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

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8 LUIS ANGEL CASTRO

9 Appellant,

10 vs.

11 THE STATE OF NEVADA,

12 Respondent.

S.Ct. No. 78643

D.C. No. C-16-314092-1

13 **APPELLANT'S OPENING BRIEF**

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LUIS ANGEL CASTRO

S.Ct. No. 78643

D.C. No. C-16-314092-1

Respondent.

This Court has appellate jurisdiction over the instant matter pursuant to Nev. Rev. Stat. § 177.015(3). Appellant, LUIS ANGEL CASTRO, appeals from his Judgment of Conviction, which was entered on March 28, 2019. 2 Appellant’s Appendix (“AA”) 201-202. A timely Notice of Appeal was filed on April 22, 2019. 2 AA 203-205.

This is a direct appeal from a judgment of conviction of a category A felony. Therefore, pursuant to N.R.A.P. 17(b)(2)(A), this appeal presumptively is routed to the Supreme Court of Nevada.

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1 **STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

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3 **I. THE DISTRICT COURT ERRED IN FAILING TO CORRECT**
4 **CASTRO’S PSI**

5 **II. THE DISTRICT COURT ERRED IN FAILING TO GIVE**
6 **CASTRO HIS CREDIT FOR TIME SERVED**

7 **III. CASTRO’S SENTENCE AMOUNTS TO CRUEL AND UNUSUAL**
8 **PUNISHMENT IN VIOLATION OF THE EIGHT AMENDMENT**
9 **TO THE UNITED STATES CONSTITUTION AND ARTICLE 1,**
10 **SECTION 6 OF THE NEVADA CONSTITUTION**

11 **IV. CUMULATIVE ERROR**

12 **STATEMENT OF THE CASE**

13 On April 12, 2016, LUIS ANGEL CASTRO (“Castro”) was charged via
14 Information as follows : **COUNT 1** – Conspiracy to Commit Murder (Category B
15 Felony – NRS 200.010, 200.030, 199.480 – NOC 50038); **COUNT 2** – Attempt
16 Murder with Use of a Deadly Weapon (Category B Felony – NRS 200.010;
17 200.030, 193.330,193.165 – NOC 50031); **COUNT 3** – Mayhem With Use of a
18 Deadly Weapon (Category B Felony – NRS 200.280, 193.165 – NOC 50045);
19 **COUNT 4** – Battery with Use of a Deadly Weapon Resulting in Substantial Bodily
20 Harm (Category B Felony – NRS 200.481 – NOC 50226); **COUNT 5** – First
21 Degree Kidnapping With Use of a Deadly Weapon Resulting in Substantial Bodily
22 Harm (Category A Felony – NRS 200.310, 200.320, 193.165 – NOC 50056);
23 **COUNT 6** – Extortion With Use of a Deadly Weapon (Category B Felony – NRS
24 200.310, 200.320, 193.165 – NOC 50056);
25 **COUNT 6** – Extortion With Use of a Deadly Weapon (Category B Felony – NRS
26 200.310, 200.320, 193.165 – NOC 50056);
27 **COUNT 6** – Extortion With Use of a Deadly Weapon (Category B Felony – NRS
28 200.310, 200.320, 193.165 – NOC 50056);

1 205.320, 193.165 – NOC 50620); **COUNT 7** – Robbery With Use of a Deadly
2 Weapon (Category B Felony – NRS 200.380, 193.165 – NOC 50138); and
3
4 **COUNT 8** – First Degree Arson (Category B Felony – NRS 205.010 – NOC
5 50414). 1 AA 1-8. Castro was charged with three other individuals. 1 AA 1-8.

6
7 On February 4, 2019, the State filed an Amended Information pursuant to
8 negotiations charging Castro with one count of First Degree Kidnapping
9 Substantial Bodily Harm (Category A Felony – NRS 200.310, 200.320, 193.165 –
10 NOC 50052). 1 AA 95-96.

