IN THE SUPREME COURT OF THE STATE OF NEVADA

DONALD LEE TAYLOR, *Appellant,* vs. THE STATE OF NEVADA, *Respondent.*	**Supreme Court Case No. 65388** Dist. Ct. Case No. C111230843-1

APPELLANT'S REPLY BRIEF

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STATEMENT OF DISPUTED FACTS FROM RESPONDENT'S BRIEF

A. The Robbery-Murder.

The Defendant, Mr. Donald Taylor, strongly disputes the State's rendition of the factual history of this case as it relates to the apartment identification. As previously outlined, at Mr. Taylor's trial, the State's primary eyewitness was one Angela Chenault ("Chenault"). (AA VOL 5 01230, AA VOL 6 01270). Chenault was the mother of the victim Michael Pearson's ("Pearson") girlfriend, Tyniah Haddon ("Haddon"). (AA VOL 3 00648-00649). Chenault testified to the circumstances surrounding the crimes with which Mr. Taylor was charged. On November 18, 2010, Pearson brought Haddon's son, Chenault's grandson, to Chenault's apartment, as she typically watched him while Pearson went to his job on night shift and Haddon finished her day job. (AA VOL 3 00649). Pearson arrived at the apartment earlier than normal. (AA VOL 3 00650). Pearson informed her that he had two acquaintances meeting him there before retrieving a large black bag of marijuana from outside the apartment that he then placed on top of Chenault's refrigerator. (AA VOL 3 00651-00653).

During the entire exchange, Chenault stated that she stood face-to-face with this perpetrator only momentarily. (AA VOL 3 00658). This was Chenault's only face-to-face encounter with either perpetrator, as the rest of the time she had her back to the drug deal occurring behind her. (AA VOL 3 00651, 00660, 00664).

Chenault stated that, as a general matter, she got "no good look" at the perpetrators. (AA VOL 3 00703). This is directly inconsistent with the State's responding brief where they state that "Chenault identified Appellant as the individual to whom she had this conversation." (Resp. Br. At 5, Footnote 1) This representation is inaccurate with the actual record of the case where Chenault clearly stated she got "no good look" at the perpetrators. (AA VOL 3 00703).

B. The Show-Up and Subsequent Identifications of Mr. Taylor.

Mr. Taylor strongly disputes the State's rendition of the factual history of this case as it relates to the show-up identification where the Appellant was taken in the patrol car. Chenault's first response to seeing Mr. Taylor was that she did not believe him to be one of the men in her apartment. (AA VOL 5 01080). Only after being shown a cell phone picture of Mr. Taylor by her friend, that was texted to her by the police, that Chenault positively identified Mr. Taylor as one of the perpetrators. (AA VOL 5 01083-01084). This was the only point at which Chenault in any way definitively identified Mr. Taylor as one of the perpetrators. (AA VOL 3 00677; AA VOL 5 01083-01084). Chenault also made an in-court identification of Mr. Taylor during his trial. (AA VOL 3 00659-00600).

C. The State's Closing Arguments.

During closing arguments, the prosecution improperly argued burden-shifting to the jury. The prosecutor, argued in rebuttal that "[t]here has to be a rational explanation for the evidence. And I challenge you to find it. . . . I challenge you to come up with a reasonable explanation of the truth if it does not involve the guilt of Donald Lee Taylor," that the jury had "a duty to find the truth," and that "there's at least one person in this room who knows beyond a shadow of a doubt who killed Michael [Pearson]." (AA VOL 6 01272). The prosecutor ended by admonishing the jury that if "you're doing your job...you'll come back here and tell that person [Mr. Taylor] you know [who killed Pearson], too." (AA VOL 6 01272). These statements were made just before the jury entered their deliberations and were clearly an improper burden-shifting argument.

DATED this 6 day of February, 2015.

By _____
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ARGUMENT

I. THIS COURT MAY ADJUDICATE THE ISSUES RAISED IN MR. TAYLOR'S OPENING BRIEF BECAUSE THEY ARE CONSTITUTIONAL IN MAGNITUDE AND SUBJECT TO HARMLESS ERROR REVIEW.

