IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN FRANCIS DUNHAM, Appellant, vs. THE STATE OF NEVADA, Respondent.	Supreme Court Case No. 73143 District Court Case No. 16-CR-0159

RESPONDENT'S ANSWERING BRIEF

(APPEAL FROM JUDGMENT OF CONVICTION RESULTING FROM GUILTY PLEA)

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Respondent State of Nevada files its Answering Brief to Appellant Johnathan Torres's ("Defendant") Opening Brief, and states as follows:

I. SUMMARY OF THE ARGUMENT

1. The district court appropriately exercised its broad discretion in refusing to give an instruction offered by Defendant seeking to define the term "reside" as it appears in NRS 205.067. Because the word "reside" is used in its ordinary sense and is commonly understood, the court was not required to attempt to define the term for the jury. Defendant wrongfully fails to recognize that the right to have the court instruct a jury as to a defendant's theory of the case does not extend to misstatements of law or to definitions of words for which no definition is necessary.

2. The district court appropriately exercised its wide discretion when it sentenced Appellant to ninety-six (96) months in the custody of the Nevada Department of Corrections, with a minimum parole eligibility when thirty-eight (38) months have been served. The sentence is within the statutory limits, and the sentence is not so unreasonably disproportionate to the offense as to shock the conscience. Thus, the sentence does not violate the constitutional prohibition against cruel and unusual punishment.

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II. ARGUMENT

A. The district court appropriately exercised its discretion in refusing to instruct the jury using Defendant's proposed instruction defining the word "reside."

This court reviews a district court's decision to issue or not to issue a particular jury instruction for an abuse of discretion. *Ouanbengboune v. State,* 125 Nev. 763, 774, 220 P.3d 1122, 1129 (2009). However, this court reviews whether a jury instruction is an accurate statement of law de novo. *Funderburk v. State,* 125 Nev. 260, 212 P.3d 337 (2009). "[T]he defense has the right to have the jury instructed on its theory of the case as disclosed by the evidence, no matter how weak or incredible that evidence may be." *Crawford v. State,* 121 Nev. 744, 751, 121 P.3d 582, 586 (2005) (internal quotation omitted). The defense is not, however, entitled to jury "instructions that are misleading, inaccurate, or duplicitous." *Id.* at 754, 121 P.3d at 589.

Defendant was charged with Home Invasion under NRS 205.067(1), which provides:

> A person who, by day or night, forcibly enters an inhabited dwelling without permission of the owner, resident or lawful occupant, whether or not a person is present at the time of the entry, is guilty of invasion of the home.

An inhabited dwelling is then defined by NRS 205.067(5)(b):

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> "Inhabited dwelling" means any structure, building, house, room, apartment, tenement, tent, conveyance, vessel, boat, vehicle, house trailer, travel trailer, motor home or railroad car in which the owner or other lawful occupant *resides.*

(Emphasis added).

Defendant proposed the following jury instruction, defining the word "reside":

> Reside means to dwell permanently or continuously. It expresses an idea that a person keeps or returns to a particular dwelling place as his fixed, settled, or legal abode. The plain meaning of reside implies a continuous arrangement.

(Joint Appendix ("JA") Vol. I, p. 14, l. 1-4, hereinafter delineated as JA I 14:1-4.)

The district court rejected Defendant's proffered definition of "reside," stating:

> Instruction 35 is a definition of reside, and the Court concludes that the jury can use the plain meaning of that term. It is not a word that needs to be defined for them. Ms. Brown may argue definition of reside at the time that she argues in her closing argument, but I'm not going to give a definition of reside. It's not defined by statute and, therefore, the jury will use their common sense and determine the plain meaning of that word without the Court defining it for them.

(JA III 3:6-15.)

In so ruling, the district court correctly exercised its discretion because the proposed instruction is an inaccurate statement of law. This Court has specifically held that "a district court must not instruct a jury on theories that misstate the applicable law." *Vallery v. State*, 118 Nev. 357, 372, 46 P.3d 66, 77 (2002)

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(holding that defendant in elder abuse case was not entitled to instruction erroneously stating that violation of regulations is not a criminal act); *see also Carter v. State*, 121 Nev. 759, 765, 121 P.3d 592, 596 (2005) (district court need not accept misleading, inaccurate, or duplicitous jury instructions).