11
12 On this same day, Castro entered into a Guilty Plea Agreement (“GPA”)
13 wherein he pleaded guilty to the charges contained in the Amended Information. 1
14 AA 97-100; 2 AA 206-234. Pursuant to the GPA, all parties agreed that the State
15 would have the right to argue for LIFE without the possibility of parole and the
16 Defense would argue for LIFE with the possibility of parole after fifteen (15)
17 years. 1 AA 97. All parties agreed that no one would seek a term of years. 1 AA
18 97. AA Castro’s co-defendants entered into the same GPA, as was required by the
19 negotiations. 2 AA 206-234.

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23 On March 22, 2019, the State filed a Sentencing Memorandum. 2 AA 105-
24 132. On March 24, 2019, Castro filed a Sentencing Memorandum. 2 AA 133-200.

25
26 On March 26, 2019, Castro was sentenced to a maximum term of LIFE
27 without the possibility of parole in the Nevada Department of Corrections (NDC).
28

1 2 AA 201-202. Castro's three co-defendants received the same sentence at the
2 same sentencing hearing. 2 AA 235-264.

3
4 Parole and Probation recommended 15 to 40 years. PSI 7.¹ Although Parole
5 and Probation noted that Castro had one thousand one hundred and twelve (1112)
6 days credit for time served at the date of sentencing, the sentencing Court did
7 neither mentioned this during sentencing nor included it in the Judgment of
8 Conviction. PSI 2; 2 AA 201-02; 258.

9
10 On March 28, 2019, the district court entered the Judgment of Conviction. 2
11 AA 201-202.

12
13 On April 22, 2019, Castro filed a timely Notice of Appeal. 2 AA 203-205.

14
15 The instant Opening Brief follows.

16
17 **STATEMENT OF FACTS**

18 According to the preliminary hearing testimony of the victim, Jose Ismael
19 Salazar-Ortiz ("Salazar-Ortiz"), he knew Castro and the co-defendants because he
20 did methamphetamine with them prior to the instant crime. 1 AA 19-21. A few
21 days prior to March 7, 2016, Salazar-Ortiz's girlfriend's car was broken down near
22 Edward Honabach's ("Honabach") house. 1 AA 25. Salazar-Ortiz, while asked
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¹ Pursuant to NRAP 30, the PSI is not included in the Appellant's Appendix filed
26 on November 26, 2019. Castro will file a "Motion for an Order Directing the Clerk
27 of the District Court to Transmit Appellant's Presentence Investigation Report to
28 the Clerk of the Supreme Court of Nevada" contemporaneously with the filing of
the instant Opening Brief.

1 Honabach for help towing the car and Honabach called Castro. 1 AA 25.
2 Honabach told Salazar-Ortiz that they would charge him seven dollars (\$7.00) per
3 mile to tow the car to his girlfriend's house. 1 AA 25. Salazar-Ortiz said no the
4 offer. 1 AA 26. Castro and Honabach then told Salazar-Ortiz that he owed them
5 \$50 for their time even though they did not tow the car. 1 AA 26. Salazar-Ortiz left
6 and went to his house. 1 AA 27.

9 On March 7, 2016, Salazar-Ortiz was at his girlfriend's house. 1 AA 27.
10 Around 11:00 a.m., Castro, Honabach and Lionel King ("King") arrived at Salazar-
11 Ortiz's girlfriend's house and asked him for money. 1 AA 27-29. Salazar-Ortiz
12 told them he did not owe them any money and asked them to leave. 1 AA 29. They
13 refused to leave and proceeded to ask for his girlfriend's phone. 1 AA 29-30.
14 Salazar-Ortiz gave Castro the phone and told them to leave. 1 AA 30. They did not
15 leave and instead dragged him to their car. 1 AA 30-31. During this process,
16 Honabach hit Salazar-Ortiz in the head. 1 AA 31. They did not push Salazar-Ortiz
17 into the car—he went because he did not know if they were armed. 1 AA 31. They
18 drove off with Salazar-Ortiz in the car and took him to an abandoned house. 1 AA
19 32-33.

