IN THE SUPREME COURT OF THE STATE OF NEVADA

WESLEY ALLEN LEWIS,

Appellant,

v.

MARIA DANIELA LEWIS,

Respondent.

Supreme Court Case No.: 66497
Dist. Court Case No.: D-10-427054-D

REPLACEMENT OPENING BRIEF OF APPELLANT

This Brief is submitted in substitution for the Opening Brief previously filed by Appellant while acting pro se.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to NRAP 26.1, Appellant Wesley Allen Lewis, through his undersigned counsel, states:

Appellant Wesley Allen Lewis is an individual.

The following attorneys and law firms have represented Mr. Lewis in this litigation:

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASE LAW

STATUTES AND RULES

Appellant, Wesley Allen Lewis, through his counsel of record, Greenberg Traurig, LLP, respectfully submits his Replacement Opening Brief on Appeal.

INTRODUCTION

This case demonstrates that a parent who, unable to afford legal counsel, can all too easily become overwhelmed and overmatched in the legal maneuverings involved in continuing child custody and support issues. Such unfairness is heightened to an even greater degree, when the District Court fails to employ the appropriate standard for the modification of child custody.

The visceral unfairness reflected in such situations is exacerbated still more when a district court not only fails to accord the *pro se* litigant appropriate leeway to present a case, but actually imposes uneven standards, favoring the represented party to an untoward degree by interfering with witness examinations, and otherwise failing to conduct proceedings with appropriate neutrality. The transcripts of the proceedings here indicate that Mr. Lewis was unfairly deprived of shared physical custody of his daughter.

Additionally, the record reveals that criminal contempt convictions were imposed upon Mr. Lewis, even though he was not afforded his Sixth Amendment Constitutional rights during the proceedings. Mr. Lewis's inability to effectively represent himself was clear throughout the proceedings, and indeed, the District Court made frequent reference to the procedural inadequacy of Mr. Lewis's efforts. Despite the District Court's knowledge that Mr. Lewis was clearly overwhelmed by the proceedings, the District Court made no effort to safeguard Mr. Lewis's rights.

…

Because the record reveals clear indications that the District Court failed to apply the appropriate standard for custody modification, failed to accord Mr. Lewis his due rights, and failed to make a fair and unbiased determination, the judgment must be vacated, and the cause remanded for a new hearing.

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to NRCP 3A(b)(1), (2) and (7). This is an appeal of a final judgment entered September 2, 2014, with Notice of Entry filed on that same date. **IV APP 894-900,** and with a supplemental order filed on September 4, 2014, and Notice of Entry of the Supplemental Order filed on September 15, 2014**. IV APP. 910-914.** The Notice of Appeal was filed September 9, 2014 and an amended Notice of Appeal was filed on September 23, 2014. **IV APP. 906; 916.**

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. The District Court abused its discretion in modifying physical custody, as the Court failed to apply the appropriate standard and failed to make specific factual findings to support its decision.

II. The District Court abused its discretion in finding Mr. Lewis in criminal contempt.

III. The District Court abused its discretion in deviating from the child support guidelines and in ordering the continued participation in the Kumon program.

IV. The District Court displayed sufficient bias so as to taint the fairness of the proceeding.

…

…

STATEMENT OF THE CASE

This is an appeal of an a post-decree Order finding Appellant guilty of several contempts, imposing criminal sanctions for such contempts, and modifying Appellant's physical custody of his daughter from the agreed joint custody arrangement of Sunday evening at 6 pm through Thursday morning at 9 am to a significantly reduced schedule of every other weekend and dinner on Mondays and Tuesdays.

STATEMENT OF THE FACTS

Appellant Wesley Allen Lewis ("Mr. Lewis") and Respondent Maria Daniela Lewis, now known as Maria Perdomo ("Ms. Perdomo") obtained a divorce in July 2011. **I SUPP. APP. 22:7-9, 21-22.** The parties have one minor child, Isabella Sara Lewis (Bella or "the Child"), who, at the time of the events discussed herein, was seven years. **I SUPP. APP. 22:17-20.**

December 27, 2013 Order

In July 2013, an order to show cause was issued allowing Ms. Perdomo's Motion seeking a contempt order against Mr. Lewis., **I APP 120-129; II APP 254-255.** Following hearings held August 28, 2013 and October 8, 2013, the District Court issued its Findings of Fact and Conclusions of Law and Order on December 27. 2013. **II APP. 403-413.**

This Order contained various findings and conclusions relating to child support arrearages and imposition of child support obligations upon Mr. Lewis. Of particular relevance to this appeal was the following provision in the order:

> It is further ordered that Defendant shall take BELLA to her Kumon Tutoring Class on Mondays immediately after school. BELLA shall continue to receive tutoring services until she is testing at or above grade level as tested by Kumon(or if Kumon does test, by the CRT's administered by the Clark County School District), or if Plaintiffs and Defendant mutually decide to terminate the tutoring. If BELLA is testing at or above grade

> level and one parent wishes to continue the tutoring, that shall be at that parent's sole expense. If BELLA needs tutoring again in the future, based on her grades or a teacher's recommendation, the cost of that tutoring will be equally borne by the parties.

Id. at 411.

In March, 2014, Ms. Perdomo filed a Motion seeking modification of custody, and enforcement of the December 27, 2013 order. **III APP 532-631**. The hearing of the Motion was held on July 29, 2014 and August 5, 2014. **Supp. App. 1-379.**

The Evidentiary Hearing

As the hearing commenced on July 29, 2014, it was immediately apparent that Mr. Lewis was completely out of his depth. The Court struck as a "fugitive document" Mr. Lewis's pro se filing, entitled "Opposition to Notice of Entry of Order," finding it to be a "fugitive" document.[1] *See*, ***Id.*** **at 12:24-214:2.** The Court asked Mr. Lewis his intent in filing the latter document, and Mr. Lewis replied "[m]y intent was to show a case." Mr. Lewis informed the Court that he had done his best to get things filed, but he is not a lawyer. **I SUPP. APP. 13:6-18.**

The Court granted Ms. Perdomo's request that unanswered Requests for Admissions be deemed admitted, the Court having denied Mr. Lewis's motion for an extension of time to respond to discovery. **I SUPP. APP. 14:11-18:17.** The Court stated that after Mr. Perdomo put on her case, Mr. Lewis could "put on his case if I permit him to do so." **I SUPP. APP. 14:9-10.**

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[1] The Court later struck another *pro se* filing, entitled "Motion to Declare Item of Material Obscene and Obtain Injunction for Dismissal." Significantly, Mr. Lewis had informed the Court that the exhibits he wished to submit had been filed with these documents, and he that he wanted the Court to at least look at the documents. The Court refused due to the title of the document. **II SUPP. APP. 310:11-312:18.** Presumably because the Court struck the items from the record, the documents were transmitted to the Court on appeal, and are not contained within the electronic database.

