent himself. Id. The Court instructed defense counsel to provide Appellant with information on proceeding by himself. Id. at 223, 225.

A Faretta hearing was held on September 20, 2012. 1 AA 144, 228-31. Appellant stated that he did not want to represent himself and just wanted another public defender. 1 AA 229. Again, defense counsel announced ready and Appellant, again, dropped his request, agreeing to proceed to trial with defense counsel. 1 AA 230-31.

Trial commenced on October 9, 2012. 1 AA 148, 2 AA 246. On October 11, 2012, the jury found Appellant guilty of Burglary and Grand Larceny. 1 AA 111, 151-52, 3 AA 636. The Judgment of Conviction was entered on January 24, 2013. 1 AA 112-13. Appellant was sentenced as to Count 1 – to a maximum 30 months with a minimum parole eligibility of 12 months, as to Count 2 – to a maximum of 30 months with a minimum parole eligibility of 12 months, Count 2 to run concurrent with Count 1, his sentence to run consecutive with Case C253779, with 90 days credit for time served. Id. A $25 Administrative Assessment Fee and $7,000 restitution was ordered. Id. at 112.

On February 15, 2013, Appellant filed a Notice of Appeal. 1 AA 114-17. Appellant's Opening Brief was filed on September 11, 2013.

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STATEMENT OF THE FACTS

On January 21, 2009, Aldegunda Mendoza left her home with her son shortly before 9:00 AM to attend a school meeting. 3 AA 453-54. She locked all the doors and left the house unoccupied. 3 AA 454. Approximately an hour and a half later, she returned home, discovered her front door ajar, and her house ransacked. 3 AA 454. At that time, she noticed that the outside of the home was wet. Id. The water faucet in the backyard, next to the bathroom window, had been broken and a bucket filled with concrete was placed by the bathroom window. 3 AA 459. The bucket of concrete was not there when she left. Id. The bathroom window was open and the screen had been removed. 3 AA 459. It was closed when she left. Id.

Inside the bathroom, the floor was covered in dirt and water. 3 AA 4601. It was clean when Mrs. Mendoza left that morning. Id. Officer Shevlin, who responded to Mrs. Mendoza's call, also testified that there were marks along the bathroom wall and on the tub ring. 3 AA 480. Based on his training and experience, Officer Shevlin determined that the window was the point-of-entry. Id. The evidence indicated to him that "[w]hoever came through the window pushed off the wall with their foot, landed on the tub ring, and that's how they entered the residence." Id. Crime Scene Analyst Robbie Dahl (CSA Dahl), who processed the home with the help of three ride-a-longs, also testified to seeing

"foot wear marks" in the bathroom, along the edges of the bathtub. 3 AA 494. They appeared to be more like mud marks than actual footprints. 3 AA 531.

CSA Dahl was able to develop finger and palm prints from the bathroom. 3 AA 496-97. The fingerprints appeared both inside and outside the window. 3 AA 497. Notably, some of the prints were faced with the fingertips pointing down which was important to CSA Dahl because it was unusual. Id. One would expect fingerprints in a shower to be pointing up. Id. The unusual placement indicated to her that the prints "could possibly be someone climbing in the window." Id.[1] CSA Dahl also recovered a print from the jewelry box in the southeast bedroom. 3 AA 499-500.

Forensic Scientist Kathryn Aoyama (FS Aoyama) testified that eight suitable prints were recovered by CSA Dahl. 3 AA 570. FS Aoyama did a side-by-side examination of the comparable prints recovered against the known prints of Appellant, Mr. Martin, and Mr. Palmer. 3 AA 541, 546.[2] FS Aoyama identified latent print 19F, which was lifted off the exterior side of the bathroom window, as Appellant's left palm print. 3 AA 544. FS Aoyama testified that although she was

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[1] Appellant complains that one of the ride-a-longs' prints were found in the shower. However, CSA Dahl testified that in her thirteen years as a crime scene analyst, she has known it is possible to have an employee's prints turn up. 3 AA 516. She has even had homicide detectives touch something they were not supposed to because "we're all human beings." 3 AA 519.

[2] Michael Palmer was one of the ride-a-longs that came to the house with CSA Dahl. Three of the suitable prints recovered from inside the home were matched to Palmer. 3 AA 548, 570.

not the initial employee who got the hit for Appellant off AFIS, she did the side-by-side comparison herself, and was "very certain" the print belonged to him.[3] 3 AA 544-47.

Both Mr. and Mrs. Mendoza testified that $6,000 was missing from their home. 3 AA 461, 469. The money was kept in a drawer in their bedroom. 3 AA 461. $4,000 was inside a sock and $2,000 was in the drawer. Id. They also testified that although they did not initially report it, they later discovered 3,000 Mexican pesos missing, approximately $300. 3 AA 467, 469.

Mrs. Mendoza testified that she did not know Appellant, did not recognize him, and had never seen him before. 3 AA 463. Mr. Mendoza also testified that he did not know Appellant. 3 AA 470. Appellant was not their gardener, not their window cleaner, and had no legitimate reason to be touching the window of their house. 3 AA 472-73.

ARGUMENT

I.

The District Court had jurisdiction

Appellant is appealing from the judgment of his conviction, not the juvenile certification order. Yet Appellant's first two claims are focused on his juvenile certification order. This Court need not consider these claims because Appellant waived his right to challenge the certification order by not properly appealing.

[3] FS Aoyama maintained on cross-examination that she was 100 percent certain that Appellant left the palm print on the exterior window. 3 AA 562.

A. Appellant waived any jurisdictional challenge

The jurisdiction of Juvenile Court is statutory and extends only so far as the Legislature's grant of authority. Kell v. State, 96 Nev. 791, 792-93, 618 P.2d 350, 351 (1980). The Legislature has vested jurisdiction over certified juveniles with the court to which they are certified: "If a child has been certified for criminal proceedings as an adult ... [t]he court to which the child's case has been transferred has original jurisdiction over the child." NRS 62B.390(5)(a). The Legislature has also said that a certification is an appealable order. NRS 62D.500(2)

This Court has also recognized that a certification order is an appealable order:

> *The order of the juvenile court transferring a child to the adult court is the final order of the juvenile court in the civil proceedings pending before it. After the juvenile is transferred, the juvenile court loses jurisdiction over the juvenile*. Thus, the order of certification is properly appealable as a final judgment in a civil matter.

Castillo v. State, 106 Nev. 349, 351, 792 P.2d 1133, 1134 (1990) (emphasis added). As such the failure to timely appeal a certification order waives all challenges to any alleged defect in the certification process. Turpin v. State, 89 Nev. 518, 520, 515 P.2d 1271, 1273 (1973).

This rule of law should not come as a surprise to Appellant since the Certification Order placed him on notice of his obligation to timely appeal:

> The COURT FURTHER ADVISES that subject minor has the right to appeal this decision to the Supreme Court and that a notice of appeal must be filed after entry of this written order and no later than 30 days after the date of service of written notice of the entry of this Order.

4 AA 699. Despite having actual notice of his obligation to timely appeal any challenges to the transfer of jurisdiction, Appellant never appealed from the certification order and instead only filed a Notice of Appeal from the proceedings before criminal court. 1 AA 114-17. Appellant's choice to waive appeal of the certification order is fatal to his current jurisdictional challenge. If Appellant wanted to challenge Juvenile Court's authority to enter a certification order he should have done so before Juvenile Court and on appeal from the Juvenile Court's certification order.

Appellant's challenge to Juvenile Court's authority to certify him amounts to a variant on home free arguments previously rejected by this Court. This Court will not allow a criminal defendant to "come back yelling 'home free'" after failing to timely litigate his certification related claims. Castillo v. State, 110 Nev. 535, 542, 874 P.2d 1252, 1257 (1994), disapproved of on other grounds, Woods v. State, 111 Nev. 428, 892 P.2d 944 (1995). Appellant cannot explain why he should benefit from his decision to not raise his challenge before Juvenile Court or on appeal of the certification order.

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B. District Court would have retained jurisdiction even if Juvenile Court lacked jurisdiction to certify

There would have been no change in outcome even if Juvenile Court lost jurisdiction through undue delay. In the context of Juvenile Court jurisdiction, this Court has held that "some court always has jurisdiction over a criminal defendant." State v. Barren, 128 Nev. _, 279 P.3d 182, 184 (2012). As NRS 171.010 states, "[e]very person . . . is liable to punishment by the laws of this state for a public offense[.]" As recognized in Barren, the general jurisdiction of criminal courts is broader than the statutory and limited jurisdiction of juvenile courts. Barren, 128 Nev. at _, 279 P.3d at 184. Even if Appellant's substantive argument was right, that Juvenile Court lost jurisdiction due to delay, then the general jurisdiction of the District Court would have required him to face his charges in the criminal system.

