IN THE SUPREME COURT OF THE STATE OF NEVADA

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THE STATE OF NEVADA,

Appellant,

v.

MARGAUX ORNELAS, A/K/A MARGAUX SHANNON ORNELAS

Respondent.

CASE NO: 82751

APPELLANT'S OPENING BRIEF

Appeal From Grant of Motion to Suppress
Eighth Judicial District Court, Clark County

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500
State of Nevada

AARON D. FORD
Nevada Attorney General
Nevada Bar #007704
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Appellant

MICHAEL A. TROIANO, ESQ.
Nevada Bar #011300
The Law Office of Michael A. Troiano
601 South 7th Street
Las Vegas, Nevada 89101
(702) 843-5500

Counsel for Respondent

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THE STATE OF NEVADA, Appellant, v. MARGAUX ORNELAS, A/K/A MARGAUX SHANNON ORNELAS, Respondent.	CASE NO: 82751

APPELLANT'S OPENING BRIEF

Appeal From Grant of Motion to Suppress
Eighth Judicial District Court, Clark County

JURISDICTIONAL STATEMENT

NRS 177.015(2) provides jurisdiction to entertain an appeal from the granting of a suppression motion.

ROUTING STATEMENT

Routing of this appeal is submitted to the Supreme Court's discretion, as NRAP 17 expresses no presumption of retention or assignment to the Court of Appeals for an appeal of the granting of a motion to suppress.

STATEMENT OF THE ISSUE

1. Whether the district court erred in granting the Motion to Suppress Evidence Based on Fourth Amendment Violation and Fruit of the Poisonous Tree.

STATEMENT OF THE CASE

On May 3, 2019, the State filed an Indictment charging Margaux Ornelas ("Ornelas") and Dustin Lewis ("Lewis") with the following: Count 1 – Conspiracy to Commit Burglary (Gross Misdemeanor – NRS 205.060, 199.480); Count 2 – Burglary (Category B Felony – NRS 205.060); Count 3 – Burglary (Category B Felony – NRS 205.060); Count 4 – Burglary (Category B Felony – NRS 205.060); Count 5 – Grand Larceny (Category B Felony – NRS 205.220.1, 205.222.3); Count 6 – Conspiracy to Commit Burglary (Gross Misdemeanor – NRS 205.060, 199.480); Count 7 – Burglary (Category B Felony – NRS 205.060).[1] Vol. I Appellant's Appendix ("AA") 01-05.

On February 26, 2021, Lewis filed a Motion to Suppress Evidence Based on Fourth Amendment Violation and Fruit of the Poisonous Tree Doctrine ("Motion to Suppress"). I AA 06. On March 3, 2021, Ornelas filed a Joinder to the Motion to Suppress. I AA 80. On March 4, 2021, the State filed its Opposition. I AA 82. On March 12, 2021, Lewis filed a Reply. I AA 88. On March 29, 2021, the State filed a Response to the Reply. I AA 96.

On March 29, 2021, the district court issued a Minute Order stating that no

[1]Two additional defendants, Tyree Faulkner and Thomas Herod, were also charged with Counts 6 and 7. I AA 01, 03-04. These defendants are not respondents in the instant appeal.

evidentiary hearing was necessary and that the parties would have the opportunity to argue their respective positions. I AA 104. On April 5, 2021, the district court heard argument. I AA 105-11. After hearing argument, the district court orally granted the motion in its entirety. I AA 111. On April 8, 2021, the district court filed its Order granting the Motion to Suppress. I AA 112-13. The State filed Notices of Appeal with the district court and this Court on April 9, 2021. I AA 115.

On May 3, 2021, The State filed its Points and Authorities in Support of Propriety of Appeal. Ornelas filed a Response on May 14, 2021. On July 9, 2021, this Court filed an Order Directing Full Briefing, thereby exercising its discretion to entertain this appeal.