Ms. Perdomo's Presentation of Evidence

Any efforts Mr. Lewis might have made to object to improper questioning was effectively foreclosed by the District Court's order that he refrain from speaking to Ms. Fine or to the Court**,** "unless it's [his] turn," with a potential sanction of $200 if Mr. Lewis interrupted counsel's examination of Ms. Perdomo. **I SUPP. APP. 38:11-15.**

The first part of Ms. Perdomo's testimony addressed her claim that Mr. Lewis had failed to comply with the Court's order December 2013 Order that he pay part of the cost of Kumon instruction, and take Bella to the instruction on Monday's after school. **I SUPP. APP. 24:21- 42:4.** All but one of the purported failures to comply occurred on dates when there was no school. **I SUPP. APP. 41:37; 43:1-5.** The sole instance occurring on a school day occurred on a date that a "Daddy-Daughter" skating event had been planned.[2] **I SUPP. APP. 36:8-42:1.** Mr. Lewis later testified that he had to drive his daughter home to change clothes for the event. **I SUPP. APP. 153:16-24.**

The next segment of Ms. Perdomo's testimony was devoted to nonpayment issues. **I SUPP. APP. 46:12-59:7.** Ms. Perdomo then listed the issue she contended indicated problems with co-parenting, including the Kumon instruction issue; Ms. Perdomo's concerns because Bella "disconnects completely from the cell phone" when she is with her father, **I SUPP. APP. 61:8-12;** displeasure that Mr. Lewis made a dentist appointment for Bella after the motion to modify custody had been filed, **I SUPP. APP. 62:16-20**; Ms. Perdomo's unsupported testimony that Bella had been biting other children and fighting in school, leading

[2] While the record does not show who planned this event, the evidence, including reference to a flier announcing the event, establishes that it was a school or community event, rather than merely something that Mr. Lewis had planned privately.

Ms. Perdomo to unilaterally initiate counseling with a social worker, [3] **I SUPP. APP. 64:1-70:18**; and her allegations that Mr. Lewis neglected Bella's medical needs, which concerned a series of rashes and two bouts of strep throat, all of which were actually discovered while Bella was in Ms. Perdomo's care. **I SUPP. APP. 70:19-80:15**. Ms. Perdomo's theory, unsupported by any testimony other than her own evidence, is that the illnesses had completely manifested while Bella was in Mr. Lewis's care, but he had refused to take her to the doctor. **I SUPP. APP. 74:12-17.** In fact, the second rash had been caused by Bella's allergy to the antibiotic used to treat the strep throat. **I SUPP. APP. 111:16-19.** Bella had been in Ms. Perdomo's care for the length of that illness. **I SUPP. APP. 113:6-23.**

In response to questions regarding Bella's testing, Ms. Perdomo stated that Bella had not tested at grade level in math, indicating she had tested at or above grade level in reading. **I SUPP. APP. 103:20-21.** Later testimony established that Bella had tested above grade level in math in the standardized testing at her CCSD elementary school. **I SUPP. APP. 149:24-151:7.**

Mr. Lewis made an effort to point out the inconsistencies of Ms. Perdomo's positions, but the Court repeatedly interfered with his efforts. Mr. Lewis attempted to question Ms. Perdomo about her failure to keep him informed of major events, but that inquiry was shut down with a lecture from the Court about his responsibilities as a parent. **I SUPP. APP. 95:1-96:12**. The Court provided an answer for Ms. Perdomo when she struggled to explain Mr. Lewis's efforts at questioning Ms. Perdomo about the actual text of the Court's order, requiring Bella

[3] While the counseling began in September 2013, Ms. Perdomo had apparently share her concerned over the issues approximately 5 months prior to that time. **I SUPP. APP. 94:17-24.** The teacher's comments regarding Bella for the 2013-2014 school year completely belie the assertion that Bella was aggressive or violent.

to be taken to Kumon "after school," not when there was no school, was halted as being "argumentative." **I SUPP. APP. 102:9-103:5.** Mr. Lewis's efforts to inquire regarding Bella's report cards was cut off by the Court, who "sustained" a nonexistent objection as to this line of questioning. **I SUPP. APP. 103:20-104:12.**

Mr. Lewis was then questioned regarding his failure to provide discovery in the procedurally correct format, **I SUPP. APP. 135:13-138:7** and his purported failures to comply with the Court's orders, including a failure to comply with oral rulings**; I SUPP. APP. 138:11-156.** Ms. Perdomo's counsel questioned him regarding his current income, and Mr. Lewis testified that his employer would not give him full time hours. ***Id.* at 158:2-8**. However, the Court interrupted the line of questioning, stating that it would rely on its findings issued six months before imputing income to Mr. Lewis. **I SUPP. APP. 158: 12-23.** When Ms. Perdomo's counsel began to berate Mr. Lewis for his failure to obtain a second job, the Court did not intervene and admonish counsel regarding the argumentative questioning, even though the Court had intervened when Mr. Lewis strayed into argument. **I SUPP. APP. 161:6-12-162:8.**

Mr. Lewis testified that he attempted to reach the Counselor, but despite leaving messages, was unable to connect with him until April. **I SUPP. APP. 164:5-165:19.** Mr. Lewis testified that he obtained moisturizers for Bella's dry skin, and denied that he had ever been provided with a medication to be used.