C. There was no undue delay or conscious disregard for procedure

The reason for the delay does not offend NRS 62D.310 or suggest conscious indifference to procedure by the State. The record indicates that Appellant and the State were pursuing negotiations of Appellant's charges:

COURT:	Alright. What's the – what was the understanding you guys had on this, Ms. Maxey?
DEFENSE:	There's no understanding. He was just going to waive cert –
COURT:	There's no understanding []?
	. . .
	You guys haven't talked about negotiations at all? Or. . .
STATE:	*We tried*.

DEFENSE: *There's no – he's – no negotiation. . .*

4 AA 690-91 (emphasis added). When negotiations fell through, Appellant was sentenced on case C253779 and the State proceeded on the instant case.

Appellant's contention that the arrest warrant cannot toll NRS 62D.310 is undermined by this Court's decision In re Eric A.L., 123 Nev. 26, 153 P.3d 32 (2007). This court rejected the claim that the one year rule of NRS 62D.310 prevented the State from appealing an adverse certification decision. Id. at 31, 153 P.3d at 35. Since any delay was likely due to attempts to globally negotiate Appellant's juvenile and criminal charges, any delay was to his benefit and he should not now be heard to complain because a deal was not consummated. To the extent that the record does not fully disclose the reason for the delay, the proper remedy is remand to Juvenile Court for further development of the record. Ryan's Express v. Amador Stage Lines, 128 Nev. _, 279 P.3d 166, 172 (2012).

II.
Appellant was properly certified from Juvenile to District Court

To the extent that this Court considers the merits of Appellant's claim, this Court should uphold the certification without consideration of his waiver since Appellant was properly certified

Appellant contends that he is ***not*** challenging the order of certification, but rather asks this Court to consider whether his waiver was knowingly and intelligently made. See Appellant's Opposition to State's Motion to Strike at 3-4;

AOB, p. 17-19. Appellant's focus on his waiver is misplaced because while Juvenile Court accepted his choice not to defend against certification, the Court made an independent determination that Appellant should be certified pursuant to In re Seven Minors, 99 Nev. 427, 664 P.2d 947 (1983), disapproved of on other grounds, In re William S., 122 Nev. 432, 132 P.3d 1015 (2006). Indeed, Appellant concedes that Juvenile Court made findings before ordering certification. AOB, p. 17. So any waiver was superfluous. Thus, this Court need not consider Appellant's invitation to consider what procedures are required for waiver of certification.

To the extent that Appellant contends that the court made a "less than adequate record on prosecutorial merit" and the Seven Minor factors, Appellant has not demonstrated that the court abused its discretion. In re Eric A.L., 123 Nev. at 33, 153 P.3d at 36-37 (noting that an appellate court will only review the juvenile court's decision for an abuse of discretion that is "arbitrary or capricious or if it exceeds the bounds of law or reason"). Juvenile Court found:

> Well based upon the -- there's slight or marginal evidence to support prosecutorial merit. The -- under Seven Minors the Court would have to consider the nature of the offense.
>
> Obviously, it is a burglar of the home, as alleged. *There were some prior services in the juvenile system. However, this case turns on the subjective factors which is the subject minor's age. At this present time the fact that there's noting the Juvenile Court could offer in this case should he been found to have committed the offense, other than an order of restitution that would terminate at age twenty-one.* And therefore, this Court finds the matter of public safety, that the

> State's petition be granted. And we'll order that the subject minor answer these charges before the Eight Judicial District Court in the State of Nevada in Clark Count. . . .
>
> . . . And yes, considering his role in the offense. That's the new Supreme Court decision; it says I have to do that.

4 AA 693-94 (emphasis added). Juvenile Court properly considered the seriousness of the crime, Appellant's past offenses, and, most important to the Court, his age. This last consideration falls under the subjective factors and is used in close cases when neither of the first two factors impels transfer. Seven Minors, 99 Nev. at 435, 664 P.2d at 952. With public protection "established as the general controlling principle upon which the transfer . . . is to be based," the court noted Juvenile Court could not offer anything beyond a temporary restitution order. Id. at 434, 664 P.2d at 952. Thus, the court properly addressed the decisional matrix of Seven Minors when granting the certification.

Furthermore, Appellant's argument places a higher burden on the State than is required. The State met its burden of establishing prosecutive merit. Prosecutive merit is akin to the probable cause necessary to bind a case over after a preliminary hearing. Id at 437, 664 P.2d at 953. Prosecutive merit "may be slight, 'even marginal' evidence because it does not involve a determination of guilt or innocence of an accused." Sherrif v. Hodes, 96 Nev. 184, 186, 606 P.2d 178, 180 (1980) (internal citations omitted); see also Sheriff v. Milton, 109 Nev. 412, 414, 851 P.2d 417, 418 (1993) (finding that the State need only present sufficient

evidence to "support a reasonable inference that the accused committed the offense"). Appellant's palm print on the outside of the victim's home forms the basis for this required "slight" probable cause.[4]

Because the court properly addressed the factors of Seven Minors, and the certification was supported by minimal prosecutive merit, the certification order was proper.[5] Appellant had 30 days to appeal the order but he did not. Appellant's attempt to re-cast the certification order as based solely on his waiver is disingenuous.

III.
District Court Did Not Violate Appellant's Speedy Trial Rights

Neither Appellant's Constitutional or statutory rights to a speedy trial were violated.[6]

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[4] Furthermore, Appellant's challenge to probable cause at the preliminary hearing stage is arguably waived because a jury convicted Appellant of robbery under a higher burden of proof. See Detloff v. State, 120 Nev. 588, 591, 97 P.3d 586, 588 (2004).

[5] Due process does not require an adversarial juvenile certification hearing because certification hearings are "generally dispositional and not adversarial in nature. See In re Three Minors, 100 Nev. 414, 684 P.2d 1121 (1984), disapproved on other grounds, In re William S., 122 Nev. 432, 132 P.3d 1015 (2006). The court properly relied upon the pleadings and arguments of counsel when determining if there was prosecutive merit.

[6] The sixty day rule of NRS 178.556 is not necessarily to be equated with the speedy trial requirement of the Sixth Amendment. Sheriff v. Berman, 99 Nev. 102, 105, 659 P.2d 298, 300 (1983); Rodriquez v. State, 91 Nev. 782, 784, 542 P.2d 1065, 1066 (1975); Sonderguard v. Sheriff, 91 Nev. 93, 95, 531 P.2d 474, 475 (1975).

A. Appellant Waived His Statutory Speedy Trial Rights

A defendant has a statutory right to trial within sixty days of arraignment or indictment. NRS 178.556. Application of NRS 178.556 is addressed to the sound discretion of the trial court. Meegan v. State, 114 Nev. 1150, 968 P.2d 292, 295, 1153 (1998), abrogated on other grounds, Vanisi v. State, 117 Nev. 330, 22 P.3d 1164 (2001). This Court has "has previously determined that the '60 day rule' prescribed in our statute has flexibility." Adams v. Sheriff, 91 Nev. 575, 575, 540 P.2d 118, 119 (1975). The purpose behind NRS 178.556 is "to prevent arbitrary, willful, or oppressive delays." In re Hansen, 79 Nev. 492, 495, 387 P.2d 659, 660 (1963). Further, a defendant already serving a prison sentence on unrelated charges suffers little prejudice when he does not receive a trial within 60 days. Mello v. State, 93 Nev. 662, 664, 572 P.2d 533, 534 (1977). Indeed, this Court has held that the prior codification of NRS 178.556 "did not apply … when the defendant was serving a sentence on another charge[.]" Bates v. State, 84 Nev. 43, 47, 436 P.2d 27, 29 (1968) (citing, Ex Parte Trammer, 35 Nev. 56, 126 P. 337 (1912)).[7] "[A] defendant can waive this statutory right and such a waiver can be expressed by counsel." Furbay v. State, 116 Nev. 481, 484, 998 P.2d 553, 555 (2000). In fact, this right can even be waived even if a defendant is not present in

[7] Wood v. Sheriff, Carson City, 88 Nev. 547, 501 P.2d 1034 (1972), is distinguishable from the instant matter as the appellant in Wood was not brought to trial until after he had completed serving his prior prison sentence and as such suffered prejudice from the State's unexplained delay.

court. Schulta v. State, 91 Nev. 290, 292, 535 P.2d 166, 167 (1975). "[W]aiver may be implied, as well as express; thus, if the defendant is responsible for delaying the trial beyond the 60-day limit, he may not complain." Broadhead v. Sheriff, Clark County, 87 Nev. 219, 223, 484 P.2d 1092, 1094 (1971) (citing, Oberle v. Fogliani, 82 Nev. 428, 420 P.2d 251 (1966)).