The State argues at length at various points in its brief that the majority of the issues raised in Mr. Taylor's Opening Brief were not preserved for appeal and that this Court should therefore not address them. (Resp. Br. at 21-22, 31) However, the State overlooks the fact that this Court has consistently held that it may address issues not preserved for appeal where they are either plain errors or errors of constitutional magnitude. *See, e.g.*, *Garner v. State*, 6 P.3d 1013, 1022 (Nev. 2000); *Walch v. State*, 909 P.2d 1184, 1189 (Nev. 1996).

It is clear from Mr. Taylor's Opening Brief that the errors at trial were constitutional in magnitude and this Court is therefore not precluded from addressing these issues on appeal regardless of whether they were preserved. Additionally, the errors here are subject to harmless error review, rather than plain error review as advocated by the State, because they are constitutional in nature. *Flores v. State*, 121 Nev. Adv. Op. 72 (2005) (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)). In order for this Honorable Court to find those errors harmless, "it [must be] clear beyond a reasonable doubt that the guilty verdict actually rendered in the case was surely unattributable to the error[s]." *Id.*

(citations omitted). This standard will guide the remainder of Mr. Taylor's arguments herein.

II. THE SHOW-UP OF MR. TAYLOR WAS UNDULY SUGGESTIVE AND THE SHOW-UP AND IN-COURT IDENTIFICATION WERE NOT INDEPENDENTLY RELIABLE.

A. The show-up of Mr. Taylor was unduly suggestive and violated his constitutional right to due process of law.

The State argues that *Gehrke v. State*, 96 Nev. 581 (1980) is inapplicable to the instant case. (Resp. Br. at 17) The State disputes the similarity of the statement Detective Wildemann ("Wildemann") made to Angela Chenault ("Chenault"), the sole witness to the crime, to that police made to the witnesses in *Gehrke*. *Id.* The State further argues that the fact that Mr. Taylor was placed in front of a squad car with a spotlight on him is entirely excused by the fact that it "ma[de] him easier for Chenault to see, as the identification took place in a parking lot at approximately 11:45pm." *Id.*

Contrary to the State's assertions, *Gehrke* is on all fours with the circumstances surrounding the show-up of Mr. Taylor. First, although Wildemann called Chenault and told her they had someone they wanted her to identify, as the State points out, Wildemann also specifically stated to Chenault that they "had him over here" when he brought her to where Mr. Taylor was being detained. (AA VOL 3 00707). This clearly indicated to Chenault that the police thought they had the perpetrator in custody, rather than leaving the possibility that Mr. Taylor did

not in fact commit the murder. Additionally, the State's intimation that the spotlight shone on Mr. Taylor does not contribute to the unduly suggestive nature of the show-up is erroneous. The defendant in *Gehrke* was also in custody and had headlights from a police car shone on him during the show-up, a fact that this Court found critical in finding the show-up to be unduly suggestive. *Gehrke*, 96 Nev. at 583-584.

The State further admits that show-ups, such as the one to which Mr. Taylor was subjected, are inherently unduly suggestive, Resp. Br. at 17, but that it was justified by countervailing policy considerations. *Id.* at 18. It is unclear what countervailing policy the State contends justified the show-up in this case. The State cites *Jones v. State*, 95 Nev. 613, 617 (1979), in which this Court held that a prompt show-up is justified to ensure fresher memory. However, the show-up in *Jones* occurred approximately 45 minutes after the crime had been committed. 95 Nev. at 616. Here, the show-up was conducted more than eight hours after the crime had been committed. (AA VOL 5 01078). The State fails to persuasively show that this lengthy amount of time did not negatively affect Chenault's memory and ability to accurately identify the perpetrator of the crime.

The State also cites the fact that the police apprehended Mr. Taylor as soon as they possibly could, implying that this is a sufficient policy consideration to justify the show-up. (Resp. Br. at 18). Although "police are not to be criticized

because they attempted to establish an affirmative identification as promptly as possible," *Banks v. State*, 575 P.2d 592, 596 (Nev. 1978), law enforcement's apprehension of a suspect as soon as possible, standing alone, cannot justify a highly suggestive show-up and the State cites no authority for such a proposition. Thus, the show-up of Mr. Taylor was unduly suggestive and was not justified by any countervailing policy.