The Court questioned Mr. Lewis regarding Bella's history of tardiness and absenteeism while in his care. He corroborated Ms. Perdomo's testimony that Bella had been in her care for the two weeks of missed school. He explained the tardies as being the result of traffic or because when he volunteers, he is signing in to enter the building; his home is located at Charleston and Lamb while the school is located at

Eastern and Horizon Ridge; a distance of 18 miles.[4] **I SUPP. APP. 172:2-12, 174:10-24.** In contrast, Ms. Perdomo lives only two minutes from the school, *id.* but the Court did not ask Ms. Perdomo to explain Bella's tardies while in her care.

Ms. Perdomo next presented testimony by Mr. Warren Wheatley, a social worker she engaged on the basis of her unsubstantiated reports of aggression by Bella. **II SUPP. APP. 182:21-183:4; 185:4-186:6**. Mr. Wheatley did not observe any aggression in Bella, other than knocking down building blocks, or similar actions during play therapy. **II SUPP. APP. 197:3-10.** Mr. Wheatley "diagnosed" an adjustment disorder. He explained that persons with adjustment disorders are "having difficulty adjusting to various situations." **II SUPP. APP. 196:4-15.**

Ms. Perdomo's counsel led Mr. Wheatley through his testimony that he had been provided contact information for Mr. Lewis by Ms. Perdomo, and had left repeated messages for Mr. Lewis to contact him beginning in the fall of 2013, but received no response until April 2014. **II SUPP. APP. 192:20-194:4.** Mr. Wheatley did not attempt to contact Mr. Lewis through any means other than telephone calls. **II SUPP. APP. 195:194:23-195:3**.[5] Throughout his testimony, Mr. Wheatley testified as to what he was told by Bella, Ms. Perdomo, or Ms. Perdomo's husband; Mr. Lewis did not object to the hearsay testimony.

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[4] Additionally, due to the timeshare arrangement, Ms. Perdomo brought Bella to school only one day per week for the bulk of the 2013-2014 school year, while Mr. Lewis brought Bella to school four days per week.

[5] Later testimony revealed that Ms. Perdomo did not sign a release allowing Mr. Wheatley to contact Mr. Lewis until sometime in October. **I SUPP. APP. 246:11-21.** Later testimony also revealed that Mr. Lewis did not have voice mail on his phone beginning in October, 2013; Mr. Wheatley was unable to testify as to the number he purportedly called. **II SUPP. APP. 247:16-248:9.**

Mr. Wheatley reiterated Ms. Perdomo's theory that Bella's rash had led to strep throat through neglect, but acknowledged that this was actually speculation by Ms. Perdomo and her husband. **I SUPP. APP. 198: 9-13**; **. Mr. Wheatley was asked to read the letter he had written at the request of Ms. Perdomo's counsel. **II SUPP. APP. 197:15-23; 199: 22-200:10; 200:16-201:17**.

Mr. Wheatley's therapy sessions ended on May 9, 2014. **II SUPP. APP. 202:4-12.** Mr. Wheatley said the goals had all been achieved by that date, and Bella was verbalizing appropriately, and no longer felt as though she were caught in the middle between her mother and father. ***Id.*** In fact, when Mr. Wheatley and Mr. Lewis met in April, Bella had already progressed to the point that Mr. Wheatley did not feel it was necessary for Mr. Lewis to participate in any therapy sessions with Bella. **II SUPP. APP. 202:18-203:2; 204:14-22.**

Mr. Wheatley's testimony revealed that Bella attended a session with him on April 1, 2014, with her father, and on April 5, 2014, with her mother and stepfather, and felt ill on both occasions. **II SUPP. APP. 206:3-207:12.**

The Court asked whether Mr. Lewis whether he consented to release his therapist/patient privilege as to Mr. Wheatley. Mr. Lewis gave no verbal response. Despite the lack of verbal response, the Court stated Mr. Lewis had given consent. **II SUPP. APP. 219:22-220:6.** Mr. Lewis was not given any advisements regarding the release of his privilege.

Mr. Wheatley did not make any diagnosis. **II SUPP. APP. 224:7-9**. While Mr. Wheatley stated that he thought Mr. Lewis could benefit from therapy, he qualified his opinion by stating that he believed that everyone needed therapy; he also stated that the benefit of such therapy would be that Mr. Lewis would know

his daughter better. I**I SUPP. APP. 229:7:231:1.** While the Court asked Mr. Wheatley to opine on the likely effect on Bella if Mr. Lewis did not obtain therapy, the Court refused to allow Mr. Lewis to ask Mr. Wheatley to opine on the likely effect of a change in custody. **II SUPP. APP. 250:1-251:10.**

Mr. Wheatley also testified that Bella was very bright, and that she played at a level "above what [he] would consider an average seven year old." **II SUPP. APP. 213:13-22.** Additionally, While Ms. Perdomo has emphasized that Mr. Lewis did not participate in Bella's therapy, it is striking that Bella's progress coincided *with her mother and stepfather receiving instruction in more appropriate parenting skills.* **II SUPP. APP. 214:23-216:3.**

Mr. Lewis's Presentation of Evidence

Mr. Lewis testified on his own behalf, with the Court cross-examining him and engaging in argumentative questions. **II SUPP. APP. 301:4-304:10.** The Court interrupted Mr. Lewis's testimony to berate him for failing to pay for an attorney to represent him. **II SUPP. APP. 305:4-307:21.** The following dialogue occurred:

> The Court: How has this been financially straining? I don't see any lawyer over there.
>
> The Defendant: I know.
>
> The Court: How has it been financially trying –
>
> The Defendant: My—
>
> The Court: -- for you?
>
> The Defendant: Well-
>
> The Court: Explain that.
>
> The Defendant: I make fifteen thousand dollars –

The Court: No, but tell me how it's been a financial burden. You didn't engage a paralegal to help you [sic] discovery, I don't see a lawyer sitting at your table either today –

The Defendant: I had a –well-

The Court: --excuse me--

The Defendant: I'm sorry.

The Court: -- either today or the last court date. So how, how has it been a financial burden going through this trial? How?

The Defendant: Can I answer?

The Court: What has been the financial outlay that you've had –

The Defendant: But the pre –

The Court: -- for this trial?

The Defendant: Well, the previous – I –I did never finish paying off [prior counsel] Marr from the previous cases.

The Court: Uh-huh.

