IN THE SUPREME COURT OF THE STATE OF NEVADA

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KEVIN MARQUETTE GIPSON, Appellant, v. THE STATE OF NEVADA, Respondent.	CASE NO: 69174 District Court Case No. 10C264079

APPELLANT'S OPENING BRIEF

Appeal from Judgment of Conviction
Eighth Judicial District Court, Clark County, Nevada
Honorable David B. Barker and William D. Kephart

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Docket 69174 Document 2016-17662

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

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JURISDICTIONAL STATEMENT

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NRAP 4(b) and NRS 177.015 (3)

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10/22/15 Findings of Fact, Conclusions of Law regarding Appellant's post-conviction petition for writ of habeas corpus

11/7/15 Notice of Appeal Filed

(C) **Assertion of Final Order or Judgment**

This appeal is from the denial of a post-conviction petition for writ of habeas corpus.

II.

STATEMENT OF THE ISSUES

Issue A:

Whether Appellant's trial counsel was ineffective under Strickland v. Washington, 466 U.S. 668 (1984).

Issue B:

Whether Appellant had the competence to plead guilty.

III.

ROUTING STATEMENT

As this appeal challenges only a Judgment of Conviction and corresponding sentence imposed, this matter is presumptively assigned to the Court of Appeals pursuant to NRAP 17(b)(1).

IV.

STATEMENT OF THE CASE[1]

A. Nature of the Case

On April 28, 2010, Appellant, KEVIN GIPSON (hereinafter GIPSON), was charged by way of Grand Jury Indictment with one count of the crime of Murder with Use of a Deadly Weapon (Felony - NRS200.010, 200.030, 193.165). (KMG @ 1)[1]

On December 7, 2011, GIPSON entered into a Guilty Plea Agreement with the State whereby he agreed to plead guilty to the charge as alleged in the Indictment. Pursuant to negotiations, the parties stipulated to a sentence of twenty (20) years to life in the Nevada Department of Corrections. Moreover, the parties retained the right to argue the deadly weapon enhancement for a term of not less than four (4) to eight (8) years. (KMG @ 4)

On February 10, 2012, Appellant was present in court with counsel, at which time he was sentenced to the Nevada Department of

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1 Hereafter KMG shall refer to "Kevin Marquette Gipson Appendix." The number immediately following is the volume and page number of the appendix where the reference can be found.

Corrections as follows: life with a possible parole eligibility of Twenty (20) years, with a consecutive term of Two Hundred Forty (240) months maximum and Ninety-Six (96) months minimum for Use of a Deadly Weapon with Six Hundred Eighty-Six (686) days credit for time served. Judgment of Conviction was filed on March 13, 2012. (KMG @ 13)

B. Prior Proceedings

Thereafter, Appellant filed a Pro Per Motion to Withdraw Plea on September 5, 2012. (KMG @ 15) A hearing on that motion was held September 26, 2012. Said motion was denied by the court on September 26, 2012, and an order entered on September 27, 2012. (KMG @ 20)

Appellant subsequently filed a Pro Per Motion to Proceed in Forma Pauperis on October 15, 2012. (KMG @ 22) Said motion was granted on November 7, 2012. Appellant then filed an Ex Parte Motion for Appointment of counsel and Request for Evidentiary Hearing on October 15, 2012. (KMG @ 25)

On November 5, 2012, Appellant filed a Pro Per Motion for Direct Appeal/Memorandum of Points and Authorities Facts of the Case, (KMG @ 32) "may have been construed as a notice of appeal. "...Further,

at the same time, case appeal statement was filed which triggered Supreme Court review..." (see court minutes dated January 28, 2013) (KMG @105). This Honorable Court issued its Order Dismissing Appeal on December 20, 2012, stating, "an appeal deprivation claim must be raised in a post-conviction petition for a writ of habeas corpus filed in the district court in the first instance." (KMG @ 43) Previously, this Court issued an Order of Limited Remand for Appointment of Counsel. (KMG @ 103)

