IN THE SUPREME COURT OF THE STATE OF NEVADA

CORY DEALVONE HUBBARD,	)	
	)	Case No.: 66185
Appellant,	)	District Court No.: C-13-292507-1
	)	
vs.	)	
	)	
THE STATE OF NEVADA,	)	
	)	
Respondent.	)	
	)	

APPELLANT'S REPLY BRIEF

Appeal from Judgment of Conviction
Eighth Judicial District Court

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AMENDED STATEMENT OF ISSUES

Mr. Hubbard's opening brief conceded that sufficient evidence was adduced regarding count 4 (robbery of Asia Hood who had actual possession of the iPad) and count 5 (robbery of Kenneth Flenory who had actual possession of his cellular phone).[1] Therefore, the opening brief challenged the convictions based on the robberies of Darny Van (ct. 3), David Powers (ct. 6), Anthony Roberts (ct. 7), Thavin Van (ct. 8) and Trinity Briones (ct. 9).

After completing significant further review of the applicable law, it is now conceded that sufficient evidence was adduced that Darny Van had joint/constructive possession of the iPad which was taken in her presence. Therefore, Mr. HUBBARD is no longer challenging his conviction of count 3.

Consequently, Mr. Hubbard only challenges the sufficiency of the evidence adduced regarding the four robbery counts involving David Powers, Anthony Roberts, Thavin Van and Trinity Briones. These convictions are enunciated in counts 6 through 9 of the Amended Indictment.

Although not discussed in the present brief, Mr. Hubbard continues to challenge the introduction of the facts of the Washington state crime.

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[1] See AOB at 16.

ARGUMENT

I. Mr. HUBBARD'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS HAS BEEN VIOLATED BY HIS CONVICTIONS FOR ROBBERY WITH USE OF A DEADLY WEAPON, AS CHARGED IN COUNTS 6 THROUGH 9, BECAUSE THE STATE FAILED TO ADDUCE ANY, MUCH LESS SUFFICIENT, EVIDENCE THAT THE NAMED VICTIMS HAD ANY PERSONAL PROPERTY TAKEN FROM THEM

Standard of Review: This Court must determine, after viewing the evidence in the light most favorable to the prosecution, whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[2]

On August 22, 2013, three items were taken from the actual possession of two persons who were within, but did not live at, the 657 Shirehampton, Las Vegas home. Nonetheless, Mr. Hubbard was convicted of seven counts of robbery with use of a deadly weapon. By this appeal, challenges four of those robbery convictions.

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[2] Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979). Apparently, the state believed that Mr. Hubbard's citation to the Fourteenth Amendment's requirement that a state must prove a defendant's guilt beyond a reasonable doubt, which is required in order to adequately present this constitutional issue for this Court's resolution, was a misstatement of the standard of review. Therefore, the state felt compelled to respond with a one full page standard of review.

Mr. Hubbard's standard of review relied entirely upon the United States Supreme Court's seminal opinion regarding the sufficiency of evidence - Jackson v. Virginia. Jackson was also cited by the state. Accordingly. Mr. Hubbard's standard of review was entirely correct. Compare AOB 14 with AB 9-10.

The state urges this Court conclude that sufficient evidence was adduced regarding counts 6 through 9. In order to refute Mr. Hubbard's challenges to these convictions, the state is implicitly requesting this Court interpret two essential elements of robbery, the possessory interest in the item(s) taken and "in the person's presence", in an untenably broad manner which produces absurd results.[3]

The state argues that the victims of three of the challenged robberies - an aunt, cousin and friend - had the required possessory interest in the iPad taken because they were all family members of Darny Van and a close friend of David Powers, the residents of the home.[4]

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[3] See Douglas v. State, 124 Nev. 379, 385, 184 P.3d 1037, 1040 (2008), as corrected on denial of reh'g (Sept. 10, 2008); see also, Wilson v. State, 121 Nev. 345, 357, 114 P.3d 285, 293 (2005) (this court construes statutory language to avoid absurd results) and Anthony Lee R. v. State, 113 Nev. 1406, 1414, 952 P.2d 1(1997)("statutory language should not be read to produce absurd or unreasonable results.").

[4] See AB at 9 ("they all had a possessory interest because they were all family members or a close friend."). See also AB at 13("everyone present had a possessory interest in the items because they were all family members").

The state did not reference or rely upon any facts other than the family/friend relationships of Thavin, Trinity and Anthony and their ability to "use" the iPad, to establish the required possessory interest in the iPad. Therefore, in order for this Court to find any possessory interest in the iPad, the Court must find this required element can be based solely upon the relationship theory espoused by the state.