The Defendant: Anytime I needed current legal help, she made it a point that I needed to become current with paying up and letting me know what I was in store for. I paid – I paid her –

The Court: Um-hum (in the affirmative).

The Defendant: -- to where we're even to where she was here. Believe it was May 1st, just to sit in, I think, just – I don't know, per se or per, -- it's a –

The Court: Unbundled?

The Defendant: Yes, unbundled. Thank you.

The Court: Um-hum (in the affirmative).

The Defendant: And after that day she, you know, requested to be removed.

The Court: Um-hum (in the affirmative).

The Defendant: And – because she knew I could not pay. She knew it. And she told me she was sorry that she could only help. And she wasn't pro bono. And it was –from that moment forth I – had a burden on my shoulders. And I had to understand it thoroughly. And it took me months to get accustomed to it.

> The Court: Did you think about going out and getting a second job while your daughter was at her mom's, during her mom's timeshare, to earn more money to pay for your lawyer?
>
> The Defendant: Well, I actually when – when she's with her – - when she's with her mom I do work full – full days. It's hard to get a second job that will comply with a sliver of time, especially when I – my credit is so horribly bad because of support – child support arrears and IRS liens, that is it hard for me to get a second look from anybody. It's actually frustrating.

II SUPP. APP. 305:14-307:21

The Court also chided Mr. Lewis for his failure to submit procedurally correct documents, striking another document Mr. Lewis had submitted from the record. **II SUPP. APP. 310:11-24.** When Mr. Lewis attempted to reintroduce the stricken document at the beginning of the hearing, the Court flatly denied the attempt. **II SUPP. APP. 312:11:18.** When Mr. Lewis offered to submit emails that would complete email chains only partially submitted by Ms. Perdomo, the Court denied admission on the basis that Mr. Lewis had not provided the emails in discovery. **II SUPP. APP. 312:20-313:17.**

Mr. Lewis's mother testified, corroborating Mr. Lewis's statements regarding the amount of homework Bella worked on, and the entire family's participation in her studies. **II SUPP. APP. 322:6-19.** Mrs. Lewis also corroborated Mr. Lewis's testimony regarding the time he spends with her and the activities in which they engage. **II SUPP. APP. 324:16-325:3.** Mrs. Lewis had not observed any skin problems with Bella. **II SUPP. APP. 334:9-13.**

…

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The Court's Oral Ruling

At the conclusion of the hearing, the District Court made an oral ruling. The Court first misstated the test it was required to apply, wholly discarding one prong of the test:

> Under the current standard for joint physical custody, I just -- I have to make determinations as to what is in Bella's best interest.

II SUPP. APP. 363:8-10. As can be seen, the Court made no reference to a requirement that there be a substantial change in circumstances. The Court spent considerable time expressing dissatisfaction with Mr. Lewis, frequently referencing his purported failure to comply with the Court's orders. The highlights of this soliloquy include:

> You had, at that date, in October, you had child support arrears of nine thousand twelve dollars and thirty-eight cents, evidencing your disrespect at that time for court orders that you pay child support. So in October of 2013 you already signaled The Court, I don't care what you're going to order, I'm not paying.
>
> ***
>
> And at this time I found -- at that time, in October, 2013, I found you to be in contempt of court for your non-payment of child support. In 2011 for June, July, August and September. In 2012 for January, May, June, July, September, October and November. I found you responsible for attorney fees. And then I made orders, and I ordered you to be equally responsible for Bella's tutoring with Kumon, and that didn't happen. You just didn't pay.
>
> I specifically ordered that you were to take Bella to her Kumon class on Mondays immediately after school, that she shall continue to receive tutoring services until she's testing at or above grade level as tested by Kumon or by the CRT's administered by the Clark County School District, or you mutually decide to terminate the tutoring. And you unilaterally stopped the Monday tutoring, because by your testimony it was too far a drive during the summer months.
>
> That's not what my Court order said, to stop it during the summer months because it's too far to drive. You're in contempt of court for that. You're in contempt of court for not paying your child support for the months of October, November, December and January. The order says, It's ordered that commencing October, 2013, defendant shall pay

current child support to plaintiff in the amount of ninety-one dollars. And even if you just got the order in December of 2013, you should have made immediate payments. But you just waited until something else happened, until you had a wage assignment on you that didn't happen until February. You just did nothing. You're in contempt of court for not making those payments, at least until December when you got the Court order. So you're in contempt of court for December and January. And Kumon, you're in contempt of court for not paying November, December, January, February, March, April, May, June and July. A total of one thousand dollars.

***

The Court accepts Mr. Wheatley's testimony that he attempted to reach you at the phone numbers that he was given, and he was -- his calls were not returned.

***

THE COURT: I find that Defendant, despite being the father of the seven-year-old child, doesn't have a voicemail set up on his telephone with no real valid excuse, but since October of 2013.[6]

***

Dad testified everyday I get better as a parent. You know what? That proves absolutely nothing to This Court, everyday I get better. Bella is not an experiment for you to improve everyday as a parent.

***

The Court finds that Defendant did not participate in discovery in any timely fashion. Discovery he propounded was not in the -- it was not procedurally correct. It was impossible for Ms. Fine to ascertain if she got the documents that she had requested. There was no Bates stamp, there was no list of documents that were being turned over. From what The Court could see from the bench it was in a chaotic form. He did not complete the discovery. And despite that, I still let him put on his case.

***

As I didn't find him credible in October of 2013, I don't find him credible today either. There was even a disparity in testimony where Mr. Wheatley said that Dad told him that he's tired a lot due to work and then he lets his parents take care of Bella. And Mrs. Lewis

[6] The Court's acknowledgement that Mr. Lewis did not have voicemail on his phone substantially undermines Mr. Wheatley's purported calls with messages left for Mr. Lewis, which calls purportedly began in October, since Mr. Wheatley could not have left voice messages for Mr. Lewis.

testified that, no, she gets home around four thirty and her son is always taking care of Bella.

***

And I find that although Defendant did not have an attorney during this proceeding, he did testify that he had counsel during the May court date. I think that was an initial motion court date.. . . who had represented him in the past, that he -- so he had access to counsel, although he did not retain her. She was unbundled on that date.