Thereafter, the case was returned to the district court, where on January 13, 2016, Carmine J. Colucci, Esq., was appointed counsel for Appellant for the purpose of this appeal. (KMG @ 105)

C. Disposition by Court Below

An evidentiary hearing was conducted on September 10, 2015 before the Honorable William D. Kephart, district judge. An order denying Appellant's post-conviction petition for writ of habeas corpus was filed on October 22, 2015. (KMG @ 93)

Appellant filed a pro per notice of appeal on November 12, 2015. The undersigned was appointed as appellate counsel on January 19, 2016. (KMG @ 105)

V.

STATEMENT OF THE FACTS

(In that Appellant pled guilty per negotiations and was indicted, the facts, as set forth herein are taken from investigative reports.)

On March 25, 2010, Brittany Lavoll was shot in the parking lot of the "Jack in the Box" restaurant where she worked. The business was located at 7541 West Lake Mead Boulevard, Las Vegas, Nevada. According to witnesses, the shooting occurred at approximately 5:45 a.m.

The three witnesses described the perpetrator to police as a male dressed in a dark hooded sweatshirt who was seen running from the scene. Witness, Wade Fleming, quickly observed Lavoll and thought she was dead. Robert Gilmore, another witness, called "911." Christina Benitez was a third witness who claimed to have seen the man in the dark hoodie running from the scene. Fleming and Gilmore were drawn

to the area where Brittany Lovall was found by the sound of what they felt was a gunshot.

A witness named Bailey, who worked at a grocery store in the same shopping center as the Jack in the Box, initially saw a woman lying on the ground and the man in the dark hoodie standing over her. Bailey thought the man was helping the woman who Bailey thought might be "drunk."

Las Vegas Metropolitan Police Department (hereinafter, LVMPD) officers arrived at the scene located at 7541 West Lake Mead Boulevard and Brittany Lovall was immediately transported to University Medical Center where she was pronounced dead at 6:15 a.m. An autopsy conducted on March 26, 2010, and it was determined that the cause of death was a gunshot to the head.

Brittany Lovall's father met police at the crime scene and told police that Brittany had been in an abusive relationship with Kevin Gipson and that they had two (2) children together. He related that they had broken up a year before but that he (GIPSON) had been stalking her.

Detectives of the LVMPD ultimately located GIPSON and arranged to meet him on the afternoon of March 25th. GIPSON allegedly agreed to speak with the detectives, which he ultimately did. GIPSON provided them with an alibi to support his statement that he could not have been at the scene of the shooting when it occurred. GIPSON denied having an abusive relationship with Lovall. Moreover, GIPSON said that he had recently tried to contact Lovall in order to arrange a visit with their children.

After interviewing GIPSON, the police asked him to take a modified polygraph test. Such test is called a "Concealed Information Test." The next day the police gave GIPSON such a Concealed Information Test. Part and parcel of the test, LVMPD detectives Mirandized him and GIPSON then took the test. According to the detectives, he "failed it." He was told by LVMPD Detective Geoffrey Flohr that by "failing," he must have knowledge of the murder that only the killer would know.

GIPSON, without the services of an attorney, was confronted with this accusation. Gipson told them that he had been in and out of a

mental hospital and that he killed Brittany Lovall because she "drove him crazy." Allegedly, GIPSON managed to find out where Lovall worked prior to meeting her on March 25, 2010. Police speculated that GIPSON went to the Jack in the Box and laid in wait for Lavoll and then shot her.

VI.

SUMMARY OF THE ARGUMENT

The district court erred in not granting Appellant's post-conviction petition for writ of habeas corpus. Appellant alleged he was denied the effective assistance of counsel. In that Appellant was mentally challenged, hallucinating, delusional, never read the Guilty Plea Agreement, and was told what to say during the plea canvass, his trial counsel was ineffective.