B. The unduly suggestive show-up of Mr. Taylor had no independent indicia of reliability.

The State argues in the alternative that even if the show-up of Mr. Taylor was unduly suggestive, there were "sufficient indicia of reliability" relative to Chenault's identification that do not make the show-up run afoul of Mr. Taylor's right to due process. Resp. Br. at 19. Of course, "reliability is the linchpin in determining the admissibility of identification testimony." *Manson v. Brathwaite*, 423 U.S. 98, 114 (1977). As outlined in Mr. Taylor's Opening Brief, several factors are considered when determining whether an identification is independently reliable, including the witness' opportunity to view the criminal, the time between the crime and the identification, the witness' degree of attention at the time of the crime, the witness' level of certainty, and the accuracy of the witness' prior descriptions of the criminal. *Id.* at 114.

The State argues first that Chenault had sufficient opportunity and time to view the criminal in her apartment. Resp. Br. at 19. The State points to the fact that "she came face to face with the perpetrator" in her apartment. *Id.* at 19-20. However, the State fails to consider the fact that this encounter was merely seconds and did not occur *during* the commission of the crime, nor was Chenault the victim of the crime at issue here. The presence of such circumstances would have given Chenault more of a motive and time to view the criminal. *Cf. Neil v. Biggers*, 409 U.S. 188, 200 (1972) (noting that victims of crime typically have a particularly special motive to closely note and remember the characteristics of a perpetrator). Chenault also testified that she got "no good look at" the criminal. AA VOL 3 00703. This stands in contrast to other cases, such as *State v. McCray*, 460 P.2d 160 (1969), in which the witness clearly had sufficient opportunity, time, and motive to view the criminal. In *McCray*, this Court affirmed the trial court's finding that an in-court identification was independently reliable, based upon the fact that the criminal held a gun one and a half feet from the witness' head for at least a minute. *McCray*, 460 P.2d at 161-162. Here, Chenault viewed the criminal for only a few seconds, before any crime had even been committed. She therefore clearly had little opportunity, motive, or time to view the criminal.

The State continues to argue that "Chenault exhibited sufficient certainty" because she stated "I thought that was him." (Resp. Br. at 20). This statement is

entirely ambiguous and shows no degree of certainty. It must also be considered in light of her other definitive statements that she "got no good look" at the criminal. (AA VOL 3 00703). Even Wildemann testified that after he brought Chenault to the show-up, "[s]he [took] a look and she [said] that she [didn't] think [it was] him; she just [didn't] recognize that to be him." (AA VOL 5 01080). Chenault's equivocal statements are entirely uncertain when compared to other cases where the witness made definitive identifications. *See, e.g.*, *Biggers*, 409 U.S. at 200 (describing the witness/victim's statement that she had "no doubt" that the defendant was her rapist). Most tellingly, the State fails to address that Chenault was focused on preparing dinner at the time of the crime, rather than the events going on around her, and that more than eight hours had passed between the crime and the show-up. These are two factors that must be considered by this Court when determining whether Chenault's identification had sufficient indicia of independent reliability and, as fully outlined in Mr. Taylor's Opening Brief, weigh heavily in favor of finding her identification unreliable. (Op. Br. at 19-24).

The State also makes a last ditch attempt to argue the identification's independent reliability by arguing that "the weight and credibility of identification testimony is solely within the province of the jury," citing *Wise v. State*, 547 P.2d 314, 315 (1976). (Resp. Br. at 20). This is gross mischaracterization of the *Wise* holding, however, as that case was concerned with an *insufficiency of the evidence*

challenge to identification testimony. *Wise*, 547 P.2d at 315 (describing the defendant's "challenge to the sufficiency of evidence to support the verdict" by suggesting the court "should reverse because of the 'inherent unreliability of eyewitness identification'"). Here, in contrast, Mr. Taylor is not arguing that the identification was insufficient for his conviction but is rather arguing its admissibility at trial in the first place. Based on the foregoing, it is clear that Chenault's identification of Mr. Taylor had no indicia of independent reliability from the tainted show-up procedure and this Court should therefore reverse the holding of the court below.

C. Chenault's in-court identification of Mr. Taylor should have also been suppressed because it was unreliable and not free from the initial tainted identification.