STATEMENT OF THE FACTS

In December of 2018, Nedy Macedo was the on-site manager of Storage One at 9960 West Flamingo Road, Las Vegas, Nevada. II AA 150. On the morning of December 8, 2018, Macedo observed several units in building B that were open with no lock. II AA 153. Macedo also observed damage to the door of unit B145. II AA 154. Macedo noticed that the doors to units B151 and B147 were open. II AA 155. Macedo then notified her manager, as well as the customers for units B151, B147, and B145. II AA 155. Macedo provided the police with Storage One surveillance video from the previous night. II AA 155-56. The surveillance video showed two

individuals walking out of Storage One. II AA 156-57. One individual appeared to be pushing a wheelchair while another appeared to be carrying a couple of duffle bags. II AA 157.

In December of 2018, Michael Rodrigue was renting storage unit B147 from Storage One. II AA 133. On December 8, 2018, the police and Storage One informed Rodrigue that it appeared his unit had been burglarized. II AA 135. Upon arriving at Storage One, Rodrigue observed a hole in the side of his storage unit which had not been present the last time he saw the unit. II AA 135. Rodrigue also observed that multiple items were missing from his unit: a wooden chess set, an Army jacket, and Army dog tags. II AA 135-36.

In December of 2018, Marc Falcone was renting five units from Storage One. II AA 140. One of those units was unit B151. II AA 142. On December 8, 2018, Falcone was notified by the manager of Storage One that it appeared one of his units, B151, had been burglarized. II AA 140-41. Falcone is a watch collector and was storing numerous watches in B151. II AA 142. Upon arriving at Storage One, Falcone observed that the lock to his unit was damaged. II AA 141-42. Falcone also observed that some of the watches he had been storing in the unit were missing. II AA 143. The total value of the missing watches was approximately $2.2 million. II AA 143. Five of the missing watches were Panerai brand watches. II AA 147.

On December 8, 2018, Las Vegas Metropolitan Police Department ("LVMPD") crime scene analyst Whitney Scharpf responded to Storage One to process the scene. II AA 193-94. Scharpf processed unit B151. II AA 194-95. Scharpf dusted various areas to obtain fingerprints. II AA 195. Scharpf dusted the walls of the unit as well as a safe inside of the unit. II AA 195. Scharpf was able to obtain multiple fingerprints, which were impounded and forwarded to LVMPD's latent print section for forensic analysis. II AA 196-97.

On December 10, 2018, LVMPD Detective Ethan Grimes was assigned to investigate the burglaries at Storage One. II AA 201-02. After being assigned to the case, Detective Grimes reviewed still photos from the video surveillance of the incident on December 8, 2018. II AA 203. Detective Grimes observed one male and one female suspect; the female suspect was pushing a wheelchair with a chess board. II AA 203-04. Detective Grimes observed the male suspect was carrying multiple bags and wearing an Army jacket. II AA 204.

On the night of December 11, 2018, a squad of police officers canvassed the area near Storage One in an attempt to locate the suspects. I AA 22; II AA 205. In a fenced-in desert area adjacent to Storage One, east of a Chevron gas station, the officers observed in the area a tent with a wheelchair approximately 25 yards away from it. I AA 22; II AA 206. The officers challenged the tent to determine if there

was anyone inside. II AA 206-07. When the officers received no answer, they unzipped the tent and observed that there was a large chess board and numerous watch boxes, one with the Panerai brand name, inside the tent. II AA 207. Detective Grimes and Detective Andrew Shark obtained a search warrant for the tent and the surrounding area. II AA 207-08.

After the search warrant was obtained, Detective Grimes and other officers entered the tent and observed a Panerai bag, as well as other items that matched the victims' descriptions of the missing items. II AA 207. Items recovered from the tent included a chess board, business cards bearing Marc Falcone's name and a Panerai watch box. II AA 207. Crime Scene Analysts responded to the scene to obtain fingerprints from various items located inside the tent and near the tent. II AA 208-09. The Panerai watch box was dusted for fingerprints. II AA 209. The serial number on the Panerai watch box matched the Panerai serial number that Mr. Falcone had reported missing. II AA 210.

After impounding the items from the scene, detectives returned to the scene near the tent in an attempt to locate a detective's missing cellular phone. II AA 211. While the detectives were there, at approximately 11:00pm, they heard an alarm sound at Storage One. II AA 212. Detective Grimes and other officers responded to the scene to assist in setting up a perimeter, because the alarm indicated individuals

were on the property. II AA 212. Officers began searching Storage One for the intruders, and subsequently located an unoccupied black Lincoln Navigator parked outside of the facility, with what appeared to be a watch in a plastic case on the passenger seat. I AA 24; II AA 213-14. The vehicle had an Eagle Trace Apartments sticker on it. II AA 216. Eventually it was determined that the lock had been cut off of unit B-151, although nothing appeared to be missing. II AA 223.