This broad interpretation would require this Court to find sufficient evidence was adduced to sustain three hundred (300) robbery convictions when a robber who enters a wedding reception, being held in one large ballroom, attended by three hundred family members and close friends of the bride/groom and took money from only one family member. This is an absurd result and should not be countenanced by this Court.

Next, it is indisputable that robbery involves a taking "from the person of another or in the person's presence."[5] "The" is defined as "denoting one or more people or things already mentioned or assumed to be common knowledge; the definite article."[6] Thus, the language of the statute is plain and a taking must be from "the" specific person or in "the" same specific person's presence.

Nonetheless, the state urges this Court to interpret this statutory provision as meaning from one specific person or in the presence of other people.[7]

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[5] Emphasis added.

[6] See Oxford University Press Dictionary.

[7] See AB at 12-13 (The taking from Asia was in the presence of Thavin, Trinity, Darny because they were in the same room with Asia when the items were taken. Anthony was in an adjacent room and David was upstair and "actually saw the men in the house" so they were also "in the presence of the taking."). See also AB at 13 (the taking of Kenneth's cell phone occurred in the presence of Anthony because he was kneeling beside Kenneth during the taking. The taking was also in the presence of David, Darny, Thavin and Trinity because "they were in the same

According to this interpretation, the legislature's use of the word "the" is completely irrelevant even though it was used twice. This is not a legally supportable position and should not be sanctioned by this Court .

A. Neither family members nor a close friend of the residence's occupants have the necessary possessory interest in taken property when **no** evidence is adduced that the persons have a special relationship to the property and do not have right to possess the taken property

First, the robbery statute requires the state prove personal property was taken. This element has been described as requiring the robbery "victim" have a possessory interest in the property taken.[8] Obviously, the owner of the property has a possessory interest in taken property.[9] However, another person, who does not own the property, **can** also have a possessory interest in property if the person has lawful possession of the item(s).

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house").

[8] See, Klein v. State, 105 Nev. 880, 885, 784 P.2d 970 (1989) and Phillips v. State, 99 Nev. 693, 696, 669 P.2d 706 (1983).

[9] It is recognized that David Powers, one of the home's residents, had a possessory interest in the taken iPad. However, this item was not taken in Mr. Power's presence. Moreover, Mr. Powers did not have any possessory interest in Kenneth's taken cellular phone. Therefore, the robbery of David Powers, count 6, cannot be sustained.

Lawful possession is based either upon: (1) the person's special relationship - husband/wife to actual owner, servant to owner, employee, bailee, agent, trustee, common carrier - to the property;[10] or (2) the joint/constructive possession of the taken item with the owner.[11] Having a possessory interest in the property taken is an essential element of robbery because "robbery is a crime against possession."[12]

1. The victims of counts 7 through 9 did not have a special relationship to the iPad taken, while the victims of counts 6 through 9 did not have a special relationship with Kenneth's cellular phone, and consequently did not have a right to possess the iPad or cellular phone

a. No possessory interest in the iPad taken from Asia

In the case at bar, the state maintains that Thavin, Trinity and Anthony, who did not have the iPad in their actual possession, were robbed because they had a

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[10] See, State v. Ah Loi, 5 Nev. 99, 101-02 (1869)(money taken from wife of the money's actual owner); see also, State v. Adams, 49 P. 81, 81-82 (Kan. 1897)(Kansas Supreme Court cites Ah Loi and concludes taking from the servant of the property's owner was robbery); State v. Hackle, 158 S.E. 708, 711 (W. Va.1931)(West Virginia Supreme Court concludes "robbery is committed where the taking is from the person, or in the presence of one who has a special interest in the property, such as a bailee, trustee, common carrier, or pawnee" and cites Ah Loi in support of this conclusion)(emphasis added).

[11] See Klein v. State, 105 Nev. 880, 885, 784 P.2d 970 (1989)(recognizing joint possession of business' money taken from two employees establishes possessory interest required for robbery). This court has only discussed "constructive possession" in relation to robbery in unpublished opinions.

[12] Guy v. State, 108 Nev. 770, 775, 839 P.2d 578 (1992).

sufficient possessory interest in the item, owned by David and Darny, which was taken from Asia.[13] The state claims a possessory interest existed in the iPad because Thavin and Trinity were Darny's family members and Anthony was a friend of David's.[14] Additionally, the state postulates these same people had a sufficient possessory interest because "they were free to use the iPad."[15]

While recognizing that a customer who walked into a jewelry store had no possessory interest in store inventory,[16] the state attempts to distinguish Thavin, Trinity and Anthony from that customer because "everyone in the house were either family or a close friend." Additionally, according to the state, "it is not essential that the person robbed be the absolute owner of the property."[17]

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[13] David owned the iPad taken from Asia and clearly has a possessory interest in the item. However, as established above, the iPad was not taken from David and was not taken from David's presence. Therefore, Mr. Hubbard's convictions for count 6 (David) cannot be sustained by the taking of this item.

