

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

2 EMPLOYMENT SECURITY DIVISION,
3 STATE OF NEVADA and RENEE
4 OLSEN, in her capacity as Administrator
5 of the EMPLOYMENT SECURITY
6 DIVISION; KATIE JOHNSON, in her
7 capacity as Chairperson of the
8 EMPLOYMENT SECURITY DIVISION
9 BOARD OF REVIEW,

10 Appellants,

11 vs.

No. 65681

12 CALVIN MURPHY,

13 Respondent.

14 **RESPONDENT'S ANSWERING BRIEF**

15 Appeal from Denial of Petition for Judicial Review
16 District Court, Clark County, Nevada Department 1

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Electronically Filed
Dec 08 2014 09:38 a.m.
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Clerk of Supreme Court

1 **NRAP RULE 26.1 DISCLOSURE**

2 The undersigned counsel certifies that there are no persons and entities
3 as described in NRAP 26.1(a) that must be disclosed because undersigned
4 counsel has no parent corporation and no shareholders. These
5 representations are made in order that the judges of this court may
6 evaluate possible disqualification or recusal.

7 DATED this 5th day of December, 2014.

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1 *State, Emp. Sec. Dep't v. Weber*, 100 Nev. 121, 676 P.2d 1318

2 (1984)5

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4 **Statutes**

5 NRS 612.3808, 10

6 NRS 612.3838, 10

7 NRS 612.3854, 8, 10, 13

8 NRS 612.530 1, 4

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1 September 19, 2013, the Board of Review affirmed the Appeal Referee's
2 decision. (JA23). On October 7, 2013, Murphy filed his timely Petition for
3 Judicial Review in district court. (JA12). On March 31, 2014, the Honorable
4 Judge Cory reversed the Appeals Referee decision as it was incorrect as a
5 matter of law.¹ (JA132-133). On May 8, 2014, a notice of entry of order was
6 mailed to ESD. (JA129-131). On May 13, 2014, ESD filed an appeal with
7 this Court. (JA134-135).

8 **STATEMENT OF FACTS**

9 On July 13, 2011, Greystone hired Murphy to work as a Maintenance
10 Employee. (JA27 and 45). His last day of work was June 1, 2012. (JA27).
11 Murphy worked Mondays through Fridays. (JA27). On June 10, 2013,
12 Greystone terminated Murphy for no call no show on Monday June 4, 2012.
13 (JA27).

14 On Friday June 1, 2012, the Las Vegas Metropolitan Police arrested
15 Murphy due to a warrant for possession of stolen property. This warrant
16 was issued before his employment with Greystone. (JA28 and 53).
17 Murphy's next scheduled work day was Monday, June 4, 2012. (JA28). On
18 Saturday June 2, 2012, Murphy's girlfriend, Tina Watkins (hereinafter
19 "Watkins"), informed Inez Cabrerra (hereinafter "Cabrerra"), property

20 ¹ Appellant incorrectly states oral argument was provided to the District Court.
(Appellant's Opening Brief, 2). The District Court decided the case without a hearing.

1 manager for Greystone, about Murphy's incarceration. (JA28 and 61).
2 Watkins asked Cabrerra whether Greystone would hold Murphy's job.
3 (JA61). Cabrerra stated that Greystone might hold Murphy's job for one or
4 two days. (JA61). Watkins informed Cabrerra she did not know when
5 Murphy was going to be released from jail. (JA57 and 61). Cabrerra asked
6 Watkins to keep her informed about Murphy's incarceration. (JA61).

7 On June 10, 2014, the Court charged Murphy with possession of
8 stolen property and set bail at \$40,000. (JA57). Murphy lacked the funds to
9 post the \$40,000 bail for release before trial. (JA57). That same day,
10 Watkins informed Cabrerra that Murphy would remain incarcerated. (JA62).
11 Watkins also asked Cabrerra for Murphy's paycheck. (JA62).

12 While incarcerated, Murphy had limited access to the phone in jail, as
13 inmates can only call collect. At the same time, Greystone refused to
14 accept collect calls. Murphy informed Greystone about his incarceration via
15 his girlfriend, Tina Watkins, before his next scheduled work day, June 4,
16 2013. (JA28).