In response to the alarm, Detective Grimes positioned himself in the Storage One parking lot on the southeast side of the facility. II AA 212. While in that position, Detective Grimes observed a U-Haul parked in a nearby Chevron parking lot. II AA 214. Detective Grimes and other officers approached the U-Haul with the key discovered at the Storage One, and observed two black male individuals exit the Chevron and get inside of a vehicle with a Lyft sign on it. II AA 214. The two individuals were eventually identified as Tyree Faulkner and Thomas Herod. II AA 214-15.

At approximately 1:00am the officers were notified that a carjacking incident had been reported at the Chevron next to the Storage One. II AA 215. The person reporting the crime stated he was at his apartment at the Eagle Trace Apartments. II AA 216.

Detective Grimes contacted the emergency contact for Storage One, who

responded to Storage One and obtained surveillance video. II AA 216. Upon reviewing the surveillance video, Detective Grimes observed three male individuals and recognized one of them from the December 8th surveillance video. II AA 216-17. Detective Grimes recognized the other two individuals as the black male individuals he had observed entering the Lyft vehicle in the Chevron parking lot. II AA 217.

The caller who reported the robbery was eventually identified as Tyree Faulkner, and was arrested. II AA 217. After Faulkner was read his Miranda rights, Detective Grimes interviewed him. II AA 218. Faulkner told Detective Grimes that he made up the robbery incident because he left his wallet in the Lincoln Navigator and he knew that he would be identified as being involved in the burglaries at Storage One. II AA 220. Faulkner stated that the other black male individual was his cousin, who had met the white male individual on the video when they were in jail. II AA 219. He stated that he met the white male and female a couple of days ago, and the white male asked his cousin if he could take them places because they didn't have a car. II AA 220. The white male gave Faulkner and his cousin $500 to drive them around to various places. II AA 220.

Faulkner stated that on the 11th he and his cousin ran into the white male again, at which time the white male asked if they would drive him around again, in

exchange for some watches. II AA 221. Faulkner and his cousin looked at the watches but didn't want them. II AA 221. The white male then agreed to pay Faulkner and his cousin $1000 each. II AA 221. They drove to Storage One, and Faulkner's cousin and the white male went inside, where the white male opened the exit gate. II AA 222. The white male used a bolt cutter to cut locks from one of the units. II AA 222. The alarm then went off, but the white male said no one was going to come. II AA 222. They left when they heard a police helicopter flying over the facility. II AA 222.

A search warrant was executed on the Lincoln Navigator. I AA 50-63. During the execution of the search warrant, a Panerai watch and a Greubel Forsey watch in a plastic case were recovered, as well as Faulkner's wallet with his identification inside. I AA 27, 63. LVMPD crime scene analyst Tasha Olson photographed the Lincoln Navigator and dusted items inside for fingerprints. II AA 188. The fingerprints obtained were then submitted to LVMPD's latent print section for forensic analysis. II AA 190.

Lori Haines, a latent print examiner working in the LVMPD forensic laboratory was assigned to examine multiple fingerprints that were obtained in this case. II AA 166, 168. She compared a fingerprint obtained from the handle of a wheelchair with prints obtained from five known individuals. II AA 176. Haines

determined that the fingerprint from the wheelchair matched the right thumb of Lewis. II AA 176. Haines also examined a fingerprint obtained from a wooden Panerai watch box, and determined that it matched the right middle finger of Ornelas. II AA 180-81. Haines also examined a fingerprint obtained from a green watch box and determined that it matched the right middle finger of Ornelas. II AA 181. Haines also examined a fingerprint obtained from a white watch box and determined it matched the left thumb of Ornelas. II AA 181.

Haines also examined a fingerprint obtained from a plastic case found in the tent. II AA 181. Haines entered the fingerprint into an AFIS database and received a positive hit. II AA 181. Haines then compared the AFIS hit with the fingerprint and rendered a conclusion of identification to the left thumb of Lewis. II AA 181.