Moreover, the state completely failed to argue that David, Darny, Thavin, Trinity or Anthony had any possessory interest in Kenneth's phone. Therefore, the state has clearly abandoned any claim that robbery counts 7 through 9 can be sustained based upon the taking of this item.

[14] AB at 13.

[15] AB at 14.

[16] Phillips v. State, 99 Nev. at 696.

[17] AB at 14 citing State v. Ah Loi.

Unfortunately for the state, being a family member or a close friend, by itself, does not establish a possessory interest in taken property and this Court has never found a possessory interest on this basis. Further, when the state's argument is closely examined, it is clear that it is legally untenable.

First, the Court in Ah Loi did **not** conclude, as alleged by the state, that:

> [t]here was sufficient evidence of robbery when money was taken from the victim, who was not the owner of the money, because it is not essential that the person robbed be the absolute owner of the property taken as long as the property did not belong to the defendant.[18]

Rather, the Court specified that it was sufficient for robbery "[i]f the person robbed ha[d] a general or special property in, or a right to the possession of, the goods taken."[19] Based upon this recognition, the Court held that "[r]obbery may be committed by the taking of property from the person of one who has nothing but a special right in it, as well as from the general owner."[20]

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[18] AB at 12.

[19] Ah Loi at 101-02.

[20] Id. at 102.

Far from establishing a possessory interest in any non-owner of property taken "which did not belong to the defendant,"[21] Ah Loi extended the essential element of possessory interest to persons who have a special relationship to the property taken and, therefore, have a lawful right to the possession of the property. Ah Loi established that taking property from or in the presence of a wife/husband, a servant, an agent, an employee, a bailee, a trustee, or a hired common carrier, by force or fear, is robbery.[22] These persons have a special relationship to the property and, based upon the special relationship, also have a lawful right to possess the property taken.

Given Ah Loi's recognition of a possessory interest in persons with a special relationship to the property who thus have a right to possess the property taken, this Court's conclusion, in Phillips, that the jewelry store customer did not have a possessory interest in the store's inventory is entirely consistent with Ah Loi. The customer was not an agent, employee, bailee, trustee or married to the owner of the property and, therefore, did not have a special relationship to the property. Thus, the customer did not have any right to possess the store's inventory.

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[21] AB at 12.

[22] See cases cited in fn.8. While the property in Ah Loi was taken directly from the wife, there is no reason to believe that this same analysis does not apply to property taken in the presence of a person who has a special relationship with the property.

Consequently, the state's attempt to distinguish the jewelry store customer from the relatives/friend in this case must fail.

Not only is this case controlled by Phillips, the state has not pointed out a single fact in the record of this appeal that establishes the relatives/friend had a special relationship to the property taken. Thavin, three year old Trinity and Anthony were not married to either Darny or David, were not their employees, were not their servants, were not their agents, were not bailees or trustees of the iPad and did not even live at the Shirehampton residence. Therefore, none of these persons had a special relationship with the iPad and did not have a possessory interest in that item. Because Thavin, Trinity and Anthony did not have a special relationship to the property, none of these people had a right to possess the iPad.

Finally, having the ability "to use" the iPad is no different from the jewelry customer's ability to handle the store's inventory and does not establish a possessory interest in the iPad. Hence, the state completely failed to adduce any evidence of the required element - possessory interest - for counts 7 through 9. Consequently, Mr. Hubbard's convictions for these counts must be reversed.

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b. No possessory interest in the cellular phone taken from Kenneth Flenory

The Superseding Indictment alleged that the robberies, in counts 6 through 9, could be based upon the taking of one or more cellular phones.[23] Kenneth Flenory's cellular phone was taken from his possession. However, Mr. Hubbard's convictions of counts 6 through 9 cannot be sustained based upon the taking of Kenneth's phone.

In the answering brief, the state **completely failed** to argue that David, Thavin, Trinity and Anthony had any possessory interest in Kenneth's cellular phone. By failing to present any argument, the state has conceded that Mr. Hubbard's robbery convictions cannot be sustained by the taking of Kenneth's cellular phone.[24]

Even if this Court magnanimously overlooks the state's complete failure to argue that any other person had any possessory interest in Kenneth's phone, as set forth above, Ah Loi and Phillips control this issue. David Powers, related to Kenneth only through his marriage to Darny - Kenneth's sister, Thavin Van (aunt), Trinity

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[23] AA 13-17.