24 When they arrived at the abandoned house, Castro's girlfriend, Fabiola
25 Jimenez ("Jimenez") opened the door. 1 AA 34. Salazar-Ortiz was taken into the
26 house where Honabach put a knife to his throat. 1 AA 34-35. Honabach and King
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28

1 tied Salazar-Ortiz up in a chair. 1 AA 35. Salazar-Ortiz testified that Castro was
2 giving the orders. 1 AA 35. Honabach and King kicked him and told him he could
3 make three calls to obtain money. 1 AA 35-36. Salazar-Ortiz was unable to
4 persuade any of the people he called to give him money. 1 AA 37. While the calls
5 were being made, Honabach was pulling on Salazar-Ortiz's fingers with pliers
6 while King was stabbing him in the right arm and ribs. 1 AA 37-38. Because
7 Salazar-Ortiz could not procure any money, Honabach cut his finger and ripped off
8 his fingernail while King continued to stab him. 1 AA 38. Castro made out with
9 Jimenez while he stared at Salazar-Ortiz. 1 AA 38. Honabach eventually started
10 cutting Salazar-Ortiz's throat. 1 AA39. Castro said the cut was too small so later
11 Jimenez and Castro both cut Salazar-Ortiz's throat further. 1 AA 39. Finally, King
12 cut Salazar-Ortiz's throat very deeply. 1 AA 39-40. Salazar-Ortiz pretended to be
13 dead. 1 AA 41. They then set the house on fire. 1 AA 42. Salazar-Ortiz escaped the
14 burning house and received medical attention. 1 AA 43-45. The knives were later
15 recovered and contained Honabach's DNA on them. 2 AA 136. Castro, Hanabach,
16 King and Jimenez were all arrested and charged with the crimes contained in the
17 Information. 1 AA 1-8.

24 Although Salazar-Ortiz's testimony makes it appear that Castro was present
25 during the entire ordeal, video footage from a convenience store and statements
26 from a witness demonstrate that Castro actually left while this ordeal was
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1 occurring. 2 AA 135-137; 158-65. It should also be noted that the victim, although
2 in no way deserved the pain that was inflicted upon him, was a three-time felon
3 who had a documented history of making false statements to police. 2 AA 138;
4 168-72. For example, after accidentally shooting himself in the leg, he lied and
5 stated that he was robbed by a black male who shot him in the process of the
6 robbery. 2 AA 138; 168-72. This lie was told to law enforcement with no concern
7 for the fact that an innocent black male may have been arrested for the shooting. 2
8 AA 138.

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12 Following the arrests, Castro attempted to cooperate with police and offered
13 to take a polygraph to prove his truthfulness when he stated that he did not know
14 how violent the encounter would be; attempted to get his co-defendants to stop; left
15 the scene when things got very violent; and returned without calling the police out
16 of fear for his family. 2 AA 135-38. He also offered to testify against his co-
17 defendants. Id.

18 **SUMMARY OF THE ARGUMENT**

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21 Castro was charged with numerous crimes along with three co-defendants
22 for the kidnapping and torture of the victim for money in an abandoned house.
23 After the victim was thought to be dead, the defendants burned the house down.
24 The victim escaped and survived. Although the victim testified at the preliminary
25 hearing that Castro was present the entire time, other evidence such as footage
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1 from a convenience store and statements made by a witness demonstrate that
2 Castro left during the ordeal. Castro attempted to cooperate with police and offered
3 to take a polygraph test as well as testify against his co-defendants. Ultimately, all
4 four defendants pleaded guilty to First Degree Kidnapping with Substantial Bodily
5 Harm and all received the sentence of LIFE without the possibility of parole.
6
7

8 Castro only raises four issues in the instant brief. First, the district court
9 erred in failing to correct an error in Castro's presentence investigation report
10 showing that he was first arrested at "19 or younger" when the accurate
11 information was "24 or older." This was not corrected despite this issue being
12 raised prior to sentencing and stipulated to by the State. Second, the district court
13 erred in failing to give Castro his one thousand one hundred and twelve (1112)
14 days credit for time served. Third, Castro's sentence amounts to cruel and unusual
15 punishment in violation of the Eighth Amendment to the United States
16 Constitution and Article 1, Section 6 of the Nevada Constitution. Fourth,
17 cumulative error warrants reversal of Castro's sentence.
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1 **ARGUMENT**