Appellant cannot complain about the trial's delay as the record reveals that defense counsel explicitly waived Appellant's rights in a written motion and then impliedly waived his speedy trial rights by continuously requesting continuances. Appellant's original trial date was January 18, 2011, well within sixty days of his November 18, 2011 arraignment. 1 AA 120, 170. But on December 14, 2010, Appellant filed his first motion to continue trial. 1 AA 14-16. In his written motion, Appellant cited his defense attorney's trial schedule as the reason for the request, and asked for a February trial date. 1 AA 15. Appellant's written motion also noted that Appellant "agrees to waive the sixty-day rule for this limited purpose." Id.

At the December 14, 2010 hearing on Appellant's motion, defense counsel, without Appellant present, advised the Court that Appellant waived his right to a speedy trial. 1 AA 173. "I talked to Mr. Barber; he's willing to waive the sixty-day rule for the purpose of resetting this trial date." Id. The Court instructed

defense counsel to obtain a waiver from Appellant and defense counsel agreed.[8] 1 AA 174. The court reset trial for March 21, 2010. Id.

On March 14, 2011, the State filed a Motion to Continue, citing the need to secure another fingerprint expert. 1 AA 37-39. The previously subpoenaed expert had moved out of the state and was nonresponsive. 1 AA 39. The State requested a short continuance, to the week of April 4, 2011. Id. Appellant objected to the delay, noting that Appellant "initially invoke[d]" but waived for the "limited purpose" of Appellant's previous motion to continue. 1 AA 178. The Court granted the request for good cause shown and asked the parties if they would like to set a trial date for the week of April 4th, as the State requested. 1 AA 180. Defense counsel said she was "hoping for something mid-May" given that she had "trials set back-to-back in April." 1 AA 181. The Court told defense counsel that his next criminal stack would be May 23 into June and offered her June 6th, June 13th, and June 20th. Id. Defense counsel chose the latest available date, June 20th, adding an additional 63 day delay. Id.

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[8] The record does not indicate whether such a document was ever filed. Appellant attempts to utilize this silence to suggest that Appellant did not in fact waive his statutory speedy trial rights. AOB, p. 21-22, 27, footnote 5. Appellant even goes so far as to suggest that he did not receive effective assistance of counsel due to this complaint and others. AOB, p. 32. To the extent that Appellant's right to effective assistance of counsel is implicated, the claim is not appropriate for direct appeal and instead must be raised in the context of a post-conviction petition for writ of habeas corpus alleging ineffective assistance of counsel. Corbin v. State, 111 Nev. 378, 381, 892 P.2d 580, 582 (1995) (citing, Gibbons v. State, 97 Nev. 520, 634 P.2d 1214 (1981)).

Even assuming Appellant only waived his speedy trial rights for the "limited purpose" of Appellant's original motion for continuance and did not waive for any further delays, Appellant still would have been tried within 60 days had defense counsel agreed to the April 4th trial date. There were 26 days between his November 18, 2010, invocation and Appellant's December 14, 2010, motion for continuance. There were an additional 14 days between March 21, 2011, the day trial was reset for as a result of Appellant's motion for continuance, and the State's proposed April 4, 2011 date. It was Appellant who requested to push the trial date out to June 20, 2011, beyond the 60 days. Despite defense counsel's earlier statement on the record that Appellant previously waived for the "limited purpose" of Appellant's motion to continue, this request was an implied waiver of Appellant's speedy trial. Thus, even if this court finds that Appellant did not explicitly waive the 60 day rule on December 14, 2010, he certainly impliedly waived it at the March 14, 2011, hearing.

Appellant continued to impliedly waive his statutory speedy trial rights. Appellant's trial was again reset on June 14, 2011, with Appellant present, at a hearing on Appellant's motion for discovery. 1 AA 131,195. Although the State's outstanding subpoenas were expected to be in "within the next few weeks," Appellant asked for a trial date in October. 1 AA 195. The Court complied and set a trial date of October 31, 2011. Id. Neither Appellant nor defense counsel

objected or voiced any concern about Appellant's speedy trial rights. Id. Rather, Appellant and his counsel were more concerned, again, with scheduling a trial date around defense counsel's schedule.

At the October 25, 2011, hearing on Appellant's motion for discovery, more than nine months after the original speedy trial date, Appellant, for the first time, made the unsupported claim that he never waived his 60-day trial right "*at all*." 1 AA 211 (emphasis added). Appellant was mistaken. Defense counsel immediately corrected the record, telling the court that he had indeed waived on December 14, 2010. Id. "He waived, Judge. You're correct." Id. If it is not clear from a review of the record, defense counsel's words are clear enough: Appellant waived his right to a 60 day trial.[9]

B. Defendant's Sixth Amendment Speedy Trial Rights Were Not Violated

"Simply to trigger a speedy trial analysis, an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from presumptively prejudicial delay." Doggett v. United States, 505 U.S. 650, 651-52, 112 S.Ct. 2686, 2690 (1992). If this hurdle is overcome, a court determines if a constitutional speedy trial violation has occurred by applying the four-part test laid out in Barker v. Wingo, which examines the "[l]ength of delay,

[9] After this hearing, Appellant asked for one more continuance. Appellant requested a nine month continuance because defense counsel was going out on leave. 1 AA 222-227. Surely Appellant would not have requested such a long continuance had he not waived his 60 day rights.

the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." Prince v. State, 118 Nev. 634, 640, 55 P.3d 947, 951 (2002) (quoting, Barker v. Wingo, 407 U.S. 514, 530, 92 S.Ct. 2182, 2192 (1972)). The Barker factors must be considered collectively as no single element is necessary or sufficient. Moore v. Arizona, 414 U.S. 25, 26, 94 S.Ct. 188, 189 (1973) (quoting, Barker, 407 U.S. at 533, 92 S.Ct. at 2193). However, to warrant relief, "failure to accord a speedy trial must be shown to have resulted in prejudice attributable to the delay." Anderson v. State, 86 Nev. 829, 833, 477 P.2d 595, 598 (1970).

1. Length of the Delay

In Doggett the Supreme Court examined the threshold requirement and the length of delay element together. Doggett, 505 U.S. at 651-52, 112 S.Ct. at 2690. The first part of this double inquiry is the threshold requirement. In order to meet the threshold requirement appellants must demonstrate "that the interval between accusation and trial has crossed the threshold dividing ordinary from 'presumptively prejudicial' delay. Id. The Court justified the imposition of this threshold requirement by noting that "by definition he cannot complain that the government has denied him a 'speedy trial' if it has, in fact, prosecuted the case with customary promptness." Id. at 651-52, 112 S.Ct. at 2690-91.

Subtracting the extensive delays requested by defense, Appellant's case was processed with customary promptness and as such the length of delay was not

prejudicial. Appellant was arraigned on November 18, 2010. 1 AA 120,170. His trial commenced on October 9, 2012. 1 AA 148, 2 AA 246. Thus, it took a total of 691 days to go to trial. As discussed *infra*, 63 days are attributable to the court, 29 days are attributable to the State, and 599 days are attributable to Appellant. The delay was not presumptively prejudicial because Appellant is more responsible for the delay. See Middelton v. State, 114 Nev. 1089, 1110, 968 P.2d 296, 311 (1998) (holding that a delay of two and a half years was not presumptively prejudicial because the defendant was responsible for most of the delay); Furbay v. State, 116 Nev. 481, 485, 998 P.2d 553, 555 (2000) (finding a five and a half year delay between defendant's arrest and jury trial was not a violation of his speedy trial rights, despite the State's unacceptable two month delay to attend a seminar, because defendant asked for five of the nine continuances); Leonard v. State, 117 Nev. 53, 83, 17 P.3d 397, 415 (2001) (holding that defendant was not denied his right to a speedy trial after a two year delay because one of the reasons for the length delay was defense counsel's actions or specific requests).