***

All right. Bella's report card, her final grades, B in Reading, A in Writing, B in Language, Mathematics was a B, A in Social Studies and A in the Special Subject.

And the teacher's comments in part on the third trimester, This trimester Isabella has shown some improvement in her attention skills, she is able to answer more questions correctly during whole group, however, Isabella does require more time than others to complete her classwork, Over the summer, please make her more aware of time and time-management. Which means she would have benefitted from more tutoring. She's a kind, play, friendly girl who gets along easily with others, She's quick to help others in need and shows respect for her classmates and me, She's on the A/B Honor Roll, It's been a pleasure to have her in class.

***

You know, Mr. Lewis, in the space of ten months, you demonstrated to The Court by your own behavior in this – your own conduct, I should say, that it's in the best interest of the minor child that I change the custodial arrangement, from not paying your support to not taking her to Kumon, to ignoring her medical needs, to not making yourself available with a voicemail, to not following my Court orders, even so far as making sure your child's phone stay plugged in and
charged so that Mom can have access to her, and to the tardies and the absentee record, especially the tardies and the absentee records. Those are significant factors The Court looks at.

II SUPP. APP. 363:8- 373:24 (capitalization original).

Order Dated September 2, 2014

The Court's written Order, drafted by Ms. Perdomo's counsel, was similarly focused on the contempt issues rather than the custody modification. **IV APP. 889.** It contains no findings regarding a change in

circumstances, and nothing more than a bare assertion that that the best interests of the child would be served by a change in custody. ***Id.***

Furthermore, there is no indication as to the standard of proof that was applied to with respect to the findings of contempt. However, specific, set sentences of imprisonment were imposed, with prospect that such sentences could be purged. Additionally, the imposition of the continued requirement of Kumon instruction is inconsistent with the previous order regarding tutoring, requiring that termination by virtue of testing be based on testing by Kumon. ***Id.***

Ex Parte Motion and Order

Prior to the issuance of the Court's written ruling, Ms. Perdomo filed an ex parte motion for clarification and/or instructions regarding the Kumon instruction on Mondays. **IV APP. 883.** The Court issued a supplemental order which reiterated Court's September 2, 2014 order regarding the Kumon instruction program, but also required that Mr. Lewis use his time share on Monday's or Tuesdays to take Bella to any after school activity occurring on those days. **IV APP 910.** No evidence had been presented as to any such additional after school activities, and indeed, the Ex Parte Motion had not made that request. **IV APP. 883.**

SUMMARY OF THE ARGUMENT

Both the written Order, and the Court's oral statement from the bench, reveal that the Court failed to apply the complete test required for a change in custody, wholly discarding the necessary first prong that a substantial change in circumstances had occurred. Moreover, the written ruling falls woefully short of the specific findings this Court has required for a modification of custody. Additionally, the change in custody was based, in large part, upon contempt

findings that were imposed in violation of Mr. Lewis's constitutional rights, or otherwise improper contempt rulings, including a purported contempt of an ambiguous order, as well as contempt based on an unwritten order.

Furthermore, the finding of contempt relating to the Kumon instruction is not supported by the order, which is ambiguous as to its applicability when school is out of session. Nor did the Court make proper findings as to Mr. Lewis's present ability to pay the arrearages. Additionally, the evidence established that the requirement for termination of the instruction, *i.e.*, that the minor child had CRT test scores at or above grade level, had actually been met, and thus, there was no disobedience to the order.

Finally, the record as a whole reveals that the District Court was biased and hostile toward Mr. Lewis, to such a degree that Mr. Lewis was unable to receive a fair hearing of either the contempt allegations or the motion to modify custody. Accordingly, the District Court's Orders should be vacated, and the cause remanded for a new hearing.

STANDARD OF REVIEW

This Court reviews determinations of modification of child custody under an abuse of discretion standard. *Ellis v. Carucci,* 123 Nev. 145, 149, 161 P.3d 239, 241 (2007). However, when determining whether the District Court applied the appropriate standard, this Court reviews *de novo*. *Rennels v. Rennels,* 127 Nev., Adv. Op. 49, 257 P.3d 396, 399 (2011).

When this Court reviews an order of contempt on direct appeal, such review is pursuant to an abuse of discretion standard. *In re the Determination of Rights of Claimants*, 118 Nev. 901, 906, 59 P.3d 1226, 1229 (2002).

The "standard for assessing judicial bias is whether a reasonable person, knowing all the facts, would harbor reasonable doubts about a judge's impartiality.

In re Varain, 114 Nev. 1271, 1278, 969 P.2d 305, 310 (1998) (Internal quotations and citations omitted).

LEGAL ARGUMENT

I. THE DISTRICT COURT ABUSED ITS DISCRETION IN MODIFYING CHILD CUSTODY.

The District Court abused its discretion in modifying custody of the minor child. Here, the District Court failed to make the requisite specific findings of a substantial change in circumstances and as to the best interests of the child. Furthermore, the District Court's oral findings indicate that the District Court's modification was imposed, at least in part, as punishment for the Court's perception that its orders had been disobeyed. However, a modification of custody may not be imposed to punish an alleged contempt. Because District Court abused its discretion in order the modification of custody, the order must be vacated, and the matter remanded to the District Court for a new hearing addressing the best interests of the child.

A. The District Court Failed to Make the Specific Findings Required to Order a Modification of Custody.

A District Court may modify an order regarding primary physical custody "only when (1) there has been a substantial change in circumstances affecting the welfare of the child, and (2) the child's best interest is served by the modification." *Ellis v. Carucci*, 123 Nev. 145, 150-51, 161 P.3d 239, 242-43 (2007). Here, the District Court failed to comply with this standard, as it failed to address any change in circumstances, and failed to make any findings with references to the statutory factors. Furthermore, the Court failed to make written findings as to the best interests of the child.

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In both its oral and written ruling, the District Court failed to make any reference to the requirement that there be a substantial change in circumstances. But this Court has stated that there must not only be a change in circumstances, but that such change must be substantial. *Ellis, supra*.