[24] Polk v. State, _ Nev. _, 233 P.3d 357, 360 (2010). The opening brief challenges the state's general failure to establish property was taken from Darny Van, David Powers, Thavin Van, Trinity Briones, and Anthony Roberts. The state failed to argue Mr. Hubbard's convictions on counts 6 through 9 could be based on the possessory interest of each "victim" in Kenneth Flenory's cellular phone. The state has no excuse for failing to respond and establish a possessory interest in Kenneth's phone. Failure to respond is a concession of error under NRAP 31(d).

Briones (3 year old cousin) and Anthony Roberts' (friend only to David Powers) did not have a special relationship to Kenneth's phone. Based upon this fact, none of these persons had a legal right to possess the phone. Consequently, none of these persons had a possessory interest in Kenneth's phone and Mr. Hubbard's robbery convictions, of counts 6 through 9, cannot be sustained on this basis either.[25]

2. The victims named in counts 7 through 9 did not have joint or constructive possession of the iPad or iPhone taken from Asia or the cell phone taken from Kenneth Flenory, therefore these victims were not robbed by Mr. Hubbard

In 1989, this Court recognized that a manager of a store and an employee, who both had duties regarding a store's money, were both "in joint possession and control of all of the store's money."[26] While the Court recognized that joint possession could fulfill the possessory interest element of robbery, the Court did not enunciate a detailed analysis of how this concept was to be applied.

The California Supreme Court has also recognized that joint/constructive possession expands the concept of possession to employees.[27]

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[25] For exactly the same reasons, Mr. Hubbard's convictions on counts 6 through 9 cannot be sustained based upon the iPhone taken from Asia Hood.

[26] Klein, 105 Nev. at 885 (1989).

[27] People v. Nguyen, 24 Cal.4th 756, 772, 14 P.3d 221, 224-25 (Cal. 2000).

This Court has explained that:

> For constructive possession, courts have required that the alleged victim of a robbery have a "special relationship" with the owner of the property such that the victim had authority or responsibility to protect the stolen property on behalf of the owner.[28]

This is similar to the standard that this Court announced in Ah Loi. As established by the prior argument, none of the victims named in counts 6 through 9 had a special relationship to either the iPad or iPhone taken from Asia's actual possession or the cellular phone taken from Kenneth's actual possession.[29] Therefore, Mr. Hubbard's convictions of robbery in counts 6 through 9 should be reversed.

B. In order to sustain a robbery conviction, if property is not taken directly from a person who actually possesses the item, the taking must occur in the presence of a person who has a possessory interest in the property

The plain language of NRS 200.380 requires a taking must be from "the" specific person or in "the" same specific person's presence.

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[28] People v. Scott, 45 Cal.4th 743, 750, 200 P.3d 837, 841 (Cal. 2009).

[29] While the California Supreme Court recognized a special relationship to the **owner of the property**, Ah Loi recognized a special relationship to the **property itself**. Even if the California interpretation were applied by this Court to the case at bar, no evidence was adduced that Thavin, Trinity or Anthony had or believed they had "authority or responsibility to protect the stolen property on behalf of " Darny (iPad), Kenneth (cellular phone) and/or Asia (iPhone). Further, no evidence was adduced that Darny had or believed she had "authority or responsibility to protect the stolen property on behalf of " Kenneth and his cellular phone. Therefore, even pursuant to California's differing standard, Mr. Hubbard's convictions cannot be sustained.

In the answering brief, the state's interprets this statutory provision as meaning from one specific person or in the presence of other people.[30] This interpretation is legally flawed for several reasons.

First, while the state does not specifically cite to any authority for this broad interpretation, it is clear that the state is requesting this Court to approve the Model Penal Code which defines robbery as including the use of force or fear against any person during the commission of a theft:

> A person is guilty of robbery if, in the course of committing a theft, he: [¶] (a) inflicts serious bodily injury upon another; or [¶] (b) threatens another with or purposely puts him in fear of immediate serious bodily injury; or [¶] (c) commits or threatens immediately to commit any felony of the first or second degree.[31]

While many states have specifically adopted the Model Penal Code for their definition of robbery, Nevada's legislature has not done so.[32]

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[30] See AB at 12-13 (The taking from Asia was in the presence of Thavin, Trinity, Darny because they were in the same room with Asia when the items were taken. Anthony was in an adjacent room and David was upstair and "actually saw the men in the house" so they were also "in the presence of the taking."). See also AB at 13 (the taking of Kenneth's cell phone occurred in the presence of Anthony because he was kneeling beside Kenneth during the taking. The taking was also in the presence of David, Darny, Thavin and Trinity because "they were in the same house").