In support of his contention that the delay was unconstitutionally long, Appellant erroneously relies upon a series of decisions in attempt to paint a two year wait as prejudicial. However, Appellant's reliance on these cases is misplaced because there is one key factual difference between his case and the

cases he cites – Appellant was directly responsible for the vast majority of the delay. In the cases Appellant cites, the defendants did not cause the delay. The delays in those cases were *solely* due to the State. See State v. Erenyi, 85 Nev. 285, 289, 454 P.2d 101, 103 (1969) (finding that the State had a constitutional duty to make a diligent, good-faith effort to bring defendant to trial within a reasonable amount of time after defendant made a request to be brought to trial in Nevada as soon as possible), Wood v. Sheriff, Carson City, 88 Nev. 547, 549, 501 P.2d 1034, 1035 (1972) (noting that the prosecutor assigned no reason to justify the delay and simply "ignored" defendant's request for disposition of the charge against him). As this court has repeatedly recognized, an appellant cannot now claim prejudice from the ensuing delay that he helped cause. See Manley v. State, 115 Nev. 114, 126, 979 P.2d 703, 710 (1999).

2. Reason for Delay

As for the second factor, Appellant understates the record in a blatant attempt to blame the State for his delays. Appellant claims that "the State requested 2 continuances when the Defense announced ready . . . [and] many of the other continuances were due to discovery issues caused by the State. The defense only asked for the first continuance and the 9 month continuance." AOB, p. 26. A review of the record demonstrates that Appellant was responsible for the vast majority of the delay in terms of time.

The State did ask for two continuances but they were short continuances. The first was the March 14th motion. 1 AA 37-39. The State needed time to secure another fingerprinting expert and only asked for a continuance to the week of April 4th, a delay of 14 days. 1 AA 39. Under Barker, the reason for the State's requested delay was proper and the Court found good cause for the delay. See 407 U.S. at 531, 92 S.Ct. at 2192 (noting that a missing witness is a valid reason and should serve to justify appropriate delay). It was Appellant who chose a trial date of June 20. 1 AA 181. So, although the State filed the motion for continuance, the remaining 63 days after April 4th are attributable to Appellant.

On October 25, 2011, the State requested a 1 day delay, from October 31, to November 1, because the lead detective was out on vacation. 1 AA 210. Again, the State had a proper reason for the delay. See Barker, 407 U.S. at 531, 92 S.Ct. at 2192. Although Appellant did not ask for an additional delay on the record, it was defense counsel who asked the court for a sidebar after the State announced their intention to start on November 1st. 1 AA 210. The court came back from the sidebar with a January 9th date. Id. Because the State only asked for a 1 day delay, the additional 69 days should be attributed to Appellant. Combined, the State requested 15 days to deal with witness issues.

Appellant claims that "*many* of the other continuances were due to discovery issues caused by the State." AOB, p. 26 (emphasis added). There was only *one*

continuance due to discovery issues. The parties appeared on June 14, 2011, for a status hearing on Appellant's motion for discovery and asked for a continuance due to outstanding subpoenas. 1 AA 195. However, the State expected to get those materials within a few weeks. Id. It was Appellant who requested that the court reset the trial for an October date due to "scheduling." Id. There is nothing on the record to suggest that the State requested such a long continuance date. Thus, 14 days should be attributable to the State and 133 days attributable to Appellant. [10]

The State asked for a total of 29 days: 15 days to deal with witness issues and 14 days to deal with discovery issues. Appellant asked for 599 days: 62 days for his first requested continuance, 63 days at the March 15th hearing, 133 days at the June 14th hearing, 69 days at the October 25th hearing, and 272 days at the January 10th hearing.[11] It is clear looking at these numbers that Appellant is more responsible for the lengthy delay. Additionally, each delay requested by Appellant and the State was reasonable.

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[10] But even if this Court attributes the entire 147 day delay to the State, the State would still have a combined total of 162 days to Appellant's 466.

[11] 63 days are attributable to court scheduling: the 61 days between arraignment and the initial trial date, a one day delay between January 9th and 10th, and a one day delay from October 8th to 9th.

3. Appellant's Assertion of his 60 Day Right

As for the third Barker factor, as discussed *supra*, Appellant waived his right to a speedy trial through his repeated delays and the multiple instances on the record where his counsel told the court that he waived his 60 day right. Despite his waiver, the court made every effort to give him as speedy of a trial date as possible. The court and the State consistently scheduled around defense.

4. Prejudice to Appellant

As for the fourth Barker factor, Appellant was not harmed by the delay. The only concrete claim of prejudice offered by Appellant is that "he obtained little credit for time served on this case[.]" AOB, p. 27. Appellant neglects the important fact that he was sentenced to prison on another case while this matter was pending before the lower court. 3 AA 648, 650. This fact is conclusive as to any alleged claim of prejudice arising from lost credit for time served since Appellant was not entitled to credit for time served when he was serving another sentence. NRS 176.055(2)(b); Griffin v. State, 122 Nev. 737, 745, 137 P.3d 1165, 1170 (2006). As such, Appellant's claims of presumptive prejudice must also fail. This Court cannot presume prejudice premised only upon the passage of time when the record is clear that Appellant was serving his sentence on another case.

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IV.
The District Court Did Not Err in Denying Appellant's Motions to Withdraw Counsel[12]

The district court properly denied Appellant's motions pursuant to Young v. State, 120 Nev. 963, 102 P.3d 572 (2004). This Court reviews a district court's denial of a motion for substitution of counsel for an abuse of discretion. Id. at 968, 102 P.3d at 576. "Where a motion for new counsel is made considerably in advance of trial, the [district] court may not summarily deny the motion but must adequately inquire into the defendant's grounds for it." Id. A defendant in a criminal trial does not have an unlimited right to substitution of counsel. Garcia v. State, 121 Nev. 327, 337, 113 P.3d 836, 842 (2005); Young, 120 Nev. at 968, 102 P.3d at 576. Absent a showing of sufficient cause, a defendant is not entitled to the substitution of court-appointed counsel at public expense. Garcia, 121 Nev. at 337, 113 P.3d at 842; Young, 120 Nev. at 968, 102 P.3d at 576. A defendant's Sixth Amendment rights are only violated when there is a complete collapse of the attorney-client relationship and the court refuses to substitute counsel. Garcia, 121 Nev. at 337, 113 P.3d at 842; Young, 120 Nev. at 968, 102 P.3d at 576. The three factors to consider when reviewing a district court's denial of a motion for substitution of counsel are: (1) the extent of the conflict, (2) the timeliness of the

[12] To the extent that Appellant hints at an ineffective assistance of counsel claim, this issue is not appropriate for direct appeal. Instead, Appellant must dispose of his ineffective assistance claim on collateral review. See Feazell v. State, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995).

motion and the extent to which it would result in inconvenience of delay, and (3) the adequacy of the court's inquiry into the defendant's complaints. Young, 120 Nev. at 968-69, 102 P.3d at 576-78.

Here, the three factors weigh in favor of upholding the district court's decision to not to appoint Appellant new counsel.

A. Extent of Conflict

Any alleged conflict between Appellant and his counsel was not irreconcilable and did not amount to a complete collapse of the attorney-client relationship. Every time Appellant believed he was getting his way, he was perfectly willing to continue with counsel.

Appellant filed his first motion to appoint counsel on July 15, 2011. 1 AA 55-63. His motion gave the court no reason for the request. Id. When the court held a hearing on his motion, Appellant complained that he had "been requesting a motion for discovery the whole time" and had still not gotten it. 1 AA 202. He also said that he wanted to go to trial and his counsel had presented him with plea offers, and that he had no contact with his counsel outside of the courtroom. Id. The court explained to Appellant that his counsel had filed a number of motions on his behalf. 1 AA 205-206. The Court further explained that defense counsel was required to bring any potential plea deals to his attention. 1 AA 205. Appellant responded saying "Okay. They say there's been motions filed and whatnot. I

haven't seen or received anything . . ." Id. The court then determined that Appellant was housed at High Desert Prison and was not getting things forwarded to him. Id. Given the additional difficulties due to Appellant being housed at High Desert Prison, the court determined that any problem was more of a communication issue than anything and suggested that defense counsel update the Appellant on his case.[13] Id. Appellant agreed to this resolution. Id.

Appellant's second motion to withdraw also failed to give a reason for the request. 1 AA 64-70. Again, the court brought in Appellant to explain his request. At the hearing, Appellant initially complained that he was having trouble contacting counsel. 1 AA 219. Again, the court determined that Appellant was expressing an issue with communication. 1 AA 220. The court offered to vacate the trial date in an attempt to let Appellant and counsel remedy the communication issues. Id. However, as soon as defense counsel announced ready for trial, Appellant dropped his motion, telling the court that he was "absolutely" ready to go to trial with his counsel. Id.