Furthermore, the District Court failed to make specific findings regarding the best interests of the child. The change in circumstances must be substantial, and district courts are not to take that prong of the requirement lightly. *Id.* In determining the best interests of, the court is required to consider and make specific findings regarding the factors set forth in NRS 125.480. Those factors include:

> (a) The wishes of the child if the child is of sufficient age and capacity to form an intelligent preference as to his or her custody.
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> (b) Any nomination by a parent or a guardian for the child.
>
> (c) Which parent is more likely to allow the child to have frequent associations and a continuing relationship with the noncustodial parent.
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> (d) The level of conflict between the parents.
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> (e) The ability of the parents to cooperate to meet the needs of the child.
>
> (f) The mental and physical health of the parents.
>
> (g) The physical, developmental and emotional needs of the child.
>
> (h) The nature of the relationship of the child with each parent.
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> (i) The ability of the child to maintain a relationship with any sibling.
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> (j) Any history of parental abuse or neglect of the child or a sibling of the child.
>
> (k) Whether either parent or any other person seeking custody has engaged in an act of domestic violence against the child, a parent of the child or any other person residing with the child.
>
> (l) Whether either parent or any other person seeking custody has committed any act of abduction against the child or any other child.

NRS 125.480(4).[7] Indeed, this Order herein, while extensive in its reiteration of previously made findings of contempt for non-payment of child support (without any finding of an ability to pay), the finding of contempt for noncompliance with an ambiguous order, and the imposition of criminal sentences for such contempt, the Order is remarkably reticent regarding the reasons for the modification of custody.

As this Court recently reiterated, "[s]pecific findings and an adequate explanation of the reasons for the custody determination "are crucial to enforce or modify a custody order and for appellate review. . . . Without them, this Court cannot say with assurance that the custody determination was made for appropriate legal reasons." *Davis v. Ewalefo*, 131 Nev. Adv. Op. 45, 352 P.3d 1139, 1143 (2015). In *Davis*, this Court vacated a custody ruling due to the absence therein of factual findings, even though the District Court in *Davis* had made extensive oral findings regarding the statutory factors. *Id*., 352 P.3d at 1147 (Parraguirre, J., dissenting). Similarly, in *Rivero v. Rivero*, 125 Nev. 410, 430, 216 P.3d 213, 227 (2009), this Court reversed and remanded when the family court judge made inadequate factual findings to support the modification of custody. A Court's oral rulings are not valid for any purpose. *Rust v. Clark Cnty. Sch. Dist.,* 103 Nev. 686, 689, 747 P.2d 1380, 1382 (1987). Accordingly, the Court's oral rulings cannot satisfy the requirement that the Court make specific findings.

B. The District Court Improperly Based the Change in Custody Upon a Purported Failure to Comply with the Court's Orders.

While the District Court's oral rulings cannot satisfy the requirement for findings, such oral rulings do reveal that the District Court's rationale for the

[7] Pursuant to Nevada AB 263 (2015), effective June 9, 2015, the provisions of NRS 125.480 were repealed and re-enacted in NRS Chapter 125C.

modification was based, in large part, upon Mr. Lewis' purported noncompliance with its orders. Indeed, the District Court found this basis so significant that it was included *twice* in the oral statement. However, "[t]his court has made it clear that a court may not use changes of custody as a sword to punish parental misconduct . . . *Sims v. Sims*, 109 Nev. 1146, 1149, 865 P.2d 328, 330 (1993). *See also Gepford v. Gepford*, 116 Nev. 1033, 1038, 13 P.3d 47, 50 (2000) (district court abused discretion by focusing more on father's noncompliance with court's orders than on best interests of the child). Here, as in *Sims* and *Gepford*, the modification of child custody appears to have been largely based upon the Court's displeasure with its perception that Mr. Lewis failed to obey the Court's orders. Indeed, the Court expressly noted that Mr. Lewis had failed to obey the Court's *oral* ruling. However, there can be no contempt of an unwritten order. *See Millen v. Eighth Judicial Dist.*, 122 Nev. 1245, 1251, 148 P.3d 694, 698 (2006) ("Generally, a "court's oral pronouncement from the bench, the clerk's minute order, and even an unfiled written order are ineffective for *any purpose*.") (citations omitted). Accordingly, the modification improperly imposed a punishment, and must be vacated.

Because the Order modifying child support was based on deficient standards, was unsupported by specific findings, and was modification, at least in part, by a desire to punish Mr. Lewis, the modification must be vacated. Additionally, because the modification of child support was based upon an improper modification of custody, the Order to modify child support must also be vacated.

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II. THE DISTRICT COURT ABUSED ITS DISCRETION IN FINDING MR. LEWIS IN CRIMINAL CONTEMPT.

The District Court's punitive modification of custody becomes even more egregious when it becomes apparent that the findings of contempt were themselves made in violation of Mr. Lewis's rights. Furthermore, one of the findings of contempt was based upon an Order that was too ambiguous to support a contempt Order. Additionally, the District Court found Mr. Lewis in contempt for failing to obey the Court's oral ruling.

This Court has jurisdiction to review an Order of contempt on direct appeal where the order finding contempt is entered as part of an otherwise appealable order. *In re the Determination of Rights of Claimants*, 118 Nev. 901, 906, 59 P.3d 1226, 1229 (2002) (finding review of contempt order on direct appeal appropriate where "entered as a final judgment" that it appealable). Here, the contempt findings and sentences were entered as part of an order modifying custody, which is an appealable order. NRAP 3A(b)(7). Additionally, the contempt Orders served as the basis of the attorney fee Order that is properly on appeal, and grew out of the rights of the parties arising from the divorce decree. *See Gumm v. Mainor,* 118 Nev. 912, 918, 59 P.3d 1220, 1225 (2002) (special order appealable when it affects the rights of some party to the action, grows out of the judgment previously entered, and affects rights incorporated in the judgment). Accordingly, this Court has jurisdiction to review the orders of contempt and the sanctions imposed, on direct appeal.