17 Murphy was incarcerated from June 1, 2012, to June 3, 2013. (JA28).
18 After his release, Murphy filed for unemployment benefits effective June 2,
19 2013. (JA27). On July 31, 2013, ESD's Appeals Referee decided that

1 Murphy was ineligible for unemployment insurance benefits on the basis of
2 misconduct. (JA27-30).

3 **STANDARD OF REVIEW**

4 NRS 612.530(4) confines the court to questions of law and ESD's
5 factual findings are conclusive if supported by evidence and without fraud.

6 NRS 612.385 allows ESD to deny unemployment benefits if Kurtz was
7 discharged from either his last or next to last employment "for misconduct
8 connected with the person's work. . . ." *Id.* "Misconduct" has been defined
9 repeatedly as

10 a deliberate violation or disregard on the part of the employee
11 of standards of behavior which the employer has the right to
12 expect. Carelessness or negligence on the part of the
13 employee of such a degree as to show a substantial disregard
14 of the employer's interests or [of] the employee's duties and
15 obligations to his employer. . . . Mere inefficiency or failure of
16 performance because of inability or incapacity, ordinary
17 negligence in isolated instances, or good faith errors in
18 judgment or discretion are excluded in the definition of
19 misconduct.

20 *Barnum v. Williams*, 84 Nev. 37, 41, 436 P.2d 219, 222 (1968).

Misconduct also requires "an element of wrongfulness." *Kolnik v.*
State, Emp. Sec. Dep't, 112 Nev. 11, 16, 908 P.2d 726, 729 (1996) *citing*
Garman v. State, Emp. Sec. Dep't, 102 Nev. 563, 565, 729 P.2d 1335,
1336 (1986). A misconduct determination is a "fact-based question of law .

1 . . . entitled to deference." *Clark County Sch. Dist. v. Bundley*, 122 Nev.
2 1440, 1445, 148 P.3d 750, 754 (2006). If supported by substantial
3 evidence, ESD's misconduct determination should not be disturbed. *Kolnik*,
4 112 Nev. at 16. "Substantial evidence" is that which a reasonable mind
5 could find adequate to support a conclusion. *Id.* "Substantial evidence is
6 more than a mere scintilla but less than a preponderance." *Bayliss v.*
7 *Barnhart*, 427 F.3d 1211, 1214 n.1 (9th Cir. 2005) (internal quotes and
8 citation omitted).

9 This Court must reverse an ESD decision that lacks substantial
10 evidence. *State, Emp. Sec. Dep't v. Weber*, 100 Nev. 121, 124-25, 676
11 P.2d 1318, 1320 (1984); *Lellis v. Archie*, 89 Nev. 550, 554, 516 P.2d 469,
12 471 (1973). This Court may also "set aside the agency's final decision . . .
13 because it is, among other things, affected by error of law. . . ." *Father &*
14 *Sons v. Transp. Servs. Auth.*, 124 Nev. 254, 259, 182 P.3d 100, 104
15 (2008). This Court reviews errors of law *de novo*. *Bundley*, 122 Nev. at
16 1445.

17 ARGUMENT

18 A. ESD APPLIED THE WRONG STANDARD IN DENYING MURPHY'S
19 UNEMPLOYMENT BENEFITS SOLELY DUE TO HIS INCARCERATION.

1 Murphy argued in his appeal to the District Court that the Appeal
2 Referee's decision must be reversed because it was affected by an error of
3 law. Murphy argued that ESD violated Nevada law as decided in
4 *Employment Sec. Dept. v. Evans* by automatically disqualifying him due to
5 his incarceration. 111 Nev. 1118, 901 P.2d 156 (1995). Specifically, the
6 Appeals Referee ruled,

7 The claimant's admitted off-duty criminal conduct is connected
8 with the work because said conduct resulted in the claimant
9 inability to report for work, dutifully notify the employer, and
10 perform his job duties. Therefore claimant's off-duty criminal
11 conduct, which adversely affected his ability to fulfill his dutiful
obligations to the employer, demonstrated a deliberate violation
or disregard of reasonable standards of conduct so as to
contain an element of wrongfulness. Disqualifying misconduct
connected with the work has been established.

12 (JA29).