The State argues that Chenault's in-court identification was properly admitted because "[i]t can be said that the identification was 'the product of observations at the time of the crime' rather than the result of 'impresssions made during the suggestive pretrial photographic identification process.'" *United States v. Hanigan*, 681 F.2d 1127, 1133 (9th Cir. 1982) (citations omitted). As outlined in Mr. Taylor's Opening Brief, this involves a consideration of the same factors as those used to determine whether an identification itself is reliable independently of a tainted identification procedure. (Op. Br. at 25-26). Since the focus is on "the reliability of the witness' identification itself," *United States v. Barron*, 575 F.2d

752, 754 (9th Cir. 1978), those same factors point to the fact that Chenault's in-court identification was not independently reliable of the tainted show-up. As outlined herein, as well as Mr. Taylor's Opening Brief, Chenault had little opportunity and motive to view the criminal, was paying little to no attention, made equivocal statements as to her certainty of the criminal's identity, and there was a great deal of time that elapsed between the crime and the identification.

Based on the foregoing, both the in and out of court identifications were erroneously admitted and violated Mr. Taylor's constitutional right to due process of law and these errors were not harmless. As outlined in Part I, these constitutional errors are subject to harmless error review and the State carries the burden to show that it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Neder v. United States*, 527 U.S. 1, 18 (1999). The State has failed to carry this burden here because it utilized the plain error analysis to argue that the identifications were properly admitted. (Resp. Br. at 21-23). Here, identification of Mr. Taylor as the perpetrator was a required element of the State's case and without this testimony, it is questionable as to whether a rational jury would have found him guilty beyond a reasonable doubt. *Cf. Stephans v. State*, 262 P. 3d 727, 734 (Nev. 2011) (finding the erroneous admission of hearsay testimony as to the price of stolen goods not harmless error for a prosecution for grand larceny, since price was a requisite

element of the charge). Thus, the erroneous admission of the identifications here was not harmless error.

III. THE PROSECUTION'S POWERPOINT SLIDE AND CLOSING ARGUMENTS VIOLATED MR. TAYLOR'S SIXTH AMENDMENT RIGHT TO A FAIR TRIAL AND FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION.

The State argues that its Powerpoint slide, which had the word "GUILTY" superimposed over Mr. Taylor's booking photo did not violate his Sixth Amendment right to a fair trial because it "did not undermine the presumption of innocence." (Resp. Br. at 24-25). Although a prosecutor may request the jury to find a defendant guilty based upon the evidence presented, *Morales v. State*, 143 P.3d 463, 467 (Nev. 2006), it is impermissible to unilaterally declare the defendant guilty. *Pacheco v. State*, 82 Nev. 172, 179 (1966). The State attempts to distinguish *In re Glassman*, 286 P.3d 673, 678-79 (Wash. 2012) by stating that the defendant looked battered and bloody in the photograph used by the state in its argument to the jury. However, the photograph used was still a booking photo, which is inherently prejudicial, just as the booking photo used here.

The State also cites *Allred v. State*, 92 P.3d 1246, 1252-53 (Nev. 2004) in making a general argument that annotated photographs may be used as demonstrative evidence at trial. (Resp. Br. at 24). While this is accurate, demonstrative photographs "may not be used to make an argument visually that would be improper if made orally," *Watters v. State*, 313 P.3d 243, 247 (Nev.

2013), and the facts of this case are distinguishable from *Allred*. There, the trial court required removal of certain statements on photographs regarding physical assault that explained the defendant's injuries. The statements here, however, were much more prejudicial since they declared Mr. Taylor unequivocally guilty.