Similarly, at Appellant's Faretta hearing, Appellant again dropped his request to withdraw counsel. 1 AA 229. Although he initially told the court that

[13] It is worth noting that High Desert Prison does not allow counsel to call their clients. See 4 AA 684-685. While this was not discussed on the record at this hearing, there is evidence that Appellant was experiencing the same problem as early as September 2010, when he was in juvenile court with a different attorney. Id.

he wanted to represent himself, he changed his mind at the hearing and told the court he just wanted another public defender. Id. When defense counsel announced ready for trial, Appellant again dropped his request and said "I'll go to trial *with her*." 1 AA 231 (emphasis added). The record demonstrates that any alleged conflict between Appellant and counsel was not irreconcilable because Appellant repeatedly dropped his complaints and chose to proceed with defense counsel.

B. Timeliness of Motion

While Appellant's repeated requests to discharge his attorney may have initially been timely, Appellant's repeated decisions to withdraw those motions undermined the district court's ability to address Appellant's concerns in a timely and meaningful fashion. Appellant never fully explained what his problem with counsel was and instead repeatedly withdrew his motions upon inquiry by the court. See 1 AA 205, 219, 229. Indeed, it was Appellant's description of his concerns that caused the district court to conclude that any difficulty was not a complete collapse of the attorney-client relationship and was instead a fixable communication problem due to Appellant being housed at High Desert Prison. 1 AA 206-07, 220. The district court attempted to address Appellant's concerns by offering Appellant time to confer with his counsel and remedy the communication issues with the assistance of the court. 1 AA 220. The court was reasonably

attempting to balance Appellant's constitutional right to counsel against the inconvenience and delay that would result from the substitution of counsel.

C. Adequacy of Court's Inquiry

The district court made an adequate inquiry and attempted to remedy the communication issues Appellant was experiencing. At Appellant's first motion hearing, the court directed defense counsel to contact Appellant. 1 AA 206-07. At the second motion hearing, the court attempted to remedy the communication issues by offering to vacate the trial date and trail the case to give Appellant time to confer with his counsel. 1 AA 220. Appellant himself rejected that opportunity, choosing to go forward with defense counsel. Id. A further inquiry in this case was not warranted because Appellant cut off the court's inquiry at every hearing, dropped his motions to withdraw, and chose to proceed with counsel. See 1 AA 205, 219, 229. The court could not have done a more thorough inquiry given Appellant's clear statements that he wanted to proceed with counsel. Because the court made reasonable inquiries into Appellant's motions to withdraw and Appellant withdrew his motions on each occasion, the court did not abuse its discretion in failing to appoint a new attorney.[14]

[14] Appellant complains that the court held sidebar conferences prior to considering Appellant's motions to withdraw. AOB, p. 33. The record provides a simple answer to why defense counsel asked for those sidebars. Different judges heard this case during its progression to trial. The first time Appellant filed a motion to withdraw counsel, Judge Tao heard the motion. 1 AA 201. The second motion to

Lastly, Appellant's argument that the court did not seriously consider his request to represent himself is belied by the record. Appellant made an oral request to represent himself on January 10, 2010. 1 AA 223. The court attempted to respond to Appellant's request by explaining that defense counsel would bring him the necessary information to proceed with a Faretta request. 1 AA 224. However, Appellant repeatedly refused to engage with the Court, ignoring the court's questions, and telling the marshal that he was ready to go. Id. In the face of Appellant's refusal to engage, the court did what it could. The court instructed defense counsel to provide Appellant with information on representing himself and instructed defense counsel to place it on the calendar if Appellant decided he did want to represent himself. 1 AA 225. There was little else the court could have done given Appellant's refusal to engage. At Appellant's Faretta hearing, the court repeatedly asked Appellant if he wanted to represent himself and Appellant repeatedly said he did not. 1 AA 229. Therefore, the court seriously considered Appellant's request to represent himself.

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withdraw counsel was heard by Judge Smith. 1 AA 215. Appellant's Faretta hearing was in front of Judge Tao. 1 AA 228. Defense counsel was likely getting the court up to speed on the progress of Appellant's case and his previous motions. However, even if the sidebars warrant further inquiry, the appropriate remedy is not to vacate Appellant's conviction. Rather, the Court may remand this case for the limited purpose of further fact finding on the issue of the sidebar conversations. See Ryan's Express v. Amador Stage Lines, 128 Nev. _, 279 P.3d 166, 172 (2002).

V.
There was Sufficient Evidence to Support Burglary and Grand Larceny Convictions

When this court is asked to review the sufficiency of evidence supporting a jury's verdict, this Court will inquire "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Mitchell v. State, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008) (internal citations omitted). This Court should not "reweigh the evidence or evaluate the credibility of witnesses because that is" the jury's responsibility. Id. Furthermore, while evaluating the sufficiency of the evidence presented at trial, this Court recognizes that circumstantial evidence alone may sustain a conviction. Cunningham v. State, 113 Nev. 897, 909, 944 P.2d 261, 268 (1997).

Appellant focuses his argument on the burglary charge and limits discussion of his grand larceny conviction to a single unsupported sentence. See AOB, p. 36-37. As the trial court said, the State had to prove two things in this case: whether a crime occurred and who did it. See 3 AA 604. Appellant seems to concede that there is no doubt a crime occurred. The Mendoza's home was clearly broken into and ransacked. Appellant's argument focuses on the second part of the State's burden: *who* did it.

First, Appellant points this Court to Geiger v. State, 11x Nev. 920, 944 P.2d 993 (1996), Reed v. State, 95 Nev. 190, 591 P.2d 274 (1979), and Matthews v. State, 94 Nev. 179, 576 P.2d 1125 (1978), to erroneously suggest that the State is required "to prove something more when fingerprint evidence was used to prove a burglary." AOB, p. 36. Matthews and Reed involved factual situations where there was additional evidence beyond fingerprints and as such this Court did not address the legal issue Appellant claims it did. Rather, Matthews and Reed did nothing more than find sufficient evidence based upon the facts presented. Matthews, 94 Nev. at 180, 576 P.2d at1125-26; Reed, 95 Nev. at 193-94, 591 P.2d at 276-77. Indeed, the appellant in Reed contended that "as a matter of law, fingerprints alone, without accompanying corroboration (,) are insufficient to support a conviction." Id. at 193, 591 P.2d at 276 (brackets in original). This Court rejected this contention and instead noted that fingerprint evidence is strong evidence. Id. at 193-94, 591 P.2d 276-77.

Geiger is directly adverse to Appellant's position. This Court specifically held that "[c]orroborating evidence [of fingerprints] is not required." Geiger, 112 Nev. at 941, 920 P.2d at 995. Instead, this Court concluded that fingerprint evidence standing alone was sufficient to support a conviction for residential burglary where "circumstances rule out the possibility that they might have been imprinted at a different time than when the crime occurred[.]" Id. (quoting, Carr v.

State, 96 Nev. 936, 939, 620 P.2d 869, 871 (1980). Moreover, other courts have reached the same conclusion. See e.g., People v. Riddick, 516 N.Y.S. 2d 71, 130 A.D.2d 780 (1987) (finding defendant's fingerprint on the exterior door that the assailant broke into sufficient to uphold a burglary conviction); State v. Gray, 504 S.W.2d 825 (Mo.App. 1974) (finding that defendant's fingerprints found on a broken window plus testimony that defendant was not a member of the church congregation and had no reason to be at the burglarized part of the church building was sufficient to support a guilty verdict); People v. Figueroa, 2 Cal.App.4th 1584, 4 Cal.Rptr. 2d 40 (1992) (finding that defendant's fingerprints found on the exterior of a window and testimony from the victim that defendant had not been in that part of the home during his previous visits was sufficient to affirm defendant's conviction).

Moreover, Appellant's argument ignores the record because the State *did* present circumstantial evidence that Appellant entered the home through the bathroom window. See Cunningham, 113 Nev. at 909, 944 P.2d at 268 (recognizing that circumstantial evidence alone may sustain a conviction). There was evidence presented that the back patio was wet. Mrs. Mendoza, Mr. Mendoza, Officer Shevlin, and CSA Dahl all testified to the broken water spigot in the backyard, next to the bathroom window. 3 AA 454, 480, 493. It was not broken when Mrs. Mendoza left that morning. 3 AA 454. Mrs. Mendoza also testified

that a bucket filled with concrete was moved and placed under the bathroom window. 1 AA 459.

Next, there was evidence presented that there were mud or dirt marks in the interior of the bathroom. Mrs. Mendoza testified that when she left that morning, the bathroom was clean. 3 AA 460-64. Yet, when she returned less than 2 hours later, there were dirt marks on the bathroom tile. Id. Officer Shevlin and CSA Dahl corroborated this testimony. Officer Shevlin testified there were "marks along the wall and on the tub ring." 3 AA 480. CSA Dahl testified to seeing "foot wear marks" in the bathroom, along the edge of the bathtub. 3 AA 494.