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3 **I. THE DISTRICT COURT ERRED IN FAILING TO CORRECT**
4 **CASTRO'S PSI**

5 **A. Standard of Review**

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7 In Stockmeier v. State, Bd. of Parole Com'rs, this Court ruled that a
8 defendant's Presentence Investigation Report ("PSI") must be corrected prior to
9 sentencing. 255 P.3d 209, 127 Nev. Adv. Op. 19 (2011). This Court further
10 emphasized that even if disputed factual statements contained in a defendant's PSI
11 do not affect a defendant's sentence, any significant inaccuracy could follow a
12 defendant into the prison system and be used to determine his classification,
13 placement in certain programs, and eligibility for parole, and thus, the defendant
14 must promptly seek to correct any alleged inaccuracies to prevent the Department
15 of Corrections from relying on a PSI that could not later be changed. 255 P.3d 209,
16 214; *see*, NRS 176.159(1); *see also* United States Dept. of Justice v. Julian, 486
17 U.S. 1, 5–6, 108 S.Ct. 1606, 100 L.Ed.2d 1 (1988) (noting that PSIs are used for
18 determining status of an inmate, choosing treatment programs, deciding eligibility
19 for privileges, and making parole decisions).

20 "[A] defendant [has] the right to object to factual [or methodological] errors
21 in [sentencing forms], so long as he or she objects before sentencing, and allows
22 the district court to strike information that is based on 'impalpable or highly
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1 suspect evidence.'" Blankenship v. State, 132 Nev. Adv. Rep. 50, 375 P.3d 407,
2 412 (2016) (alterations in original) (quoting Sasser v. State, 130 Nev. 387, 394-95,
3 324 P.3d 1221, 1226 (2014)). When the district court refuses to correct an error in
4 a PSI objected to prior to sentencing, that refusal is reviewed for abuse of
5 discretion. Id.

8 **B. Castro's PSI is Incorrect with Respect to Age at First Arrest**

9 Castro's PSI is incorrect with respect to the entry titled, "Age at first arrest"
10 on page two of his PSI. PSI 2. Castro objected to this prior to being sentenced and
11 argued that the PSI should be corrected to reflect that the age at first arrest was "24
12 or older" as opposed to "19 or younger." 2 AA 236. The State stipulated to the
13 request for the correction but the district court refused to correct the error and
14 stated, "I don't think that rises to the level of a Stockmeier issue, I don't believe." 2
15 AA 236-37. Castro's PSI should have been corrected to reflect the accurate
16 circumstances of his upbringing. Stockmeier, 255 P.3d at 214.

20 While the State may argue that this did not matter with respect to Castro's
21 sentencing because the district court took note of the error and that it will not
22 impact Castro's parole at a later date because he will never be eligible for parole
23 pursuant to his current sentence, this deficiency or error will follow Castro through
24 the prison system and be used to determine his classification and placement in
25 certain programs. Stockmeier, 255 P.3d at 214. Additionally, if for some reason his
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1 sentence is reversed either through the instant direct appeal or a subsequent
2 petition for writ of habeas corpus and he ultimately receives a sentence with a
3 parole eligibility date, the incorrect information on his PSI will affect parole
4 eligibility. Castro must seek correction of his PSI on direct appeal otherwise it will
5 be deemed waived if he raises the issue in later proceedings. Pantano v. State, 122
6 Nev. 782, 795, 138 P.3d 477, 486 (2006)(The "failure to specifically object on the
7 grounds urged on appeal preclude[s] appellate consideration on the grounds not
8 raised below."). Therefore, the district court abused its discretion when it refused to
9 correct Castro's PSI and Castro was, and will continue to be, prejudiced by this
10 error. Stockmeier, 255 P.3d at 214.