The State next argues that the prosecution's comments in closing did not violate Mr. Taylor's constitutional rights because they were made after a summation of the evidence and were merely conclusions based upon that evidence. (Resp. Br. at 26). While the prosecution may make conclusions based upon the evidence to the jury, *Collins v. State*, 488 P.2d 544, 545 (Nev. 1971), the prosecution was not making conclusions based upon the evidence here. In *Collins*, for example, the prosecution argued that "there is no question *from the evidence presented*" that robbery was committed. 488 P.2d at 545. The prosecution made many other comments, all of which involved conclusions "from the evidence presented." *Id.* Here, however, the prosecution at no time made comments "from the evidence presented" but rather made impermissible statements that Mr. Taylor was guilty and that intimated that he had consciousness of guilt due to his failure to testify in his own defense. The prosecution was also not stating its belief that the evidence showed Mr. Taylor's guilt beyond a reasonable doubt, which would be permissible. *See Domingues v. State*, 917 P.2d 1364, 1374 (Nev. 1996). The prosecution's comments here left the jury with only one reasonable conclusion,

independent of the evidence presented at trial: that Mr. Taylor was guilty. These errors tainted Mr. Taylor's trial and warrant reversal of his conviction.

IV. THE STATE'S WARRANTLESS ACCESS TO AND USE OF MR. TAYLOR'S HISTORICAL CELL PHONE LOCATION DATA CONSTITUTED A SEARCH IN VIOLATION OF THE FOURTH AMENDMENT BECAUSE THERE IS AN OBJECTIVELY REASONABLE EXPECTATION OF PRIVACY IN THAT DATA.

It is useful first to refute the State's mischaracterization of Mr. Taylor's position relative to the applicability of *Jones v. United States*, 132 S. Ct. 945 (2012) to this case. The State's brief incorrectly states that Mr. Taylor contends that the majority holding in *Jones* supports his arguments. (Resp. Br. at 41). While it is true that the majority held that a physical trespass on Jones' property in order to place a GPS tracking device on his vehicle violated the Fourth Amendment, Mr. Taylor's Opening Brief cites the *concurring opinion* of Justice Sotomayor as persuasive authority for this Court's consideration. (Op. Br. at 36-39). That opinion denotes two important features of cell phone data that are indicative of whether there is a reasonable expectation of privacy in that data: the quantity and the private nature of that data. *Jones*, 132 S. Ct. at 955-956.

Mr. Taylor's brief argues that this Court should consider the large amount of information and the highly intrusive nature of that information that can be gleaned from cell phone data and find that there is a reasonable expectation of privacy therein, as outlined in his Opening Brief. The State attempts to argue that the

nature of information revealed by cell phone location data is not private because it merely reveals the location of cell towers. (Resp. Br. at 35). This glosses over the real nature of cell phone location data. The data at issue here allowed the State to determine a cell phone's location based upon the tower to which his cell phone connected. Indeed, the State acknowledges as much in its Brief, where it reiterates the fact that Mr. Taylor's cell phone data showed that his cell phone was in the vicinity of the scene of the crime at the time of the murder. (Resp. Br. at 22, 32, 35, 42).

Additionally, the prosecution heavily relied on the cell phone data at trial to establish Mr. Taylor's guilt. Ms. Christensen's closing argument is indicative of this, in that she told the jury "[t]he defense suggests that it's not his phone or that someone else was using it, I would submit to you because the person using that phone is guilty of the crimes charged in this case. So he's got to distance himself from that phone. But the evidence is overwhelming. He can't." (AA VOL 5 01217). This is significant because "if [the data] could place him near [the scene of the crime], it could place him near any other scene." *United States v. Davis*, No. 12-12928, at 20-21 (11th Cir., June 11, 2014). Clearly, the nature of the information gleaned from the cell site locations of Mr. Taylor is highly sensitive and intrusive. Therefore, Mr. Taylor holds a reasonable expectation of privacy in that data.

The State next argues that Mr. Taylor had no reasonable expectation of privacy in his cell site location information because he disclosed that information to his cellular service provider, a third party. (Resp. Br. at 36-41). The State cites ..... Resp. Br. at 35-36. *Smith v. Maryland* is not entirely on point to the facts of this case, however in *Smith*, the United States Supreme Court held that there is no reasonable expectation of privacy *in numbers dialed*, a point recognized by the State. 442 U.S. at 744. This case concerns not numbers dialed, but the physical location of Mr. Taylor's cell phone at innumerable points in time.