The term "resides," as used in NRS 205.067(1), does not require intent to remain or that a person dwell in a certain location continuously or permanently. "Residence," the noun form of "reside," means "[t]he act or fact of living in a given place for *some time." Black's Law Dictionary*, 1502 (10th ed. 2014) (emphasis added). In addition, "residence" is distinguished from "legal residence" or "domicile," which requires bodily presence, in addition to intent to remain. *Id.*; *Williams v. Clark County Dist. Attorney*, 118 Nev. 473, 482, 50 P.3d 536, 542 (2002) (noting that actual residence is a place of living and does not require intent to remain, in contrast from legal residence or domicile). There is no other indication within NRS 205.067 that the Legislature intended the victim of home invasion to possess intent to remain in the home or that he or she remain there on a permanent basis. Thus, Defendant's proposed jury instruction, configured based on "legal residence" or "domicile" and applicable in the civil context, *see* NRS 10.155, clearly presents an inaccurate and misleading statement of law as it pertains to Home Invasion. Consequently, that a person did not *permanently* or *continuously* live at the structure Defendant broke into is not a defense to the

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crime of Home Invasion. *See Adler v. State*, 95 Nev. 339, 346, 594 P.2d 725, 730 (1979) (holding that defendant was not entitled to theory instruction that was not a defense to the crime). As such, Defendant was not entitled to the instruction.

Further, applying Defendant's proffered instruction to Nevada's Home Invasion statute would lead to absurd results. Requiring a permanency or continuousness element would directly undermine the purpose of the Home Invasion statute, as evidenced from the statute's plain language. After all, NRS 205.067 specifically provides that the crime is committed whether or not a person is present at the time of entry, NRS 205.067, and it provides for a very broad list of what constitutes an "inhabited dwelling:" "any structure, building, house, room, apartment, tenement, tent, conveyance, vessel, boat, vehicle, house trailer, motor home, or railroad car." NRS 205.067(5)(b).

Defendant's proposed instruction would make it a defense to the crime of Home Invasion if the victim did not have live at the location permanently. As a result, it would preclude prosecution if a perpetrator broke into, for example, a vacation home, occupied or not, a secondary residence, almost all hotel rooms, and so forth. For example, if a victim were staying the weekend at a condominium used as a second home, and, while he or she is there, a perpetrator broke in the door and entered the home, under the theory put forward by Defendant's instruction, this would not constitute a Home Invasion. Given the plain language

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of the statute, such a result would be absurd. *See, e.g.*, *Washington v. State*, 117 Nev. 735, 739, 30 P.3d 1134, 1136, *as amended* (Nov. 14, 2001) ("[Statutes] …should not be read to produce unreasonable or absurd results."). The various cases from outside jurisdictions to which Defendant cites for support of his claim that "reside" requires a permanent or continuous presence, (Op. Br. 13:21-14:22,) are taken from situations not involving home invasion and fail to take into account this absurdity in the context of Home Invasion as defined by NRS 205.067. Thus, they are inapposite and unpersuasive.

Moreover, Defendant was not entitled to any definition of the word "reside," regardless of the accuracy of Defendant's requested instruction. A district court need not define words unless those words have technical legal meaning, as explained in the case of *Dawes v. State*, 110 Nev. 1141, 881 P.2d 670 (1994). In that case, the defendant argued that the district court erred in initially refusing to provide the jury with the legal definition of "speed contest" within the meaning of an "anti-racing" statute. In holding that the district court did not err in failing to provide the requested definition, this Court held as follows:

> Trial courts have broad discretion in deciding whether terms within an instruction should be further defined.
>
> Words used in an instruction in their ordinary sense and which are commonly understood require no further defining instructions.

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> However, when a phrase has a technical legal meaning, that phrase should be defined so that a jury is not misled or confused into applying the plain language as commonly understood.

Dawes, 110 Nev. at 1145–47, 881 P.2d at 672–74 (internal citations omitted). The Nevada Supreme Court agreed with the district court that the phrase "speed contest" had no technical legal meaning, and, therefore, it was not error to decline to define the term. *Id*. at 1146, 881 P.2d at 673.