Appellant was found to be competent to stand trial. However, he was never found competent to waive his constitutional rights and plead guilty to first degree murder with the use of a deadly weapon.

VII.

ARGUMENT

A. Appellant was Denied the Effective Assistance of Counsel in Violation of His Right to Counsel as Guaranteed Under the Sixth Amendment of the Constitution of the United States

1. The Standard

A claim of ineffective assistance of counsel presents a mixed question of law and fact, which is subject to independent review upon appeal. Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996). A defendant must prove the facts underlying an ineffective assistance of counsel claim by preponderance of the evidence. The Court's review of defense counsel's performance is highly deferential. There are circumstances warranting relief. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004); Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065, 80 L.Ed.2d 674 (1984). In the context of an appeal deprivation claim, prejudice may be presumed if the petitioner was deprived of the right to direct appeal due to the ineffective assistance of counsel. Hathaway v. State, 99 Nev. 248, 71 P.3d 503 (2003); Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).

Nevada has adopted the two-pronged test outlined in Strickland, supra, for determining the effectiveness of counsel. Under Strickland, in order to assert a claim for ineffective assistance of counsel, the defendant must prove that he was denied "reasonably effective assistance" of counsel by satisfying a two-pronged test. Strickland; see also, State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993).

Under the Strickland test, the defendant must show: first, that his counsel's representation fell below an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. See Strickland, at 687-688 and 694. The defendant bears the burden to satisfy both requirements in order to prevail. Strickland at 697; Means v. State, supra at 1011.

Inadequate performance is representation that falls below an objective standard of reasonableness. Id. (*citing* Dawson v. State, 108 Nev. 112, 115, 825 P.2d 593, 595 (1992)]. The role of a court in considering allegations of ineffective assistance of counsel is "not to pass upon the merits of the action not taken but to determine whether,

under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978) (citing Cooper v. Fitzharris, 551 F.2d 1162, 1166 (9th Cir. 1977)).

In considering whether the defendant has an ineffective assistance of counsel claim, the court must determine whether counsel conducted a reasonable investigation of the facts relevant to the defendant's case. Doleman v. State, 112 Nev. 843, 846, 921 P.2d 278 (1996). Next, the court must consider whether counsel made "a reasonable strategy decision on how to proceed with his client's case." Doleman, id. at 846; *citing* Strickland, supra, at 690-691, 104 S.Ct. at 2066. While counsel's strategy decision is a "tactical" decision and will be "virtually unchallengeable absent extraordinary circumstances." Doleman, supra, at 846; see also Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990); Strickland, supra, at 691, 104 S.Ct at 2066. It is not without limitation. The defendant has the burden of overcoming the presumption that trial counsel's actions were the product of sound trial strategy. Means, 120 Nev. At 1012, 103 P.3d at

33 (*citing* Strickland, 466 U.S. at 689, *quoting* Michel v. Louisiana, 350 U.S. 91, 101, 76 S.Ct. 158 (1955)).

Even if counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice and show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 263, 1268 (1999) (*citing* Strickland, 466 U.S. at 687.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

Claims asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id.

2. **Appellant's Diminished Mental Abilities Required Extraordinary Legal Assistance.**

Appellant pled guilty, but mentally ill, to a charge of first degree murder with the use of a deadly weapon. (KMG @ 115, Tr., 12/7/11, pp.

2, 3). There is no question Appellant was mentally challenged. His court-appointed attorney conceded such at the evidentiary hearing:

> "Q Okay. Did you represent Mr. Gipson from the inception of that case?
>
> A Yes.
>
> Q And you – during the course of your preparation for that case, of course, you investigated his background?
>
> A Yes.
>
> Q And during this pretrial investigation process, you became aware that he had some mental health issues?
>
> A Yes, very early on.
>
> Q And do you know what those mental health issues were? Do you remember?
>
> A I think – I think it was schizophrenia maybe bipolar disorder. I'm just not – I haven't relooked at his diagnoses."