[31] Model Penal Code Section 222.1.

[32] See, Nguyen, 24 Cal.4th at 762-63 fn.4, 14 P.3d 221, 225 fn. 4 collecting the following: Alabama Code, title 13A, section 13A–8–43 (2000), defines robbery

Rather, our legislature defined robbery in the traditional manner which limits "victims" to those persons who have actual or constructive possession of the property which is taken in the presence of the persons by force or fear. Therefore, the state's assertion that counts 6 through 9 can be sustained because Thavin, Trinity, Kenneth, David and Anthony were either in the room where property was taken from the actual possessory or in an adjacent room must fail.

Second, the state made a similar argument in Phillips and this Court stated:

> The state argues that one is robbed if he is present during a taking of an item of personal property, regardless of whether he has any interest in the item taken, provided only that he is "subjected to force in order to facilitate [the] taking."[33]

This Court then rejected that argument.

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to include the threat or use of force against the person of the owner or any person present. Hawaii Revised Statutes, section 708–840 (2000), defines robbery to include the threat or use of force against the person of anyone present." Montana Code Annotated, section 45–5–401 (2000), defines robbery to include the threat to inflict bodily injury upon any person. Robbery statutes that track the language of the Model Penal Code include New Hampshire Revised Statutes, section 636:1 (2000), New Jersey Revised Statutes, section 2C:15–1 (2000), North Dakota Century Code, section 12.1–22–01 (2000), and 18 Pennsylvania Consolidated Statutes, section 3701 (2000).

[33] Phillips, 99 Nev. at 695.

In this case, after asserting an incorrectly broad interpretation of possessory interest, the state then argues Thavin, Trinity, Anthony and David were robbed because force and fear were used to take an iPhone, iPad and another cellular phone from the actual possessors - Asia and Kenneth - and these others were present in the house at the same time. Because Thavin, Trinity and Anthony did not have a possessory interest in these items, the state's argument is exactly the same, as that made in Phillips, and should be rejected again. Consequently, Mr Hubbard's convictions for count 7, 8 and 9 must be reversed.

It is recognized that this Court has accepted, for the purposes of robbery, that a "thing is in the presence of a person, in respect to robbery, which is so within his reach, inspection, observation or control, that he could, if not overcome by violence or prevented by fear, retain his possession of it."[34] The words used in this definition all relate to a person's ability to control the property by sight and reach. Additionally, these words also contain an element of knowledge that specific property is being taken.

Although Asia had joint possession the iPad and iPhone with David, unlike the bartender in Robertson, he had no knowledge that these items were being taken from Asia. David was upstairs during the entirety of the robbery.

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[34] Robertson v. Sheriff, 93 Nev. 300, 302, 565 P.2d 647 (1977).

David could not see into the room nor could he observe that items were taken, at all, much less from Asia. David could not "reach" and he could not "control" the items. Mr. Hubbard's conviction of count 6 cannot be sustained by the taking of the iPad and/or iPhone from Asia.

David did not have a possessory interest in Kenneth's cellular phone. Moreover, David could only see through a mirror that three men entered the house. No evidence was adduced that David saw Kenneth and Anthony kneeling in the foyer area. Further, no evidence was adduced that David knew a phone was being taken from Kenneth. As with the iPad, David could not "reach" or "control" Kenneth's cellular phone. Mr. Hubbard's conviction of count 6 cannot be sustained by the taking of Kenneth Flenory's cellular phone.

CONCLUSION

Based upon the forgoing, it is respectfully requested that this Honorable Court find that the state did not adduce sufficient evidence to sustain Mr. Hubbard's convictions of counts 6 through 9. This Court should reverse the convictions on these counts.

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Additionally, based upon the erroneous admission of other crime evidence, it is respectfully requested that this Court reverse all of Mr. Hubbard's other convictions and remand the matter to the district court for a new trial on counts 1, 2, and 15.

DATED this 23rd day November, 2015.

Respectfully Submitted,

/s/ Brent D. Percival

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect X6 in size 14 Arial font.

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:

[x] Proportionately spaces, has a typeface of 14 points or more, and contains 4348 words.

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 the 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.

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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 23rd day of November, 2015.

Respectfully Submitted:

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 23rd day of November, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Chief Deputy District Attorney Steven Owens

Attorney General Adam Laxalt

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/s/ Brent D. Percival
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