As in *Dawes*, the district court below ruled that the word "reside" "[is] not defined by statute and, therefore, the jury will use their common sense and determine the plain meaning of that word without the Court defining it for them, (JA III 3:6-15,) echoing this Court's ruling that "words used in an instruction in their ordinary sense and which are commonly understood require no further defining instructions." *Id*. at 1146, 881 P.2d at 673. Further, the Home Invasion Statute, NRS 205.067, does not provide a technical legal meaning of the word "reside." Consequently, Defendant was not entitled to any proposed definition, much less Defendant's requested instruction which, as argued above, misstated the law by erroneously adding a permanency requirement to the word "reside."

Notwithstanding the above, Defendant argues that failing to provide the requested instruction, or some unrequested, unknown version of it, constitutes an abuse of discretion. (Op. Br. 12:4-19.) In so doing, Defendant calls upon the right to have the court instruct the jury as to the law that supports the defense theory of

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the case. (*Id.*) However, this argument fails to recognize that the defense must propose an instruction that, in some form "should be given." *Crawford* 121 Nev. at 755, 121 P.3d at 589 (2005).

Defendant's argument fails to recognize that a right to have the jury instructed as to the defense's theory is not limitless and must end when the instruction in question misstates the law or requires that the jury be instructed as to the definition of a commonly understood word, as explained above. It is true that the State was required to prove beyond a reasonable doubt that, among other elements, Defendant forcibly entered an *inhabited dwelling* as that word is defined by NRS 205.067(5)(b). As part of that definition, the State was required to prove that someone, in this case, Defendant's estranged wife, Patricia Scripko, resided at the residence into which Defendant broke and entered. As a result, Defendant was entitled to have the jury instructed accordingly, and, in fact, it is undisputed at this point that the jury was instructed as to the burden of proof as to these elements. In fact, Defendant did argue that the victim in this case, Patricia Scripko, did not reside at the home in question. (JA III 46:2-47:19.)

Consequently, as established above, this right to have the jury instructed regarding a defendant's theory of the case ends when the theory of the case is based upon an incorrect statement of law or an unnecessary definition. Consequently, the district court did not abuse its discretion when it ruled that

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Defendant's proposed jury instruction defining the word "reside" would not be given to the jury. Further, the district court did not abuse its discretion by failing to define the word *sua sponte* as no such definition was necessary.

B. Defendant's sentence does not violate the constitutional prohibition against cruel and unusual punishment.

As is relevant to Defendant's argument, "[a] sentence within the statutory limits is not cruel and unusual punishment unless…the sentence is so unreasonably disproportionate to the offense as to shock the conscience." *Blume v. State*, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (internal citations omitted).

Under the facts before this Court, Defendant's sentence of ninety-six (96) months in the custody of the Nevada Department of Corrections, with a minimum parole eligibility of thirty-eight (38) months, comes nowhere close to shocking the conscience.

At the time of his offense, Mr. Dunham had an outstanding warrant from Boston, Massachusetts, for the offense of Assault by Means of a Dangerous Gun, and he had multiple other pending charges, including Inflict Corporal Injury to Spouse, Threaten Crime with Intent to Terrorize, Battery Spouse, and several violations of a protective order. (JA I 22.) At the time Defendant committed the crime of Home Invasion, he had been specifically ordered by two different courts to stay away from the Stateline condo, the very residence he broke into, and to

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have no contact with his wife, Dr. Patricia Scripko. (JA III 130, 131, and 132.) He was also ordered to not possess any firearms or ammunition. (JA III 130.)

At sentencing, the victim, Dr. Scripko, provided a victim impact statement under oath. (JA III 106:7-12.) She stated that she and Defendant had been separated for ten months and that, during that time, Defendant had refused to leave her alone or allow her safety. (JA III 107:1-4.) She talked about their marriage in 2012 and how Defendant had abused her both verbally and then physically, with the abuse intensifying gradually. (JA III 108:24, 109:13-16.) She recounted how Defendant would throw things at her, push her to ground, drag her across the floor for not cleaning or cooking well enough. (JA III 109:17-110:4.) Defendant used abuse as a means to control Dr. Scripko and her financial situation. (JA III 110:6-8.) Defendant paid his child support to his ex-wife from Dr. Scripko's personal bank account and opened credit cards fraudulently in Dr. Scripko's name. (JA III 110:9-14.) She talked about a time when Defendant threatened to kill her. (JA III 112:8-15.)