(KMG @ 115, Tr., 12/7/11, p. 22)

Clearly, this factor raised concern with his court-appointed trial counsel who engaged the services of a psychiatrist, Dr. Dodge A. Slagle. Dr. Slagle evaluated Appellant and found him to be competent to stand trial. However, Dr. Slagle's psychiatric forensic evaluation report concluded with the observation:

> "Mr. Gipson is suffering from delusions and hallucinations, but these symptoms do not render him incompetent at this time. He is in need of continuing psychiatric treatment."
>
> Dodge A. Slagle, DO
>
> Diplomate, American Board of Psychiatry and Neurology, Inc.

(KMG @ 112)

Hence, Appellant was hallucinating and delusional. Unquestionably, he required legal assistance that was above and beyond what the standard legal client received. Sadly, he received less.

He never saw the guilty plea agreement until he arrived in court – where he pled guilty (but mentally ill) to first degree murder with the use of a deadly weapon. (KMG @ 115, Tr., 12/7/11, p. 7) Moreover, counsel never discussed the agreement with Appellant. (KMG @ 115,

Tr., 12/7/11, pp. 7,8). And stunningly, at that time, Appellant was under the influence of anti-psychotic, anti-depressant medication (Evadra – phonetic), because he was "hearing voices." (KMG @ 115, Tr., 12/7/11, p. 8).

Additionally, he was never shown the discovery in his case, despite requesting it numerous times. The guilty plea agreement was never discussed with him, and his appellate rights were never considered. (KMG @ 115, Tr., 12/17/11, pp. 8-10).

One thing Appellant's counsel did do for him was to tell him what answers to utter during the guilty plea canvass. (KMG @ 115, Tr., 12/7/11, pp. 11, 12, 14, 15, 32). This Honorable Court doesn't just "consider the technical sufficiency of the plea canvass; it reviews the entire record and looks to the totality of the facts and circumstances of a case." Hurd v. State, 114 Nev. 182, 187, 953 P.2d 270 (1998), citing Bryant v. State, 112 Nev. 268, 270, 721 P.2d 364, 366 (1986)

Here, the combination of Appellant's schizophrenia, delusions, and hallucinations dictated that additional time and effort be used to convey the import and consequences of pleading guilty to first degree murder

with the use of a deadly weapon. Appellant had a long history of problems associated with mental illness. The combination of these factors put his counsel on notice that extra effort was needed to protect Appellant's due process rights.

Clearly, the record unequivocally indicates that his trial counsel's errors fell well below an objective standard of reasonableness for mentally challenged litigants. He didn't even read the entire Guilty Plea Agreement before pleading guilty. (KMG @ 115, Tr. 12/7/11, p. 19)

Had he discussed the Guilty Plea Agreement, in its entirety, the results of the proceedings would have been different because if he wasn't hearing voices and realized the full import of what he was doing, he would not have been convicted of first degree murder with the use of a deadly weapon. The net result is that it is painfully obvious that both Strickland prongs have been met here.

B. **Appellant was not Competent to Plead Guilty.**

In this case, Dr. Slagle examined Appellant and found him competent to stand trial. However, there is a separate and distinct issue

about Appellant's competence to plead guilty to first degree murder. More specifically, a number of courts have held that the Supreme Court's decision in Westbrook v. Arizona, 384 US 150, 84 S. Ct. 1320, 16 L.Ed.2d 429 (1966), requires a separate hearing to be held on the defendant's competence to plead guilty, after a defendant has been found competent to stand trial. U.S. v. Masthers, 539 F.2d 721 (CADC 1976); Seiling v. Eyman, 478 F.2d 211 (9th Cir. 1973). One court has noted the existence of a dual standard, but also observed that there is no fixed formula for determination of the need for a competency hearing:

> "There are no fixed signs that inevitably trigger the need for a competency hearing, and no court can prescribe such a list for future courts to follow. . . . The need for a competency hearing must be determined in each case by the peculiar circumstances of that case. Once it is clear, however, that "something is amiss," it is the court's responsibility not to ignore the signals but to act upon them and hold a competency hearing."