13 Appellant argues that this Court may only determine whether there
14 was substantial evidence in the record. (Appellant's Opening Brief, 8-10).
15 This argument, however, fails to recognize that this Court may determine
16 whether the administrative tribunal committed an error of law. *Father &*
17 *Sons*, 124 Nev. at 259. This Court must review issues of law *de novo* and
18 the province of this Court is to substitute its judgment if ESD made an error
19 of law. *Bundley*, 122 Nev. at 1445, 148 P.3d at 754. Because the Appeals
20

1 Referee used the wrong legal standard, the Appeals Referee's decision is
2 wrong as a matter of law and this Court must review *de novo*.

3
4 B. EVANS CREATES AN EXEMPTION TO THE THREE STATUTORY GROUNDS TO
5 DENY UNEMPLOYMENT BENEFITS IF THE CLAIMANT'S CASE MEETS TWO ELEMENTS:
6 IMPOSSIBILITY TO REPORT TO WORK AND NOTICE TO THE EMPLOYER OF THIS FACT.

7 Murphy's case is controlled by *Employment Sec. Dept. v. Evans*. In
8 *Evans*:

9 The district court reversed a decision of the Employment
10 Security Department which denied Marilyn Evans'
11 unemployment benefits. Evans lost her job because she had
12 been arrested and was forced to remain in jail pending trial
13 because she could not afford bail. She was terminated during
14 the time that she was in jail awaiting trial. The district court
15 correctly held that Evans' missing work because she could not
16 afford to post bail was not sufficient ground to deny benefits.

17 There are three possible statutory grounds for denial of
18 unemployment benefits: (1) *NRS 612.380* -- voluntarily leaving
19 employment without good cause; (2) *NRS 612.383* -- discharge
20 for crimes committed in connection with employment; and (3)
NRS 612.385 -- misconduct connected with work. None of
these three statutory grounds are implicated in this case. See
also Clevenger v. Employment Security Dep't, 105 Nev. 145,
149, 770 P.2d 866, 868 (1989) ("Nevada law requires that an
employee's misconduct be connected with his or her work
before that person can be deemed ineligible for unemployment
benefits").

The facts of this case are not in dispute. Neither Evans' pre-trial
incarceration nor her criminal acts were connected with her
employment. Further, Evans failure to be available for work was

1 due to her pretrial incarceration which was predicated on her
2 inability to obtain bail, not her criminal conduct.

3 Evans is guilty of no "misconduct" and no "deliberate violation
4 or disregard on [her part] of standards of behavior which [her]
5 employer has the right to expect." *Barnum v. Williams*, 84 Nev.
6 37, 41, 436 P.2d 219, 222 (1968). **It was impossible for**
7 **Evans to appear for work**, and she dutifully notified her
8 employer of this fact (emphasis added).² Her absence from
9 work was neither deliberate nor voluntary. There being no
10 statutory or other legal basis for denying unemployment
11 insurance benefits to Evans, the judgment of the district court is
12 affirmed.

13 *Evans* found that the claimant was not guilty of any misconduct because
14 the claimant's case satisfied two elements: 1) the impossibility to report for
15 work due to incarceration and 2) dutiful notice of this fact to the employer.
16 *Evans*, 111 Nev. at 1119.

17 Here, Murphy was arrested after work on Friday, June 1, 2012. (JA28
18 and 53). As a result of his arrest, he was incarcerated, thereby making it
19 impossible for him to report to work on his next scheduled work day on
20 Monday, June 4, 2012. (JA28). While incarcerated, Murphy, through his
girlfriend Tina Watkins, dutifully notified his employer of this fact on June 2,
2014, more than 24 hours prior to his next scheduled shift. (JA61). Watkins
informed the employer that Murphy's release date was unknown. (JA57

² Appellant's Opening Brief incorrectly cites the *Evans* case by omitting the language "it was impossible for Evans to appear to work . . ." (Appellant's Opening Brief, 11-12). Respondent's answering brief correctly cites the *Evans* case.

1 and 61). By being incarcerated and dutifully notifying his employer, Murphy
2 met both elements of *Evans* and should be eligible for benefits.

3
4 C. *ESD MISINTERPRETS EVANS BY ADDING ADDITIONAL ELEMENTS NOT*
5 *SUPPORTED BY EVANS AND CONTRARY TO THE EVANS HOLDING.*

6 Despite ESD's suggestion, *Evans* is not susceptible to various
7 interpretations. (Appellant's Opening Brief, 12). The holding is clear.