Dr. Scripko explained that she finally decided to leave the relationship after, while at the Stateline condo with Defendant and two of his children, the same condo for which Defendant was convicted of breaking into in this case, Defendant dragged her out of bed, pushed her against the wall, held her by her neck and jaw, threw her on the bed, and strangled her more than once. (JA III 113:2-13.) Dr.

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Scripko explained that she felt forced to allow Defendant to remain at the condo during out of fear, and this is why she remained in California during the summer of 2016 while Defendant stayed at the Stateline condo. (JA III 114:15-115:21.)

In August, Defendant arrived unannounced at Dr. Scripko's Monterey, California condominium. (JA III 116:13-14.) Defendant threatened to release intimate videos of Dr. Scripko, and when Dr. Scripko locked herself in a guest bedroom, Defendant released her dog outside in a successful effort to make her leave the room to retrieve her dog. (JA III 116:13-23.) The next morning, Defendant again battered her by hitting her with the door and shoving her against the balcony multiple times. (JA III 117:9-11.)

Defendant was arrested. (JA III 117:14-15.) While he was in jail, he was interviewed by Officer Garcia in the Monterey County Jail. (JA III 94:12-96:15.) Defendant informed Officer Garcia that he did not have any guns in the Stateline condo, and that, if he wanted a gun, he would have to go get a gun from someone else. (JA III 96:10-15.) As part of this arrest, the court in Monterey issued a protective order precluding contact with Dr. Scripko and requiring that Defendant stay away from the Monterey condo. (JA III 117:14-23; 130.) Nonetheless, as soon as Defendant was released from jail, he returned to the same Monterey condo, in violation of the protective order. (JA III 117:24-119:3.)

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In late August, while Dr. Scripko was in Cleveland, Defendant called her at the hotel where she was staying, again in violation of the protective order. (JA III 119:4-10.) During this time period, Defendant sent hundreds of emails to Dr. Scripko, some of which communicated that he was following her, outside her condo, waiting for her at the airport, and so forth, all in violation of the protective order. (JA III 119:11-16; I 81:8-101:16.)

On August 31, 2016, Deputy Carlos Sandoval of the Douglas County Sheriff's Office found Defendant inside the Stateline condo and arrested him for violating the protective order issued in Monterey. (JA I 20:6-22:14; JA III 96:16-22.)

On October 17, 2017, Defendant sent an email to Dr. Scripko telling her he was not in Tahoe. (JA I 99:13-18.) Defendant acknowledged there was a court proceeding in Monterey the next day, but he would not be there. (JA III 100:24-101:22.)

On October 19 or 20, Gary LaChasse, a repairman working on the Stateline condo, ran into Defendant in a Stateline restaurant and bar where Mr. LaChasse was performing some repair work. (JA II 168:13-169:1.) Mr. LaChasse was aware that there was a protective order in place ordering Defendant not to be at the Stateline condo. (JA II 167:13-16.) Mr. LaChasse planned to meet Dr. Scripko at the Stateline Condo on October 21, 2016. (JA II 168:3-11.) When Mr. LaChasse

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ran into Defendant at the restaurant and bar, they had a conversation in which Mr. LaChasse, in an effort to avoid a confrontation, told Defendant Dr. Scripko was coming to the Stateline condo on Friday. (JA II 169:12-170:3; 188:10-12.) Defendant told Mr. LaChasse he knew Dr. Scripko was coming, but he would be out of town on business when she came. (JA II 170:4-171:1; 188: 13-15.)

On October 21, 2016, Dr. Scripko drove from California to the condo in Stateline, Nevada. (JA II 122:7-14.) Dr. Scripko was under the impression Defendant would not be at the Stateline condo that day. (JA II 122:20-22.) However, as she was driving, she had a conversation with Mr. LaChasse, which resulted in her calling the police to check if Defendant was at the Stateline condo. (JA II 120:20-123:10.)