Using their training and experience, both Officer Shevlin and CSA Dahl concluded that the bathroom window was the point of entry.[15] Officer Shevlin testified that the evidence indicated to him that "[w]hoever came through the window pushed off the wall with their foot, landed on the tub ring, and that's how they entered the residence." 3 AA 480. CSA Dahl testified: "I know there was some dirt, like, around the edges of the bathtub and that was one of the indicators that we thought possibly somebody had come in through that window because it just seemed odd that there was some little bit of, like, mud, or, like, prints around

[15] Appellant argues that this Court should exclude the testimony of Mr. and Mrs. Mendoza because they "speculate[d] that Jaquez entered the home through the back window." AOB, p. 36. The State does not concede that their testimony is not competent. However, the State's argument is not solely reliant on their testimony. Therefore, the evidence discussed in this section will exclude that testimony.

the edges of the bathtub . . .it was just pieces of, you know, like, some muddy areas." 3 AA 531. A rational trier of fact could come to the same conclusion. The muddy mess inside the bathroom is circumstantial evidence that the person who broke the spigot outside of the home actually entered the home, through the bathroom window, leaving behind a trail of mud behind him.

There is no question that Appellant touched the exterior of the Mendoza's bathroom window. His print was matched to a latent print found on the exterior of the window. 3 AA 544-45. CSA Dahl testified that the prints she recovered from the bathroom window were "unusual." 3 AA 497. The prints were faced with the fingertips pointing down rather than up as you would expect. Id. This downward direction indicated to CSA Dahl that the prints "could possibly be someone climbing in the window." Id. In addition, there was testimony from Mr. and Mrs. Mendoza that they did not know Appellant, had never seen him before, and that he had no legitimate reason to be touching the window of their home. 3 AA 462-63, 472-73.

A rational trier of fact could infer from the muddy mess, the unusual direction of the print, and the fact that the victims did not know Appellant, that Appellant must have left his print while climbing through the bathroom window on the day of the burglary because he had no other reason to be at the home. Therefore, viewing the evidence in the light most favorable to the prosecution, there is sufficient

evidence that Appellant not only touched the exterior of the window, but entered through it as evidenced by his muddy foot wear prints and downward fingerprints. In sum, there is sufficient evidence to conclude that Appellant burglarized the Mendoza home based on his fingerprints and the circumstantial evidence presented at trial.

Second, Appellant's argument is belied by one of the cases he points this Court to. In Geiger, the State presented two pieces of evidence to the jury to link the appellant to the burglary. First, the State presented evidence that Geiger's fingerprint was found on the pried-off window frame. 112 Nev. at 940, 920 P.2d at 995. The screen was found leaning against the exterior of the home. Id. at 939, 920 P.2d at 994. Second, the State presented testimony from the victims that they did not know or recognize Geiger and that he had never been to the home for any purpose. Id. at 940, 920 P.2d at 995. This Court upheld the conviction, holding there was sufficient evidence to establish guilt beyond a reasonable doubt. This case is factually indistinguishable from Geiger. Appellant's print that was found on the exterior bathroom window, and Mr. and Mrs. Mendoza testified they did not know or recognize Appellant, nor did he have a legitimate reason to be touching the window of their home. 3 AA 462-63, 472-73, 544-45. Thus, under Geiger,

this Court could ignore all the messy, muddy evidence and still uphold Appellant's conviction on Mr. and Mrs. Mendoza's testimony and the fingerprint alone.[16]

VI.
The Trial Court Acted within its Discretion in Denying Appellant's Requested Advisory Verdict

Appellant argues that the court abused its discretion in not giving an advisory verdict, pursuant to NRS 175.381, instructing the jury that the court deemed the evidence insufficient to warrant a conviction but that they are not bound by the advice. AOB, p. 38-39. This Court has repeatedly recognized that such an advisory verdict instruction "rests within the *sound discretion* of the court." Milton v. State, 111 Nev. 1487, 1493, 908 P.2d 684, 688 (1995) (emphasis added) (quoting, Lenz v. State, 97 Nev. 65, 66, 624 P.2d 15, 16 (1981)). In the instant case, the trial judge made clear his reasons for not giving the advisory verdict instruction after hearing argument from the parties and summarizing the evidence presented.[17]

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[16] Because Appellant's insufficiency of the evidence argument as to grand larceny is dependent on this Court finding there was "no proof that he was inside the home," this Court should also uphold the grand larceny conviction.

[17] Notably, defense counsel cited the same case law Appellant cites to in his opening brief. She argued that Melendez Dias v. Massachusetts, 557 U.S. 305, 129 S.Ct. 2527 (2009), the 2009 National Academy of Sciences Report, Geiger v. State, 112 Nev. 938, 920 P.2d 993 (1996), and Matthews v. State, 94 Nev. 179, 576 P.2d 781 (1997) all called fingerprint evidence into question. Defense counsel also pointed the Court to People v. Ray, 626 P.2d 167 (Col. 1981) arguing that there was insufficient evidence to support a verdict because there was no evidence that Appellant was in the resident. The court considered these arguments before

The court said, in relevant part:

> And so in viewing the evidence in the light most favorable to the prosecution, *it appears to me that a reasonable and rational jury could find that Mr. Barber was the person who committed the burglary that nobody disputes happened in this case*. I understand why you're making the motion but, you know, as I indicated, it appears that a reasonable jury could conclude based on the – the totality of the evidence in this case that Mr. Barber was the person who perpetrated this offense and, therefore, the motion is denied.

3 AA 605-606 (emphasis added). Because the court deemed the evidence sufficient to warrant a conviction, the court did not abuse its discretion in denying Appellant's requested instruction to the contrary.

VII.
Forensic Scientist Aoyama's Independent Expert Opinion Did Not Violate the Confrontation Clause

Appellant's right to confront the witnesses against him was not violated because FS Aoyama testified to her own independent analysis of the fingerprint evidence and only referenced the work of other analysts as it related to chain of custody and the validation process.

This Court applies a de novo standard of review to constitutional challenges preserved by objection. Chavez v. State, 125 Nev. 328, 339, 213 P.3d 476, 484 (2009) (holding that Confrontation Clause questions are reviewed de novo); Calvin

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finding that a reasonable juror could conclude that Appellant was the perpetrator. 3 AA 599-601. Other than regurgitating trial counsel's argument, Appellant does not explain how the lower court abused its discretion.

v. State, 122 Nev. 1178, 1184, 147 P.3d 1097, 1101 (2006) (holding that the court maintains discretion to address unpreserved issues under the plain error doctrine if the "error was plain or clear"). However, alleged constitutional errors that were not objected to are reviewed for plain error. Somee v. State, 124 Nev. 434, 443, 187 P.3d 152, 154 (2008).

The Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him," and gives the accused the opportunity to cross-examine all those who "bear testimony" against him. Crawford v. Washington, 541 U.S. 36, 51, 124 S.Ct. 1354, 1364 (2004); see also White v. Illinois, 502 U.S. 346, 359, 112 S.Ct. 736, 744 (1992) (Thomas, J., concurring in part and concurring in judgment) ("critical phrase within the Clause is 'witnesses against him'"). Thus, testimonial hearsay - i.e. extrajudicial statements used as the "functional equivalent" of in-court testimony - may only be admitted at trial if the declarant is "unavailable to testify, and the defendant had had a prior opportunity for cross-examination." Crawford, 541 U.S. at 53-54, 124 S.Ct. at 1365. To run afoul of the Confrontation Clause, therefore, out-of-court statements introduced at trial must not only be "testimonial" but must also be hearsay, for the Clause does not bar the use of even "testimonial statements for purposes other than establishing the truth of the matter asserted." Id. at 51-52,

60 n.9, 124 S.Ct. at 1369 n.9 (citing, Tennessee v. Street, 471 U.S. 409, 414, 105 S.Ct. 2078, 2081-82 (1985)).