A. The District Court's Actions Violated Mr. Lewis's Sixth Amendment Right to Counsel.

Despite the fact that Mr. Lewis was unrepresented by counsel, the District Court proceeded to hearing and sentenced him to a definite and fixed term of imprisonment. The order of contempt imposed here was criminal in nature as it

imposed a definite 20 day sentence, with no means of being purged through further compliance. *In re the Determination of Rights of Claimants*, 118 Nev. at 901, 911, 59 P.3d at 1232 (suspended sentence of three days jail time was criminal because it imposed an absolute sentence.); *see also Rodriguez v. Eighth Judicial Dist. Court*, 120 Nev. 798, 804-05, 102 P.3d 41, 45-46 (2004) (holding that a contempt is criminal if the sentence is absolute). Thus, while the contempt proceeding here might have been intended to be civil, in that Mother sought the enforcement of the court's orders to benefit her, the District Court's imposition of a set term of imprisonment, without any conditions that would purge the contempt sanction, requires that the proceeding be viewed as a criminal contempt proceeding. *See Warner v. Second Judicial Dist. Court*, 111 Nev. 1379, 1383, 906 P.2d 707, 709 (1995).

Because the District Court imposed a criminal sanction, it was required to afford Mr. Lewis proper Sixth Amendment protections during the proceedings. *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 826, 114 S. Ct. 2552, 2556, 129 L. Ed. 2d 642 (1994) ("Criminal contempt is a crime in the ordinary sense . . . and criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings.") (internal quotation and citation omitted).'

In *Rodriguez v. Eighth Judicial Dist. Court*, 120 Nev. 798, 814, 102 P.3d 41, 51-52 (2004), this Court stated that appointment of counsel was not required in all civil contempt proceedings where imprisonment was a possibility. Because the Court's imposition of a determinate sentence rendered the proceeding criminal, Mr. Lewis was entitled to an offer of counsel. Indeed, even had the proceeding been a civil contempt, the facts here demonstrate that Mr. Lewis should have been afford appointed counsel. As this Court noted in *Rodriquez*, "a case may arise that requires appointed counsel to ensure that the defendant understands the law and

has a fundamentally fair opportunity to present a defense." *Rodriguez* 120 Nev. at 813, 102 P.3d at 51. This is clearly such a case.

Rodriguez held that the District Court was in the best position to determine whether counsel was necessary. Here, there is little question that the District Court was fully aware of Mr. Lewis' inability to afford counsel. Not only did Mr. Lewis himself so state, but his counsel withdrew shortly before the hearing. Yet, as above in the Statement of Facts, the District Court repeatedly indicated the deficiency of Mr. Lewis' performance as his own attorney, by striking from the record pleadings Mr. Lewis had apparently filed; chastising him for his failure to comply with discovery requirements; rebuking him for the nonconformity of his efforts, such as failing to bates stamp discovery responses; and repeatedly interfering in Mr. Lewis's questioning, often restating the questions.

Given the District Court's obvious knowledge that Mr. Lewis was unable to ensure that his evidentiary hearing was fair, the District Court improperly failed to ensure Mr. Lewis's Sixth Amendment rights were satisfied. Accordingly, orders of contempt must be vacated.

B. The District Court also Failed to Determine Mr. Lewis's Present Ability to Pay Arrearages.

Mr. Lewis's convictions must be vacated on the additional ground that the District Court failed to determine his present ability to pay. A defendant may not be imprisoned for a failure to pay a sum unless there has been a finding of a present financial ability to make the payment in question. *Gilbert v. State*, 99 Nev. 702, 708, 669 P.2d 699, 703 (1983); *see also, Rodriguez,* 120 Nev. at 809, 102 P.3d at 49 supra., ("[C]onsistent with due process, a party cannot be found guilty of failing to pay child support and sentenced to jail conditional upon his payment of arrearages unless the trial court first determines that the individual (1) has the ability to make the payment and (2) willfully refuses to pay."). Here, the District

Court relied on evidence presented at a hearing held nearly a year before to determine his present income. The District Court made no findings regarding an ability to pay.

C. The Order Directing Mr. Lewis to Take the Minor Child to the Kumon Program was too Ambiguous to Support a Finding of Contempt.

The District Court abused its discretion when it found Mr. Kumon in contempt for failing to take Bella to the Kumon instruction, as the order was ambiguous. In order to form the basis of a subsequent contempt order, the order directing conduct must spell out "the details of compliance in clear, specific and unambiguous terms so that [the person whose compliance is required] will readily know exactly what duties or obligations are imposed upon him. " *Southwest Gas Corp. v. Flintkote Co.*, 99 Nev. 127, 131, 659 P.2d 861, 864 (1983) (citations omitted).

Here, the Order that Mr. Lewis was to take Bella to the Kumon instruction program on Mondays "after school," coupled with the lack of any indication that the Kumon instruction program was to be continued during the summer vacation months, constitute an ambiguous order. Accordingly, that Order could not support a subsequent finding of contempt based on a failure to take the child to the program on Mondays for which there is no school, including the summer months.

III. THE DISTRICT COURT ABUSED ITS DISCRETION IN DEVIATING FROM THE CHILD SUPPORT GUIDELINES AND IN ORDERING THE CONTINUED PARTICIPATION IN THE KUMON PROGRAM.

The District Court abused its discretion in ordering Mr. Lewis to continue to contribute to the costs of the Kumon program, and in ordering that such program should be continued until Bella had tested to be performing at grade level by Kumon. Testimony established that Bella had tested at or above her grade level in the CCSD standardized tests. **I Supp. App.**

103: 20-21; 149:24-151:7. Accordingly, pursuant to the terms of the December 2013 order, the requirement that Mr. Lewis bring Bella to the Kumon programming and pay one half the cost of such programming, had already ended by the terms of the existing order. Because Ms. Perdomo unilaterally decided that the Kumon instruction should continue, she was solely responsible for the payments.

Furthermore, pursuant to NRS 125B.080, a court must make specific findings to adjust the amount of child support set forth in the statutory guidelines. Here, no specific findings were made to justify the deviation from the statutory guidelines.

Nor was there evidence to support that Bella had continuing special education needs, as required by NRS 125B.080(9). Bella had been shown to have tested above her grade level in mathematics, the subject areas about which Ms. Perdomo expressed concerned. Moreover, it was undisputed that Bella was earning As and Bs on her report card, and was on her elementary school's A/B honor roll. Accordingly, no special education needs were demonstrated.

Because there were no findings to support a need for special education programs, and no evidence that could have supported such findings even if made, the inclusion of such expense in Mr. Lewis's child support obligation was an abuse of discretion.