While Dr. Scripko was driving to the condo, as a result of her call, Deputy Flagg and Deputy Karosich of the Douglas County Sheriff's Office entered the Stateline condo at the request of Dr. Scripko. (JA I 83:7-20; 87:7-88:10.) After announcing themselves loudly, the deputies reached the bottom floor of the condo. (JA I 89:10-92:10.) On the bottom floor, under the bed, the deputies found the Defendant clutching a shotgun with a box of shotgun shells within arm's reach. (JA I 93:1-103:3; 111:14-121:4; 122:15-123:11.) Defendant was arrested and taken into custody. (JA I 124:4-5.)

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Dr. Scripko arrived a little later. (JA II 129:20-130:5.) Dr. Scripko found various notes throughout the condo, seemingly written by Defendant to Dr. Scripko, with messages such as "I love you," "I miss you," "Sorry I wasn't good enough," and "Have a good weekend." (JA II 132:1-134:2.) She also found a pot of freshly brewed coffee, which she drinks, but which she knew from experience Defendant did not drink. (JA II 134:5-15.)

Dr. Scripko stayed in the Stateline condo, a residence owned in her name, (JA II 76:11-16.) until October 23, 2016. (JA II 151:20-22.) On October 25, 2016, Defendant was released, after having been ordered by yet another court to stay away from the Stateline condo. (JA III 131, 132.) Then, as found by the jury, sometime between his release from custody on October 25, 2016, and the morning of October 26, 2016, Defendant returned to the Stateline condo, broke a window, and entered the residence. When he was found, he had among his personal effects a sharpened knife not matching any of the other knives in the condo. (JA I 142:3-143:3; II 135:9-136:8.)

At the conclusion of Dr. Scripko's victim impact statement, she stated the following:

> [Defendant] Mr. Dunham shows time and time again that he will never obey the law. He does not understand safety of human life, especially with me. I do not wish to harm him, and the reality is pressing criminal charges for the assault is never something I wanted, but he made it clear there was no safe means for me to get away from

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> him without involvement of law enforcement. Even with this involvement, I still have not been protected anytime he's out of jail.
> ….
> Because of this, I do fear anything outside of jail time, including probation will simply be violated and someone will be harmed again. He is relentless and for me continues to show no remorse.
> ….
> Essentially, he has yet to face anyone and admit who he is which is a lifelong sociopath who uses his lack of guilt to play on the guilt and good nature of others, conning them and exerting control and lies and violence like he did with me. His persistence and unwillingness even now to tell the truth and truly apologize exemplifies his unwillingness to change. Without those changes, he remains dangerous, sober or not.

(JA III 124:2-125:10.)

In summary, Defendant showed that, despite his relatively minor history of criminal convictions, he presented a very real and serious danger to society. The evidence before the district court was that Defendant had repeatedly and continuously violated every attempt by the court system and law enforcement to protect the victim, Dr. Scripko, Defendant's wife. Defendant violated the protective order at every turn. The evidence before the district court was that Defendant was a violent person, who misled those around him into believing that he would not be present at the Stateline condo on October 21, 2016, knowing that his estranged wife was coming that same day. Luckily, based on a conversation with Mr. LaChasse, who had had contact with Defendant only a day or two prior in Stateline, now concerned that Defendant may still be at the Stateline condo, Dr.

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Scripko called the police to ask them to check to make sure he was not there. And, knowing she was coming, Defendant was found downstairs under a bed with a shotgun and box of matching shotgun shells.

Appropriately, the district court determined that Defendant is "a thoroughly dangerous person." (JA III 127:7-8.) The court also concluded that Defendant is "a person who simply does not take no for an answer." (JA III 128:4-5.) Given the above, Defendant's sentence does not constitute cruel and unusual punishment, and the district court did not abuse its discretion when it determined that Defendant should serve ninety-six (96) months in the custody of the Nevada Department of Corrections, with a minimum parole eligibility of thirty-eight (38) months.

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III. CONCLUSION

Based on the foregoing, this Court should uphold the judgment of conviction.

DATED this 9th day of November, 2017.

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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 proportionately spaced typeface using Microsoft Word in 14 point Times New Roman.

I further certify 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) because it is proportionately spaced, has a typeface of 14 points or more, and does not exceed 30 pages.

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 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

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

DATED this 8th day of November, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that this document, **RESPONDENT'S ANSWERING BRIEF**, was filed electronically with the Nevada Supreme Court on the 9th day of November, 2017. Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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