A. FS Aoyama Did Not Offer Testimonial Hearsay

Appellant relies on Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S.Ct. 2527 (2009), and Bullcoming v. New Mexico, 564 U.S. _, 131 S.Ct. 2705 (2011), to argue that FS Aoyama's testimony was inadmissible as it violated the Confrontation Clause. AOB, p. 40. However, both Melendez-Diaz and Bullcoming are distinguishable as they involved the *admission* of a forensic or written report. Appellant's case does not involve the admission of another scientist's report.[18]

Appellant's latent print was examined by a number of forensic scientists. 3 AA 563. FS Aoyama was the second of four forensic scientists to look at Appellant's prints. 3 AA 544-45. Admittedly, FS Aoyama did testify that there was another report prepared by Vicki Farnham but the State did not attempt to admit Ms. Farnham's report, and Ms. Aoyama testified that she did not rely on it: "I looked at the report. But in this case I looked at all the cards and *I did the actual comparison* of this latent print to Barber as well." Id. (emphasis added). Because FS Aoyama was testifying to the substance of her comparison and not attempting

[18] The Court emphasized in Melendez-Diaz that their concern was with the *admission* of written certificates because they were used in lieu of live, in court testimony. 557 U.S. at 310-11, 129 S.Ct. at 2532.

to introduce the substance of another scientist's written report, the holding in Williams v. Illinois, ___ U.S. ___, 132 S.Ct. 2221 (2012) controls the analysis.

In Williams, vaginal swabs from a rape kit were submitted to an independent, private laboratory – Cellmark. 132 S.Ct. at 2227. Cellmark produced a report transmitting a DNA profile that its analyst had developed from the swabs. Id. A state DNA analyst then searched the state's database and found the matching profile of defendant Williams. Id. At trial, over defendant's objection, the police analyst was permitted to testify that the DNA profile of defendant Williams on file in the state database matched the DNA profile Cellmark created. Id. Cellmark's written report itself was not introduced into evidence. Id. The State did not introduce a witness from Cellmark. Id. No one testified to having personal knowledge of Cellmark's development of the DNA profile. Id.

Four members of the Court, in a plurality opinion, reasoned that the Cellmark report did not constitute a "testimonial statement" as used in Crawford and its progeny because its "primary purpose" is not to accuse a targeted individual and such a report is not inherently inculpatory because a "DNA profile is evidence that tends to exculpate all but one of the more than 7 billion people in the world today." Id. at 2228, 2250. Additionally, the Court's plurality opined that the DNA laboratory report is not considered "hearsay" material because it is not offered for the truth of the matter asserted, but is the underlying facts that form the basis of the

expert's testimony. Id. at 2228. As such, there is no Crawford violation by permitting an expert to form an independent conclusion based on inadmissible evidence. Id., at 2228, 2244. The plurality opined that the underlying data/report bore no resemblance to cases in which the prosecution called in-court witnesses to summarize the substance of out-of-court conversations or an absent declarant's hearsay. Id., at 2239-40. Because the testifying expert confined her testimony to her own expert analysis and opinions, as the Confrontation Clause requires, the Court did not find a Sixth Amendment violation. Id., at 2240.

Similar to Williams, where the expert discussed the data generated from Cellmark laboratory for the non-hearsay purpose of explaining the basis of her expert opinion, FS Aoyama's testimony that she looked at Vicki Farnham's report and four other scientists confirmed her results were discussed for the non-hearsay purpose of explaining the validation process. She first testified that she was sure the Appellant's print was a match to the latent print because she "looked at standards from [Appellant's] left palm" and found "points of commonality" which allowed her to match the prints. 3 AA 547. When asked how it was not possible that she was mistaken, FS Aoyama testified she was sure she was not mistaken because her analysis was peer reviewed. 3 AA 547-548. Although she referred to the work of her colleagues, FS Aoyama's testimony was confined to explaining her

own fingerprint analysis. Therefore, there is no Crawford violation under the plurality decision of Williams.

Justice Thomas provided the fifth vote in support of the Williams holding, rejecting what he called the plurality's "new primary purpose test." 132 S.Ct. at 2263 (Thomas, J., concurring in the judgment). Nonetheless, Justice Thomas concurred with the plurality that Cellmark's report was not testimonial. In Thomas's view, to satisfy the additional requirement, to be testimonial, a statement must possess sufficient "indicia of solemnity." Id. at 2259. Only "formalized testimonial materials, such as depositions, affidavits, and prior testimony, or statements resulting from formalized dialogue, such as custodial interrogation" satisfy that criterion. Id. at 2260. The Cellmark report was "neither sworn nor a certified declaration" and "[a]lthough the report was produced at the request of law enforcement, it was not the product of any sort of formalized dialogue resembling custodial interrogation." Id.

The same is true of FS Aoyama's limited reference to Vicki Farnham's report. Not only was the report never introduced into evidence, but it was never sworn or certified. It bore "no indicia of solemnity" and therefore the limited reference did not violate the Confrontation Clause. See id. at 2261 ("The Confrontation Clause does not require that evidence be reliable, but that the reliability of a specific 'class of testimonial statements' – formalized statements

bearing indicia of solemnity – be assessed through cross-examination.") (internal citations omitted). Therefore, FS Aoyama's testimony is also nontestimonial using the solemnity test from Justice Thomas's concurring opinion. Thus, five justices would find that FS Aoyama's statements were not testimonial under the Confrontation Clause.

Furthermore, this case is fundamentally distinguishable from Melendez-Diaz, Bullcoming, and Vega v. State, 126 Nev. _, 236 P.3d 632 (2010). In Bullcoming, the trial court admitted a laboratory report of a non-testifying analyst that reflected that the defendant's blood alcohol content. 564 U.S. at _, 131 S.Ct. at 2709. In Melendez-Diaz, the trial court admitted three certificates of analysis from a state laboratory which analyzed the substance seized by the defendant, concluding the substance was cocaine. 557 U.S. at 308, 129 S.Ct. at 2531.[19] In Vega, the trial court allowed a doctor who did not examine the victim to testify to the substance of another non-testifying doctor's report. 126 Nev. at _, 236 P.3d at 636. The report provided evidence that a sexual assault occurred. Id.

In these cases, the defendants were not given the chance to question the analyst who generated evidence used to convict them. Here, the live testimony absent in those cases is present. FS Aoyama testified to all of the fingerprint

[19] The Court noted that the evidence was a "bare-boned statement," and the defendant "did not know what tests the analyst performed, whether those tests were routine, and whether interpreting their results required the exercise of judgment or the use of skills that the analysts may not have possessed." 129 S.Ct. at 2537.

evidence that tied Appellant to the burglary, the protocols and procedures her laboratory uses, and the comparison test she ran on the latent prints recovered from the victim's home. Appellant had the opportunity to challenge her assertions through cross-examination. In contrast, Melendez-Diaz, Bullcoming, and Vega all involved defendants prosecuted based, in part, on scientific evidence created by a non-testifying witness.

At least one other state has held that an expert opinion independently derived and based, in part, on work performed by others is distinguishable from Melendez-Diaz and its progeny. Adopting an independent opinion rationale, the Washington Court of Appeals has repeatedly held that "a defendant's confrontation right is not violated if he or she has the opportunity to cross-examine a testifying expert that uses his or her *independent judgment*." State v. Manion, 173 Wash.App. 610, 627, 295 P.3d 270, 278 (2013) (emphasis added); see also State v. Lui, 153 Wash.App. 304, 322-23, 221 P.3d 948, 957-58 (2009) (holding that an expert's independently derived conclusions do not violate Crawford) (citing cases decided since Melendez-Diaz that have adopted the same rationale). An expert may partially base their opinions on forensic work performed by others, "so long

as the testifying expert has exercised independent judgment." Manion, 173 Wash.App. at 627, 295 P.3d at 278.[20]

FS Aoyama testified to her independent analysis, explaining the procedures she used, and how she matched Appellant to the recovered late print. She testified that AFIS is "just a tool" to generate a list of names, "what they call their top candidate and then so on down the line." 3 AA 545. But, just because you are a match in AFIC, you are not necessarily a match. "It's not like TV were it flashes 100 percent match. So you still have to look at it, look at the latent print itself, and look at the standard itself to do a side-by-side comparison." 3 AA 545. The comparing scientist generates the evidence that matches a defendant to a recovered latent print. FS Aoyama was the comparing scientist in this case.

FS Aoyama testified to the process she used to match Appellant's print to the latent print found at the scene of the burglary: "I did a side-by-side comparison of all the latents for value for comparison in this case against the three individuals, Mr. Barber, Mr. Martin, and Mr. Palmer." 3 AA 546. Her independent side-by-side comparison resulted in a match between Appellant's print and latent print 19F, taken from the exterior side of the point-of-entry bathroom window. Id. She knew

[20] The Manion court considered the Supreme Court's recent holding in Williams and found that Williams does not undermine the "independent opinion" rationale. 173 Wash.App. at 632, 295 P.3d at 280. Alone, the independent opinion rationale is sufficient to conclude there is no violation of Crawford. Id., 295 P.3d at 281.

Appellant was a match because she "looked at standards from his left palm" and looked for "points of commonality" and "points of divergence." 3 AA 547.