IV. THE DISTRICT COURT DISPLAYED SUFFICIENT BIAS SO AS TO TAINT THE FAIRNESS OF THE PROCEEDING.

This Court stated that a "trial judge must not only be totally indifferent as between the parties, but he must also give the appearance of being so." *Kinna v. State,* 84 Nev. 642, 647, 447 P.2d 32, 35 (1968). There is no reasonable argument

that the District Court here was indifferent as between the parties; and certainly no appearance of such indifference. Indeed, it is not uncommon that an unsuccessful litigant harbors suspicions that rules against him were based not on the evidence presented in a proceeding, but instead, were the result of bias on the part of the judicial officer. But it is rare that a record actually bears out such dark fears. Yet, the record herein presents one of those rare instances when the "trial ambiance is discernibly **unfair** to the defendant when viewed from the cold record on appeal. " *McNair v. State*, 108 Nev. 53, 62, 825 P.2d 571, 577 (1992).

This two day hearing constituted a series of episodes wherein the District Court displayed a stunning lack of neutrality. Indeed, it must be noted that the District Court actually encourage the filing of the Motion, in the December 27, 2013 Order, stating that the Court had concerns at that time, even though no motion to modify custody had even been raised.

The Court's pre-judging attitude continued following the filing of the Motion. Right from the start, the Court actually indicated an inclination to prevent Mr. Lewis from presenting his case at all. ***Id.* at 14:9-10.** The Court denied his *timely r*equest for additional time to respond to discovery, yet imposed sanctions for the failure to respond. ***Id.* at 14:11-18:17.**

Additionally, throughout the two day hearing, **t**he District Court relentlessly interfered with Mr. Lewis's attempted examinations of witnesses, yet threatened to fine Mr. Lewis if he so much as spoke to the Court or counsel out of turn. **I. Supp. App, 38:11-16.** Significantly, this admonition had been precipitated by some sort of unseemly outburst by Mr. Lewis. Instead, he had merely said asked a question, apparently regarding an exhibit being proffered by Ms. Perdomo. ***Id.* at 38:6.** In contrast, in just the *first ten pages* of Mr. Lewis's examination of Ms. Perdomo, the Court interjected 21 times, asking questions, sustaining objections never even made, rephrasing both questions from Mr. Lewis *and* answers from Ms. Perdomo,

and blatantly heading off avenues of inquiry by *misquoting* its own December 2013 order. **I Supp. App. 93:17-103:18.** The three objections by Ms. Perdomo's in the same ten passages **might** seem restrained, except, of course, for the fact that the bulk of the questions had come from the Court, not Mr. Lewis. ***Id.***

The Court intervened when Mr. Lewis was attempting to show that Ms. Perdomo failed to inform him of events, lecturing him as to his own responsibilities. ***See, e.g, id.*** **at 101:8-12.** The Court treated the social worker like an expert witness when proffered its own questions, but shut down Mr. Lewis's effort to ask for expert opinion**. II Supp. App. At 229:9-13; 250:1-251:10.** The Court completely took over Mr. Lewis's attempt to present his own testimony by engaging in argumentative cross examination of him, ***id.*** **at 301:4-304:10,** and expressing disbelief of his testimony. ***Id.*** **at 305:14-307:21.**

Even in the Court's questioning of *Ms. Perdomo,* the Court managed to convey its distrust of Mr. Lewis, asking Ms. Perdomo, "Do you believe your daughter knows how to play tennis." ***Id.*** **at 348:22-23.** Significantly, **t**his incredulously phrased question was proffered even though Ms. Perdomo had herself testified already regarding Bella playing tennis with her father. **I SUPP App. At 124:10-11.** Moreover, the question came after Mr. Lewis's mother had also testified that Bella and her father had played tennis together only a few weeks before the hearing. The fact that the Court, had such continuing doubts about a minor issues such as tennis playing, even in the face of *Ms. Perdomo* having previously corroborated the tennis playing, **"**display[s] a deep-seated favoritism or antagonism that would make fair judgment impossible. *See Liteky v. United States*, 510 U.S. 540, 555, (1994).

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And, indeed, the Court's bias against Mr. Lewis was further displayed in the Court's eagerness to impose criminal sanctions on him, despite the complete failure to provide any constitutional protections to Mr. Lewis.[11] This Court has previously described an experienced judge's lack of familiarity with contempt requirements as an indication of bad faith. *Goldman v. Nevada Comm'n on Judicial Discipline*, 108 Nev. 251, 294, 830 P.2d 107, 135 (1992) ("An experienced trial judge's ignorance of proper contempt procedures, *without more*, has been held to constitute the bad faith necessary to a finding of willful misconduct.", *disapproved of by In re Fine*, 116 Nev. 1001, 13 P.3d 400 (2000) (finding that bad faith is no synomous with willful misconduct). The Court's eagerness to punish Mr. Lewis was also displayed in its heavy handed response to the *ex parte* request for relief, increasing the burdens imposed on Mr. Lewis beyond that even requested.

The record here reveals an extraordinary pattern of conduct that resulted in cutting short Mr. Lewis's presentation of evidence to support his position. A reasonable person, reviewing the record here, and knowing all of the facts, would "harbor reasonable doubts about a judge's impartiality." *In re Varain*, 114 Nev. 1271, 1278, 969 P.2d 305, 310 (1998) (internal quotations and citations omitted). Accordingly, the District Court's Orders must be vacated, and the cause remanded for a new hearing.

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[11] Indeed, the December 2013 Order also includes criminal sanctions, in that there are specific set terms of imprisonment imposed.

CONCLUSION

For the reasons set forth above, Appellant requests the Court vacate the Orders entered by the District Court, and remand for appropriate proceedings.

Respectfully submitted this 8th day of September, 2015.

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CERTIFICATE OF COMPLIANCE WITH NRAP 28 AND 32

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 MS Word 2003 in Times New Roman 14.

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 proportionately spaced, has a typeface of 14 points or more, and contains 8,378 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 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 8th day of September, 2015.

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CERTIFICATE OF SERVICE

This is to certify that on September 8, 2015, a true and correct copy of the foregoing **Replacement Opening Brief** was served by via this Court's e-filing system, on counsel of record for all parties to the action below in this matter, as follows:

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