11 **II. THE DISTRICT COURT ERRED IN FAILING TO GIVE** 12 **CASTRO HIS CREDIT FOR TIME SERVED**

13 **A. Standard of Review**

14 Failure to apply credit for time served at sentencing is reviewed for an abuse
15 of discretion. Johnson v. State, 120 Nev. 296, 298, 89 P.3d 669, 670 (2004).

16 **B. Castro was entitled to One Thousand One Hundred and Twelve** 17 **(1112) Days Credit for Time Served**

18 Just as was the case in Johnson, "[a]lthough the presentence investigation
19 report prepared by the Division of Parole and Probation noted that [Castro] was
20 entitled to [1112] days of credit for time served, there was no discussion by the
21 parties or the district court about presentence confinement credit at the sentencing
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1 hearing.” 120 Nev. at 298, 89 P.3d at 670; PSI 7. The district court simply stated at
2 sentencing, “I don’t think credit time served matters.” 2 AA 258. Castro’s
3 Judgment of Conviction is lacking his credit for time served as well. 2 AA 201-02.

4
5 While it may appear that credit for time served applied to a sentence of LIFE
6 without the possibility of parole is moot, procedurally, Castro is entitled to his
7 credit for time served and it must be noted in his Judgment of Conviction. Johnson,
8 120 Nev. at 298, 89 P.3d at 670. Furthermore, if for some reason his sentence is
9 reversed either through the instant direct appeal or a subsequent petition for writ of
10 habeas corpus and he ultimately receives a sentence with a parole eligibility date,
11 his credit for time served will affect parole eligibility. Therefore, the failure by the
12 district court to include Castro’s credit for time served in his Judgment of
13 Conviction was an abuse of discretion, Castro was and will be prejudiced by this
14 error and his Judgment of Conviction should be corrected to reflect his credit for
15 time served. Id.

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20 **III. CASTRO’S SENTENCE AMOUNTS TO CRUEL AND UNUSUAL**
21 **PUNISHMENT IN VIOLATION OF THE EIGHT AMENDMENT**
22 **TO THE UNITED STATES CONSTITUTION AND ARTICLE 1,**
23 **SECTION 6 OF THE NEVADA CONSTITUTION**

24 **A. Standard of Review**

25 The Eighth Amendment to the United States Constitution as well as Article
26 1, Section 6 of the Nevada Constitution prohibits the imposition of cruel and
27 unusual punishment. The Nevada Supreme Court has stated that “[a] sentence
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1 within the statutory limits is not ‘cruel and unusual punishment unless the statute
2 fixing punishment is unconstitutional or the sentence is so unreasonably
3 disproportionate to the offense as to shock the conscience.’” Allred v. State, 120
4 Nev. 410, 92 P.2d 1246, 1253 (2004) *quoting* Blume v. State, 112 Nev. 472, 475,
5 915 P.2d 282, 284 (1996) *quoting* Culverson v. State, 95 Nev. 433, 435, 596 P.2d
6 220, 221-22 (1979)(emphasis added); *see also* Harmelin v. Michigan, 501 U.S.
7 957, 1001, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) (plurality opinion) *quoting*
8 Solem v. Helm, 463 U.S. 277, 288, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983).

12 Castro pleaded guilty to First Degree Kidnapping with Substantial Bodily
13 Harm. The victim was tremendously harmed. However, Castro did not have a
14 history of prior convictions for violent offenses (unlike his co-defendants) and he
15 was under the influence of drugs at the time the crime was committed.
16 Additionally, he was not aware that this crime would become so violent, left the
17 scene when it did become violent while his co-defendants proceeded to harm the
18 victim, and only his co-defendant’s DNA was found on the weapon. 2 AA 135-38.
19 Castro did not call police because he was scared that his co-defendants would harm
20 his family given that they knew where his family’s business was. 2 AA 137.
21 Additionally, Castro suffers from PTSD symptoms from being sexual abused as a
22 child by an uncle, which was confirmed by Castro’s parents (although not
23 diagnosed with PTSD); suffers from bipolar symptoms (although not diagnosed
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1 with bipolar disorder); suffers from depression, anxiety, and drug addiction; and
2 has attempted suicide once. 2 AA 147-48. Therefore, his sentence of LIFE without
3 the possibility of parole is so unreasonably disproportionate to the offense and
4 Castro's role in the offense as to shock the conscience and amounts to cruel and
5 unusual punishment in violation of the Eighth Amendment to the United States
6 Constitution as well as Article 1, Section 6 of the Nevada Constitution. Allred v.
7 State, 120 Nev. 410, 92 P.2d at 1253.