Osborne v. Thompson, 481 F. Supp 162, 170 (M.D. Tenn. 1979)

The Ninth Circuit Court of Appeals has stated the test of competence to plead guilty as that level of competence which "enables [the defendant] to make decisions of very serious import. . . . A defendant is not competent to plead guilty if a mental illness has substantially impaired his ability to make a reasoned choice among the alternatives presented to him and to understand the nature of the consequences of his plea." Sieling v. Eyman, 478 F.2d 211, 215 (9th Cir. 1973). See also, State v. Sims, 575 P.2d 1236 (Ariz. 1978); State v. Fuchs, 597 P.2d 227 (Idaho 1979).

Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a criminal case. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L.Ed.2d 653 (1964). Second, is the right to trial by jury. Duncan v. Lousiana, 391 U.S. 145, 88 S. Ct. 1444, 20 L.Ed.2d 491 (1968). Third, is the right to confront one's accusers. Pointer v. Texas, 380 U.S. 400, 85 S. Ct. 1065, 13 L.Ed.2d 923 (1965); Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709,

1712, 23 L.Ed.2d 274 (1969). Consequently, judges must exercise the "utmost solicitude of which they are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence." Boykin v. Alabama, supra, 89 S. Ct. at 1712.

It is of course well settled that a defendant in a criminal case cannot be deemed to abandon any fundamental constitutional protection unless there is both "an intelligent and competent waiver by the accused." Westbrook v. Arizona, supra.

Clearly, Westbrook makes it plain that, where a defendant's competency has been put in issue, the trial court must look further than to the usual "objective" criteria in determining the adequacy of a constitutional waiver. In Westbrook, although the trial court had, after hearing, concluded that the defendant was mentally competent to stand trial, the Supreme Court deemed is essential that a further "inquiry into the issue of his competence to waive his constitutional right to the assistance of counsel . . ." was required. 384 U.S. at 150. It was not suggested there, nor is it in this case, that the trial court's

determination that GIPSON was competent to stand trial was incorrect. The clear implication, then, is that such a determination is inadequate because it does not measure the defendant's capacity by a high enough standard. While the Supreme Court did not suggest a standard, it is reasonable to conclude from the Court's language that the degree of competency required to waive a constitutional right is that degree which enables a criminal defendant to make decisions of very serious import.

A strikingly similar situation arose in Moran v. Godinez, 972 F.2d 263 (9th Cir. 1992). There, defendant Moran pled guilty to three counts of capital murder. Ultimately, he was sentenced to death.

As part of the appellate process, he filed a petition for writ of habeas corpus in federal court alleging he was not competent to enter the guilty pleas. He was deemed competent to stand trial, just as GIPSON here. But, that court determined:

> "The legal standard used to determine a defendant's competency to stand trial is different from the standard used to determine competency to waive constitutional rights. A defendant

is competent to waive counsel or plead guilty only if he has the capacity to "reasoned choice" among the alternatives available to him. See Harding, 834, F.2d at 856; Evans II, 800 F.2d at 887; Chavez, 656 F.2d at 518. By contrast, a defendant is competent to stand trial if he merely has a rational and factual understanding of the proceedings and is capable of assisting his counsel. See, Drope v. Missouri, 420 U.S. 162, 172, 95 S. Ct. 896, 904, 43 L.Ed.2d 103 (1975); Pate v. Robinson, 383 U.S 375, 387, 86 S. Ct. 836, 843, 15 L.Ed.2d 815 (1966); Dusky v. United States, 362 U.S. 402, 4-2, 80 S. Ct. 788, 788, 4 L.Ed.2d 824 (1960) (per curiam); Sieling, 478 F.2d at 214. Competency to waive constitutional rights requires a higher level of mental functioning than that required to stand trial. See Evans I, 705 F.2d at 1480; Chavez, 656 F.2d at 518; United States v. Aponte, 591 F.2d 1247, 1249 (9th Cir. 1978).