Furthermore, Appellant had the opportunity to test the basis and reliability of FS Aoyama's analysis "in the crucible of cross-examination." Crawford, 541 U.S. at 60, 124 S.Ct. 1354. Appellant had the opportunity to attack the procedures FS Aoyama used, pointing out that there are no set procedural for determining a match. 3 AA 552. Appellant demonstrated that the match was primarily based on her judgment and that she compared the prints under a loupe or magnified, but did not measure the ridge distance of the prints. 3 AA 564, 569.

B. Appellant Has Failed to Demonstrate Plain Error

Appellant failed to object to two of the three alleged Confrontation Clause violations. His failure to address, no less demonstrate, plain error is fatal. The absence of a timely challenge is fatal "because failure to object, assign misconduct, or request an instruction, will preclude appellate consideration." Garner v. State, 78 Nev. 366, 373, 374 P.2d 525, 529 (1962). An unpreserved issue may only be reviewed for plain error which is "so unmistakable that it reveals itself by a casual inspection of the record." Patterson v. State, 111 Nev. 1525, 1530, 907 P.2d 984, 987 (1995) (internal citations omitted); Sterling v. State, 108 Nev. 391, 394, 834 P.2d 400, 402 (1992). In determining whether an error is plain this Court must consider "whether there was 'error,' whether the error was 'plain' or clear, and

whether the error affected the defendant's substantial rights. Additionally, the burden is on the defendant to show actual prejudice or a miscarriage of justice." Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003) (footnote omitted).

The first unpreserved statement Appellant complains violates his confrontation rights was the testimony that latent print Marnie Carter reviewed FS Aoyama's work:

> State: Okay. And are these the cards that you were actually given in this case that you're here testifying for?
> Witness: It is – they are.
> State: How do you know that?
> Witness: My markings and initials on the front of the packet and on the back of the packet.
> State: Okay. I'm going to have you go ahead and – or actually, do you know whether it was you yourself that sealed the envelopes?
> Witness: It was not.
> State: Do you know who did?
> Witness: *The person who technically reviewed my work last, which was Marnie Carter*.
> State: Okay. At one point though during this case did you yourself actually review these cards?
> Witness: I did.
> State: And you know that because your –
> Witness: My name is on the chain of custody or my initials are.

3 AA 538 (emphasis added). A casual inspection of the record demonstrates there was no Crawford violation. FS Aoyama was simply establishing the chain of custody. Appellant has not attempted to argue that this testimony amounts to plain error because he cannot.

Appellant also complains that the following testimony violated Crawford:

> State: Okay. Is it possible that you were mistaken and it was not a match to that – that palm print was not a match of [Appellant] Barber?
> Witness: No.
> State: Why?
> Witness: *This particular print has been looked at by four scientists, and we all came up with the same conclusion*.

3 AA 547-548 (emphasis added). This Court considered similar testimony in Vega, which involved the testimony of a doctor who did not examine the victim. 126 Nev. at _, 236 P.3d at 637. That doctor testified to the observations, findings, and statements contained in the report of the examining doctor. Id. The State did not call the examining doctor to testify. Id. In addition to the written report, the examining doctor also prepared a video examination of the victim, depicted by diagram. Id. At trial, the testifying doctor offered her own independent opinion as an expert witness, based on the video examination and diagram. Id. This Court found that the testimony regarding the written report was a violation of Crawford but the independent opinion of the testifying doctor was not. 126 Nev. at _, 236 P.3d at 638. Because Vega did not object to the testimony, this Court reviewed the Crawford violation for plain error and concluded that the testimony on the report did not amount to plain error because it was "duplicative" of the non-violating, independent opinion, testimony, and therefore "inconsequential." Id.

FS Aoyama's testimony that four other scientists came to the same conclusion as her is the definition of duplicative and inconsequential. The jury heard FS Aoyama testify to her independent expert conclusion. 3 AA 546-47. She explained the process of comparing a latent fingerprint to potential matches off of AFIS. 3 AA 545-46. She explained matching Appellant's print to the recovered print, finding no inconsistencies between the two prints. 3 AA 547. Any testimony that other scientists came to the same conclusion was duplicative. Therefore, Appellant cannot demonstrate plain error.

VIII.
The Restitution Order Is Not Plainly Erroneous

Appellant cannot demonstrate that the restitution amount was plainly erroneous because any minor discrepancy regarding the specific amount of restitution is explainable in light of the money taken from the victims and the damage done to their home. NRS 176.033 allows a district court to award restitution to the victims of any offense a defendant has been convicted of. "On appeal, this court generally will not disturb a district court's sentencing determination so long as it does not rest upon impalpable or highly suspect evidence." Martinez v. State, 115 Nev. 9, 12-13, 974 P.2d 133, 135 (1999). Further, a failure to object to a restitution order will limit this Court's review to plain error. Mendoza-Lobos v. State, 125 Nev. 634, 644, 218 P.3d 501, 507 (2009). To be plain, error must be "so unmistakable that it reveals itself by a casual inspection of the record." Patterson, 111 Nev. at

1530, 907 P.2d at 987. In determining whether an error is plain this Court must consider "whether there was 'error,' whether the error was 'plain' or clear, and whether the error affected the defendant's substantial rights. Additionally, the burden is on the defendant to show actual prejudice or a miscarriage of justice." Green, 119 Nev. at 545, 80 P.3d at 95.

The pre-sentence report did not recommend a restitution amount. 3 AA 645. The State requested $7,000.00 in restitution. Id. Appellant did not object. 3 AA 644-51. Nor could he as the amount was reasonable on this record. The victims testified that $6,300.00 worth of currency was taken from their home. 3 AA 461, 467, 469. The difference of $700.00 is attributable to the damage Appellant did to the victims' home. The water spigot in their backyard was broken, the backyard was flooded, the window frame of their bathroom window was damaged and their home was ransacked. 3 AA 454-55, 459-61, 470, 475. Should this Court conclude that the record supporting the restitution amount warrants investigation, this Court should refrain from reversing Appellant's sentence and should instead remand the case for the limited purpose of inquiring into the $700.00 difference. See Ryan's Express v. Amador Stage Lines, 128 Nev. _, 279 P.3d 166, 172 (2012).

IX.
Cumulative Error Does Not Warrant Reversal

This Court has held that under the doctrine of cumulative error, "although individual errors may be harmless, the cumulative effect of multiple errors may

deprive a defendant of the constitutional right to a fair trial." Pertgen v.State, 110 Nev. 554, 566, 875 P.2d 361, 368 (1994); see also Big Pond v. State, 101 Nev. 1, 2, 692 P.2d 1288, 1289 (1985). When evaluating a claim of cumulative error this Court considers "(1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." Valdez v. State, 124 Nev. 1172, 1195, 196 P.3d 465, 481 (Nev. 2008). Notably, a defendant "is not entitled to a perfect trial, but only a fair trial…" Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975).

As to the first factor, the evidence of guilt was overwhelming. Appellant's print was found at the point of entry into the victims' home. 3 AA 480, 496-7, 544-47. As to the second factor, there is no error; or, any error is minor and of an inconsequential nature. As to the final factor, the gravity of residential burglary is immense. Victims deal with the fear and the psychological consequences of residential burglary long after their homes are repaired and their property replaced. Appellant did not merely damage Mr. and Mrs. Mendoza's property and impose a hefty economic loss upon them, he violated their *home* and took from them the sense of security and safety inherent in what a home is supposed to be. Whether the Mendoza family will ever recover is outside the scope of this record.

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X.
Any Error Was Harmless

NRS 178.598 governs harmless error, and provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Error is analyzed for harmlessness based on whether it was constitutional or nonconstitutional in nature. Constitutional error is evaluated by the test laid forth in Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824 (1967). The Chapman test asks "whether it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" Tavares v. State, 117 Nev. 725, 732 n.14, 30 P.3d 1128, 1132 n.14 (2001) (quoting, Neder v. United States, 527 U.S. 1, 18, 119 S. Ct. 1827, 1830 (1999)). Nonconstitutional trial error is reviewed for harmlessness based on whether it had substantial and injurious effect or influence in determining the jury's verdict. Knipes v. State, 124 Nev. 927, 935, 192 P.3d 1178, 1183 (2008). Even if this Court were to find error, any error was nothing more substantial than mere harmless error.

CONCLUSION

In light of the foregoing arguments, the State respectfully requests that this Court AFFIRM Appellant's conviction.

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Dated this 26th day of November, 2013.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points or more and contains 13,614 words.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 26th day of November, 2013.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 26th day of November, 2013. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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