Haines also examined a palm print obtained from the exterior wall of Storage One unit B145. II AA 183. Haines determined that the palm print matched the right palm of Lewis. II AA 183. Haines also determined that a fingerprint lifted from the exterior wall of Storage One unit B145 matched the right thumb of Ornelas. I AA 30.

Detective Grimes learned that latent prints from items found in the tent had been entered into AFIS, and identified as belonging to Ornelas and Lewis. I AA 27. Detective Grimes then informed the surveillance squad that Ornelas and Lewis

needed to be located. I AA 28. The surveillances squad eventually located Ornelas in Unit 110 at the Fun City Motel. I AA 28. Ornelas was taken into custody and a search warrant was executed on the motel room. I AA 29. Three watches belonging to Falcone were recovered from the hotel room. I AA 29, 78. After Ornelas was taken into custody, Detective Grimes read Ornelas her Miranda rights. I AA 29. Ornelas stated she understood her rights and wanted an attorney. I AA 29.

Detective Grimes interviewed Lewis after reading Lewis his Miranda rights. I AA 30. Lewis denied stealing or selling any watches, or breaking into the storage unit. I AA 30. Detective Grimes asked Lewis who had the watches and Lewis stated he should talk to Ornelas. I AA 31. Detective Grimes showed Lewis the location of Storage One on a map and Lewis said he was not sure if he had ever been there or not. I AA 31.

SUMMARY OF THE ARGUMENT

The district court erred by granting the Motion to Suppress. Ornelas did not have a legitimate expectation of privacy in the tent, its contents, or the surrounding area, because she was not authorized to erect a tent or reside on the premises. Additionally, even if this Court were to find the search of the tent violated the Fourth Amendment, this Court still must find that the district court erred by suppressing additional evidence as "fruit of the poisonous tree." This evidence was sufficiently

attenuated from the search of the tent such that any taint from the search of the tent was purged. The district court also failed to make the requisite factual findings for this Court to review.

ARGUMENT

I. THE DISTRICT COURT ERRED BY GRANTING THE MOTION TO SUPPRESS BECAUSE ORNELAS DID NOT HAVE A LEGITIMATE EXPECTATION OF PRIVACY IN THE TENT AND THE SURROUNDING AREA

The district court erred by suppressing all of the evidence recovered from the tent and the surrounding area. The district court made no factual findings to support its conclusion that the evidence was seized from the tent in violation of the Fourth Amendment, and cited only three case decisions in support. I AA 112-13. Ornelas' claim that the search violated her legitimate expectation of privacy was legally inadequate because trespassers do not have legitimate expectations of privacy in the areas where they are trespassing. Accordingly, the district court's decision must be reversed.

A. Standard of Review

"Suppression issues present mixed questions of law and fact. While this court reviews the legal questions de novo, it reviews the district court's factual determinations for sufficient evidence." Johnson v. State, 118 Nev. 787, 794, 59 P.3d 450, 455 (2002), *overruled on other grounds by* Nunnery v. State, 127 Nev. 749,

263 P.3d 235 (2011). This Court gives deference to a district court's findings of fact in a suppression hearing, only disturbing them on appeal if they are not supported by substantial evidence. State v. Miller, 110 Nev. 690, 694, 877 P.2d 1044, 1047 (1994). No suppression hearing was held in this case, and the district court made no factual findings. Accordingly, the district court's decision is entitled to no deference. This Court has repeatedly emphasized that it "does not act as a finder of fact" and therefore the district court must "issue express factual findings when ruling on suppression motions so that this court [will] not have to speculate as to what findings were made below." State v. Rincon, 122 Nev. 1170, 1177, 147 P.3d 233, 238 (2006).