8 Because it was "impossible for Evans to appear for work, and she
9 dutifully notified her employer of this fact . . . her absence from work was
10 neither deliberate nor voluntary," and there is no statutory or legal basis to
11 deny benefits. *Evans*, 111 Nev. at 1119. The plain reading of *Evans*
12 demonstrates that the three statutory bases to deny unemployment
13 benefits (NRS 612.380, NRS 612.383 and NRS 612.385) do not apply to
14 an *Evans*-type case. If Murphy meets the *Evans* analysis, then ESD's
15 denial of unemployment benefits is wrong as a matter of law. Whether the
16 *Evans* standard is separate, or a subset of misconduct, the conclusion is
17 the same: if *Evans* applies, then ESD's denial of unemployment benefits is
18 wrong as a matter of law.

19 ESD argues that the majority decision in *Evans* held that
20 incarceration for criminal conduct can be misconduct so long as certain

1 factors exist. (Appellant's Opening Brief, 12). ESD claims these factors
2 include (1) whether the incarceration and inability to report to work was due
3 to poverty versus criminal conduct; (2) whether there is a nexus between
4 the criminal conduct and the work; and (3) whether the claimant dutifully
5 notified the employer of his location and the status of the criminal
6 proceeding. These factors, however, do not exist anywhere in *Evans* and are
7 in stark contrast to *Evans*.

8 First Factor

9 ESD argues the first factor is whether the failure to show to work
10 resulted from incarceration or indigence. (Appellant's Opening Brief, 13-
11 14). ESD fails to make any legal argument or find any support where this
12 requirement is found in *Evans*. Instead, ESD merely identifies the factor
13 and then states that Murphy admitted to the charges that resulted in his
14 incarceration. (Appellant's Opening Brief, 13-14). In addition, ESD first
15 states Murphy could not afford bail, but then ESD concludes the Appeals
16 Referee found Murphy was incarcerated due to criminal conduct, not
17 indigence. This is incorrect because the Appeals Referee did not remark on
18 Murphy's indigence in the decision. (JA27-30). Moreover, ESD concludes
19 there was substantial evidence that Murphy was in jail because he "willfully
20 and intentionally chose to commit a crime." (Appellant's Opening Brief, 14).

1 ESD, however, fails to cite the record in concluding Murphy intentionally
2 violated the law because evidence of this does not exist, and even if it did
3 exist, *Evans* does not include the element of intent in awarding
4 unemployment benefits because the claimant in *Evans* was similarly guilty
5 of her respective crime. *Evans*, 111 Nev. at 1120. Under *Evans*, factors
6 such as indigence, intent regarding commission of the crime, and guilt or
7 innocence of the criminal charges are all irrelevant.

8 As a policy matter, ESD's inclusion of indigence as an element of
9 *Evans* would result in unreasonable considerations. Despite a person's
10 financial means, incarceration is always the result of an accusation of
11 criminal conduct, and therefore, distinguishing incarceration between
12 criminal conduct and indigence makes no sense. Furthermore, the *Evans*
13 Court had good reason to only require that is impossible for the claimant to
14 report to work due to incarceration; otherwise ESD adjudicators would need
15 to determine whether the claimant was indigent at the time of bail, other
16 reasons the claimant was unable to make bail, and the stage of the
17 detention process when the claimant could seek to attempt bail. Finally,
18 assessing guilt or innocence of pending criminal charges for purposes of
19 qualifying for unemployment is inappropriate because only the criminal
20 justice system can reach such determinations. Therefore, ESD

1 misinterprets *Evans* to require claimants be incarcerated solely due to
2 indigence.

3 Second Factor

4 ESD argues the second factor required by *Evans* is a nexus between
5 criminal conduct and work. (Appellant's Opening Brief, 14-17). There is no
6 such requirement in *Evans*. ESD attempts to create a nexus by marrying
7 failure to show for work as satisfying the "connected to work" aspect of
8 NRS 612.385. However, ESD fails to consider that failure to show for work
9 is involved in every incarceration case, thereby making this factor totally
10 irrelevant. *Evans* controls where a claimant is denied benefits due to failure
11 to show for work due to incarceration, and Murphy, like *Evans*, was unable
12 to show for work due to incarceration.