8 Although Castro is not arguing that his sentence is an *illegal* sentence under
9 Nevada law, it is disproportionate to the crime he was convicted of— First Degree
10 Kidnapping with Substantial Bodily Harm—and his role in said crime whereas, for
11 example, a defendant acting alone convicted of First Degree Murder *can* be given a
12 chance at parole in twenty (20) years. Therefore, Castro sentence of LIFE without
13 the possibility to parole amounts to cruel and unusual punishment in violation of
14 the Eighth Amendment to the United States Constitution as well as Article 1,
15 Section 6 of the Nevada Constitution and this prejudiced him. Allred, 120 Nev.
16 410.

17 **IV. CUMULATIVE ERROR**

18 The relevant factors to consider in determining whether cumulative error is
19 present include whether (1) the issue of innocence or guilt is close, (2) the quantity
20 and character of the errors (3) and the gravity of the crime charged.” Mulder v.
21

1 State, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000). As discussed *supra*, the
2 district court erred in numerous ways that were highly prejudicial to Castro. Here,
3
4 Castro was convicted of the grave crime of First Degree Kidnapping with
5 Substantial Bodily Harm. Although Castro pleaded guilty to the crime, it was
6 established through investigation and forensic testing that he was unaware that this
7 crime would become so violent, left the scene when it did become violent while his
8 co-defendants proceeded to harm the victim, and only his co-defendant's DNA was
9 found on the weapon. 2 AA 135-38. Castro did not call police because he was
10 scared that his co-defendants would harm his family given that they knew where
11 his family's business was. 2 AA 137 . The errors on the part of the district court
12 were harmful. Furthermore, Castro was given a sentence second in harshness only
13 to the death penalty—LIFE WITHOUT THE POSSIBILTY OF PAROLE. Thus,
14 the three Mulder factors weigh in favor of finding there is cumulative error
15 warranting reversal of Castro's sentence. Id.

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1 **CONCLUSION**

2 Based upon the arguments herein, *supra*, LUIS ANGEL CASTRO sentence
3
4 should be VACATED and he should be re-sentenced.

5 Dated this 23rd day of December, 2019.
6

7
8 Respectfully submitted,
9

10
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1 **CERTIFICATE OF COMPLIANCE**

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

6 **[X] This brief has been prepared in a proportionally spaced typeface**
7 **using Microsoft Word 2010 Edition in Times New Roman 14 point font; or**
8

9 [] This brief has been prepared in a monospaced typeface using [state name
10 and version of word-processing program] with [state number of characters per inch
11 and name of type style].
12

13 2. This brief exceeds the with the page- or type-volume limitations of NRAP
14 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C),
15 it is either:
16

17 [] Proportionately spaced, has a typeface of 14 points or more, and contains
18 _____ words; or
19

20 [] Monospaced, has _____ or fewer characters per inch, and contains _____
21 words or _____ lines of text; or
22

23 **[X] Does not exceed 30 pages.**

24 3. Finally, I hereby certify that I have read this appellate brief, and to the best
25 of my knowledge, information, and belief, it is not frivolous or interposed for any
26 improper purpose. I further certify that this brief complies with all applicable
27
28

1 Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires
2 every assertion in the brief regarding matters in the record to be supported by a
3 reference to the page and volume number, if any, of the transcript or appendix
4 where the matter relied on is to be found. I understand that I may be subject to
5 sanctions in the event that the accompanying brief is not in conformity with the
6 requirements of the Nevada Rules of Appellate Procedure.
7
8

9
10 DATED this 23rd day of December, 2019.
11
12
13

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ALEXANDER CHEN, ESQ.
AARON FORD, ESQ.

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