Our analysis of the order issued after the state post-conviction hearing reveals that the state court erroneously applied

the standard for evaluating competency to stand trial, instead of the correct "reasoned choice" standard . . .

The reports to which the state court referred were both prepared to determine Moran's competency to stand trial, not his competency to waive constitutional rights. Dr. O'Gorman and Dr. Jurasky were appointed by the state court solely to consider Moran's competency to stand trial. Neither doctor considered the question whether Moran was competent to waive counsel or to plead guilty. At the time of the examinations, Moran had not yet decided to do either, so the question of competency to waive constitutional rights was simply not before the doctors.

The conclusions of the psychiatrists were the sole support for the state court's post-conviction ruling that Moran was competent to waive counsel. By relying solely on the psychiatrists' conclusions that Moran was competent to stand trial more than three years earlier, the state court applied the wrong legal standard for determining Moran's competency to waive his constitutional right to counsel.

. . .Furthermore, when we examine the record in light of the correct legal standard, we must conclude that it cannot support a finding that Moran was mentally capable of the reasoned choice required for a valid waiver of constitutional rights. In particular, the psychiatric evaluations on which the state court relied do not support the conclusion that Moran was competent to make decisions of such serious import.

Dr. O'Gorman evaluated Moran's competency to stand trial in September 1984, several months before Moran discharged his attorney and changed his pleas. Not surprisingly, his report on Moran's mental condition focused only on those qualities that reflect competency to stand trial, not the higher level of mental functioning required for a valid waiver of constitutional rights.

Dr. O'Gorman concluded that "the patient [Richard Moran] in knowledgeable of the charges being made against him. He can assist his attorney, in his own defense, if he so desires. He is fully cognizant of the penalties if convicted." Dr. O'Gorman Psychiatric Evaluation at 2 (hereinafter "O'Gorman Report").

According to his report, Dr. O'Gorman perceived Moran to have a basic awareness of what was happening to him and of what had happened, though he noted Moran's difficulty with his memory. See O'Gorman Report at 1. Dr. O'Gorman also commented that Moran was depressed and may not make the effort necessary to assist counsel in his own defense. O'Gorman Report at 3.

These observations are relevant to the question whether Moran was competent to stand trial. They are inadequate, however, to show Moran was competent of reasoned choice that the law requires for a defendant to make voluntary, knowing, and intelligent waiver of constitutional rights."

(Emphasis Added)

972 F.2d 266-68

Applying that reasoning to the present case, Dr. Slagle's report only addressed GIPSON'S competency to stand trial (KMG @ 156). It said nothing about his competency to waive his constitutional rights and plead guilty to first degree murder with the use of a deadly weapon.

In sum, the trial court applied the incorrect legal standard of competency. There is no evidence in the record that GIPSON was competent to waive his constitutional rights.

VIII.

CONCLUSION

For the above-stated reasons, Appellant asserts that the Judgment of Conviction should be set aside, his conviction vacated, and this case remanded for trial.

DATED this 1st day of June, 2016.

CARMINE J. COLUCCI, CHTD.

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IX.

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4)-(6), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

1. This brief has been prepared in a proportionally spaced typeface using Word in Century Schoolbook.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) and NRAP 28.1(e)(2) 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 4,450 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 1st day of June, 2016.

CARMINE J. COLUCCI, CHTD.

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X.

CERTIFICATE OF SERVICE

I hereby certify on the 6th day of June, 2016, that Appellant's Opening Brief was filed electronically with the Nevada Supreme Court. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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