13 ESD cites *Clark County School Dist. v. Bundley* as holding
14 unexcused absence is misconduct. ESD further argues that the claimant
15 must demonstrate their absence is reasonable and justified which Murphy
16 failed to do.³ *Bundley*, however, is easily distinguishable from this case
17 because *Bundley* applies to non-incarceration cases where an employee
18 deliberately violates an absence policy without justification. *Bundley*, Nev.
19 at 1449. Moreover, ESD misinterprets *Bundley* because the case further

20 ³ The ESD Appeals Referee did not conduct a 'reasonable and justified' analysis.
(JA28-30)

1 held "mere absence without leave is not disqualifying misconduct."
2 *Bundley*, 122 Nev. at 1448. If the *Bundley* Court wanted to overturn or
3 redefine *Evans*, it would have stated so; instead, the *Bundley* Court only
4 once cited to *Evans*, identifying the case only in a footnote as "recognizing
5 that work absences will disqualify a person from receiving unemployment
6 benefits only if the absences fall within the description of misconduct."
7 *Bundley*, 122 Nev. at 1446.

8 ESD cites other cases involving a misconduct analysis based on
9 claimants who failed to report to work or failed to notify the employer.
10 These cases are inapplicable and unpersuasive because they do not
11 involved incarcerated claimants like Murphy. See *Kraft v. State, Emp. Sec.*
12 *Dep't.*, 102 Nev. 191, 717 P.2d 583 (1986); *Nevada Emp. Sec. Dept v.*
13 *Nacheff*, 104 Nev. 347, 757 P.2d 787 (1988).

14 Third factor

15 Appellant argues that the third factor of *Evans* requires the claimant
16 to keep his employer dutifully notified of his location and status of his
17 criminal proceedings. (Appellant's Opening Brief, 18-19). This requirement
18 has no basis in law. *Evans* only requires notice to employer that they will
19 not report to work. *Evans* provides no indication that a claimant has any

1 duty to notify the employer of the status of the criminal proceedings or his
2 location.

3 Under *Evans*, dutiful notice only requires imparting information to the
4 employer that it will be “impossible . . . to appear for work.” *Evans*, 111
5 Nev. at 1119. Nowhere in *Evans* does it require the claimant to *remain* in
6 contact with her employer or that the claimant cannot use a surrogate to
7 relay information. Moreover, *Evans* does not analyze the underlying reason
8 why the claimant notified the employer or whether the claimant was
9 required to ask for a leave of absence. In *Evans*, it is unknown how or
10 when the claimant provided notice to her employer. All *Evans* indicates is
11 that it was impossible for her to appear and she dutifully notified her
12 employer of this fact. *Id.*

13 Murphy satisfied the notice aspect of *Evans*. Murphy contacted his
14 employer via his girlfriend, Tina Watkins, on Saturday, June 2, 2012, two
15 days before his next scheduled shift.⁴ (JA61). Murphy was unable to call
16 his employer because his employer would not accept collect calls from jail.
17 Watkins informed the employer that Murphy was incarcerated and that it
18 was unknown when he would be released. (JA61). On June 10, 2012,
19 Watkins again informed the employer that Murphy would remain

20 ⁴ The Appeals Referee did not distinguish whether claimant notified the employer
personally or through a surrogate, asking, “Did you or anyone on your behalf contact the
Employer . . . ?” (JA56).

1 incarcerated and asked to pick up his employment check.⁵ (JA62).
2 Therefore, Murphy dutifully notified his employer of his incarceration prior to
3 termination.

4 5 CONCLUSION

6 Based on the foregoing, the Appeals Referee's ruling violates the
7 holding in *Evans* and was wrong as a matter of law. This Court must review
8 issues of law *de novo* and the province of this Court is to substitute its
9 judgment if ESD made an error of law. *Bundley*, 122 Nev. at 1445.
10 Therefore, this Court should uphold the District Court's decision finding the
11 Appeals Referee's ruling incorrect as a matter of law.