B. Ornelas Did Not Have a Legitimate Expectation of Privacy in the Tent

By claiming that her Fourth Amendment rights were violated, Ornelas had the burden of demonstrating that the challenged government action infringed upon her legitimate expectation of privacy. Rakas v. Illinois, 439 U.S. 128, 129, 99 S. Ct. 421, 423 (1978); Katz v. United States, 389 U.S. 347, 353, 88 S.Ct. 507, 512 (1967)). "Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." Rakas, 439 U.S. at 143, 99 S. Ct. at 430. A legitimate expectation of privacy requires both a subjective expectation of privacy in the place searched or items seized, and that this privacy

expectation be one that society is prepared to recognize as reasonable. Katz, 389 U.S. at 361, 88 S.Ct. at 516 (Harlan, J., concurring); State v. Taylor, 114 Nev. 1071, 1077, 968 P.2d 315, 320 (1998).

Ornelas did not have both a subjective and objectively reasonable expectation of privacy in the tent. In fact, Ornelas' connection to the tent is entirely unclear from the record. Neither Lewis nor Ornelas was present at the scene when the tent was discovered; the tent was unoccupied. In both the Motion to Suppress and during argument, Lewis represented that he was using the tent as a residence. I AA 14, 110. The record reveals no such representations from Ornelas. Though Ornelas joined the Motion to Suppress, this at most established an adoption of the legal arguments presented therein. Ornelas was still obligated to show that her personal rights were violated by the search of the tent. "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." Rakas, 439 U.S. at 133–34, 99 S. Ct. at 425 (quoting Alderman v. United States, 394 U.S. 165, 174, 89 S.Ct. 961, 966 (1969)).

1) Ornelas Did Not Have a Subjective Expectation of Privacy in the Tent and the Surrounding Area Because the Location Was Exposed to the Public

Even assuming for the sake of argument that Ornelas was using the tent to some extent as a temporary residence, she still did not possess a subjective

expectation of privacy in the tent or the surrounding area. A subjective expectation of privacy is demonstrated by action taken to keep objects, activities, or statements private. Byrd v. U.S., 138 S.Ct. 1518, 1531 (2018). "A subjective expectation of privacy is exhibited by conduct which shields an individual's activities from public scrutiny." Young v. State, 109 Nev. 205, 211, 849 P.2d 336, 340 (1993). "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." Katz, 389 U.S. at 351, 88 S. Ct. at 511.

Lewis alleged he possessed a subjective expectation of privacy because the tent was closed and zipped. I AA 13. However, although the tent was zipped, it was also located on property not belonging to Ornelas and Lewis, and this property could be easily accessed by anyone able to climb over the fence surrounding the area. The tent was also not located in an isolated area far from public view, but in a commercial area near other businesses. It was an open desert area next to the Storage One and a Chevron parking lot. I AA 22. Zipping the tent closed did little to prevent others from accessing the items therein, especially upon leaving the area. Further, the district court not only suppressed evidence collected from inside the tent, but evidence collected from the surrounding area. This includes the wheelchair which was recovered from *outside* the tent. The wheelchair was not concealed in any way, and was exposed to public view. See Katz, 389 U.S. at 351, 88 S.Ct. at 511; Florida

v. Riley, 488 U.S. 445, 451-52, 109 S.Ct. 693, 697 (1989); Cal v. Greenwood, 486 U.S. 35, 40-41, 108 S.Ct. 1625, 1628-29 (1988). Accordingly, Ornelas cannot reasonably claim a subjective expectation of privacy in the tent or the surrounding area.

2) As a Trespasser, Ornelas Did Not Have an Objectively Reasonable Expectation of Privacy in the Tent and the Surrounding Area

Even if Ornelas was using the tent and the surrounding area as a temporary residence, and had a subjective expectation of privacy in the tent and the surrounding area, this expectation is not one that society is prepared to recognize as reasonable. "[A]n individual is not cloaked with Fourth Amendment protection simply by taking steps to conceal his activities. An objective expectation of privacy, i.e., one which society recognizes as reasonable, must also exist." Young, 109 Nev. at 211, 849 P.2d at 340. If in fact Ornelas was using the tent as a temporary residence, then she was trespassing on private property. Thus, she did not have a reasonable expectation of privacy in the tent because her occupation and the tent's presence on the land were unauthorized.

The argument in the Motion to Suppress focused largely on cases in which courts found the defendants had objectively reasonable expectations of privacy in the tents that they were using as temporary residences. Under some circumstances,

an individual may have a reasonable expectation of privacy in a tent. However, that will not be the case in all circumstances. Because "the Fourth Amendment protects people, not places" the central question is not what type of structure was searched, but whether the individual had a sufficient connection to the area searched such that a privacy expectation was objectively reasonable. Katz, 389 U.S. at 350, 88 S.Ct. at 511.