Likewise, *Miller* also does not fully parallel the facts of this case. As the State extensively notes, a substantial portion of *Miller*'s holding is couched in the notion that there is no reasonable expectation of privacy in information *voluntarily conveyed* to a third party. 425 U.S. at 442 (noting that "[a]ll of the documents obtained, including financial statements and deposit slips, contain only information voluntarily conveyed to the banks"). However, it is unclear that cell phone users voluntarily convey their location data to their service providers. *In re Target Phone 2*, 733 F. Supp. 2d 939 (N.D. Il. 2009) (stating that "[c]ell phones, unbeknownst (this court suspects) to many of their users, send out signaling information that can be used to identify the phone's physical location). Cell phones also convey location data to service providers even when the phone is not being used by the consumer. *State v. Earls*, 70 A.3d 630, 637 (N.J. 2013).

Lastly, the State also argues that there is no legal precedent to support the notion that the warrantless access to and use of historical cell phone location data violates the Fourth Amendment. However, the Eleventh Circuit Court of Appeals recently held that, under circumstances entirely similar to those here, there is a reasonable expectation of privacy in cell site location information and that a warrant is needed to access and use this information. *See United States v. Davis*, No. 12-12928 (11th Cir. June 11, 2014). Thus, Mr. Taylor's Fourth Amendment rights were violated when the State accessed his cell site location information without a warrant.

V. MR. TAYLOR IS AT MINIMUM ENTITLED TO A NEW TRIAL BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT HIS CONVICTION.

The State claims that with regard to an insufficiency of the evidence challenge, this Court must consider all of the evidence adduced at trial and that evidence was sufficient to support Mr. Taylor's conviction. (Resp. Br. at 43). In support, the State cites *Stephans v. State*, supra at 734 (citations omitted). However, *Stephans* concerns when *reversal* is warranted based upon insufficient evidence. There, the defendant was seeking acquittal based upon erroneously admitted testimony that lacked foundation, was hearsay, and violated the best evidence rule. 262 P.2d at 730. This Honorable Court found that without that testimony, there was insufficient evidence to support the defendant's conviction

and that the defendant was therefore entitled to a retrial. *Id.* at 733. This illustrates the distinction at issue here: a retrial is warranted when there is insufficient *properly admitted* evidence to support a conviction, whereas acquittal is warranted when *all* evidence admitted at trial was insufficient to support a conviction. For the reasons set forth extensively in Mr. Taylor's Opening Brief, there was insufficient *properly admitted* evidence to support Mr. Taylor's conviction and he is therefore entitled to a retrial, at minimum, on that ground alone.

VI. THERE WERE SEVERAL CUMULATIVE TRIAL ERRORS OF CONSTITUTIONAL MAGNITUDE THAT WARRANT REVERSAL OF MR. TAYLOR'S CONVICTION.

The State argues that Mr. Taylor has failed to show a single trial error. (Resp. Br. at 47). The State also argues that "only errors eligible to harmless error analysis" are subject to the cumulative error analysis. *Id.* As outlined above, however, the errors at issue here are constitutional in magnitude and are therefore subject to both the harmless error and cumulative error analysis. As fully briefed herein as well as in Mr. Taylor's Opening Brief there were several constitutional trial errors that warrant reversal of his conviction.

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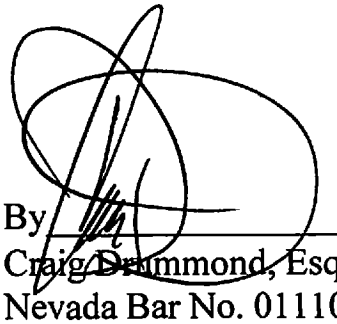
CONCLUSION

Based on the foregoing, outlined herein and in the Opening Brief, it is clear that Mr. Taylor's trial was fundamentally flawed and that his conviction should be reversed.

DATED this 6 day of February, 2015.



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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this Appellant's Reply 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.

The brief complies with the formatting requirements of Rule 32(a)(4)-(6).

The brief is formatted in Word, 14 point Times New Roman font, double-spaced, has 4,577 Words.

DATED this 6 day of February, 2015.

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 6 February, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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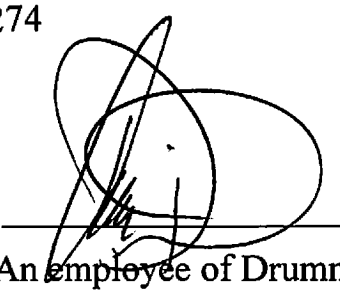

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