12 Contrary to ESD's assertions, *Evans* is the controlling case and its
13 fact-pattern matches the case of Murphy. For *Evans* to apply, the case
14 must meet two elements: the impossibility to report to work due to
15 incarceration and dutiful notice to the employer of this fact. If *Evans*
16 applies, then there is no statutory or legal basis to deny unemployment
17 benefits. Here, Murphy was unable to report to work due to incarceration,
18 and he notified his employer of his incarceration. Because the facts of

19 _____
20 ⁵ Appellant also alleges, "The only reason she [Watkins] contacted the employer . . .
was because she wanted to pick up the claimant's check." There is nothing in the record
to support this allegation, and nothing in *Evans* or any case law considers any
underlying reason for notifying the employer.

1 Murphy's case meet the two *Evans* elements, ESD was wrong as a matter
2 of law to deny his unemployment benefits.

3 ESD's arguments to reinterpret or overturn *Evans* are unsupported by
4 legal authority and contrary to established law. ESD's analysis adds extra
5 factors to the *Evans* test that are not found in the text of *Evans*, including
6 the following: incarceration due to indigence, a nexus between the criminal
7 conduct and the work, and the duty to notify the employer of the status of
8 the criminal proceeding as well as the employee's absence. However, none
9 of these standards are found in *Evans*, and thus, the standards should not
10 apply here. Additionally, ESD fails to make a persuasive argument that
11 *Evans* should not be the controlling law in Nevada. ESD asks this Court to
12 consider out-of-state cases, but those cases reach a variety of holdings,
13 none of which are binding on this Court. (Appellant's Opening Brief, 20-22).
14 Moreover, reversing *Evans* violates the principles of *stare decisis* because
15 ESD has failed to make compelling reason to overrule prior case law. *City*
16 *of Reno v. Howard*, 130 Nev. ___, 318 P.3d 1063, (2014). Thus, ESD has
17 failed to present any compelling reasons in this appeal to reinterpret or
18 overturn *Evans*.

19 DATED this 5th day of December, 2014.

20 Respectfully submitted,

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1 **NRAP 28.2 CERTIFICATE**

2 1. I hereby certify that this brief complies with the formatting
3 requirements of NRAP 32(a)(4), the typeface requirements of NRAP
4 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this
5 brief has been prepared in a proportionally spaced typeface using Microsoft
6 Office Word 2007 in Arial 14 point font.

7 2. I further certify that this brief complies with the page- or type-
8 volume limitations of NRAP 32(a)(7) because, excluding the parts of the
9 brief exempted by NRAP 32(a)(7)(C), it does not exceed 30 pages and is
10 proportionately spaced, has a typeface of 14 points or more, and contains
11 approximately less than 14,000.

12 3. Finally, I hereby certify that I have read this Respondent brief, and
13 to the best of my knowledge, information, and belief, it is not frivolous or
14 interposed for any improper purpose. I further certify that this brief complies
15 with all applicable Nevada Rules of Appellate Procedure, in particular
16 NRAP 28(e)(1), which requires every assertion in the brief regarding
17 matters in the JA to be supported by a reference to the page and volume
18 number, if any, of the transcript or appendix where the matter relied on is to
19 be found. I understand that I may be subject to sanctions in the event that

1 the accompanying brief is not in conformity with the requirements of the
2 Nevada Rules of Appellate Procedure.

3 DATED this 5th day of December, 2014.

4
5 Respectfully submitted,
NEVADA LEGAL SERVICES, INC.

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1 CERTIFICATE OF SERVICE

2 Pursuant to NRAP 25(d)(1)(B), I hereby certify that I am an employee
3 of the State of Nevada, over the age of eighteen (18) years; and that on the
4 6th day of October, 2014, I electronically filed the foregoing
5 RESPONDENT'S ANSWERING BRIEF with the Clerk of the Nevada
6 Supreme Court; and, as a consequence thereof electronic service was
7 made in accordance with the Master list.

8 I hereby certify that on the 5th day of December, 2014, I mailed a
9 true and correct copy of the above and foregoing RESPONDENT'S
10 ANSWERING BRIEF to the Appellant first-class postage fully prepaid
11 thereon, by placing the same in the United States Mail at Las Vegas,
12 Nevada, addressed as follows:

13 J. THOMAS SUSICH, ESQ.
14 1325 Corporate Boulevard, Suite C
15 Reno, NV 89502
16 Attorney for Appellants

17 DATED this 5th day of December, 2014.

18 By: 
19 EMPLOYEE OF NEVADA LEGAL SERVICES
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