Individuals may enjoy an objectively reasonable expectation of privacy in public places under circumstances in which one would reasonably expect temporary freedom from intrusion. Conversely, individuals may not enjoy an objectively reasonable expectation of privacy in places typically considered private if the information has been willingly exposed to public view. Katz, 389 U.S. at 361, 88 S.Ct. at 516-17 (Harlan, J., concurring); Young, 109 Nev. at 213, 849 P.2d at 341-42.

Ornelas lacked an objectively reasonable expectation of privacy in the tent because she was not authorized to place a tent, store property, or reside on the premises. When an individual is not legally permitted to be on the premises, then the individual lacks a reasonable privacy expectation in those premises, and cannot assert a violation of his or her Fourth Amendment rights. "[A] defendant may not

invoke the Fourth Amendment to challenge a search of land upon which he trespasses." United States v. Schram, 901 F.3d 1042, 1044 (9th Cir. 2018).

The United States Supreme Court has long recognized this principle, noting that "[a] burglar plying his trade in a summer cabin during the off season may have a thoroughly justified subjective expectation of privacy, but it is not one which the law recognizes as 'legitimate.'" Rakas, 439 U.S. at 143 n.12, 99 S. Ct. at 430 n.12. The reason the burglar has no reasonable expectation of privacy is not simply because he is engaging in criminal activity, but because *his very presence* in the burglarized cabin is unlawful. Id. The Ninth Circuit has noted this as well, stating that "while a defendant does not lose his Fourth Amendment rights simply by engaging in illegal acts, a defendant still may lack Fourth Amendment rights to challenge the search of a residence *when the law prevents him from being there in the first place*." United States v. Schram, 901 F.3d 1042, 1045 (9th Cir. 2018) (emphasis added).

Many other courts, both State and federal, have also concluded that trespassers have no reasonable expectation of privacy in premises on which they trespass: United States v. Curlin, 638 F.3d 562, 565 (7th Cir. 2011) (finding that a tenant who had unlawfully remained on the premises after eviction did not have a legitimate expectation of privacy because his occupation of the residence was unlawful);

United States v. Struckman, 603 F.3d 731, 747 (9th Cir.2010) (finding trespassers cannot claim the protections of the Fourth Amendment); United States v. Washington, 573 F.3d 279, 284 (6th Cir.2009) (finding trespassers cannot claim the protections of the Fourth Amendment); United States v. McRae, 156 F.3d 708, 711 (6th Cir. 1998) (finding defendant "did not have a legitimate expectation of privacy by virtue of having stayed a week in the vacant premises that he did not own or rent."); United States v. Gale, 136 F.3d 192, 195–96 (D.C.Cir.1998) (finding defendant who changed the locks on an apartment rented to another and used it for packaging drugs did not have a legitimate expectation of privacy because he did not have legal authority to be in the apartment); Zimmerman v. Bishop Est., 25 F.3d 784, 788 (9th Cir. 1994) (finding squatters had no reasonable expectation of privacy because they were occupying the property unlawfully); United States v. Carr, 939 F.2d 1442, 1446 (10th Cir.1991) (finding that the defendant's three-week occupancy of a hotel room that was not registered to him, or someone he was sharing it with, could not be the basis of a legitimate expectation of privacy in the room);); United States v. Ruckman, 806 F.2d 1471, 1472–74 (10th Cir.1986) (finding that individual lacked reasonable privacy expectation in cave in which he resided on federal land); United States v. Sanchez, 635 F.2d 47, 64 (2d Cir.1980) (finding trespassers cannot claim the protections of the Fourth Amendment); Amezquita v. Hernandez-Colon,

518 F.2d 8, 11 (1st Cir. 1975) ("[the plaintiffs knew they had no colorable claim to occupy the land…That fact alone makes ludicrous any claim that they had a reasonable expectation of privacy."); People v. Nishi, 207 Cal. App. 4th 954, 961, 143 Cal. Rptr. 3d 882, 889 (2012) (finding that a defendant camping on federal land without a permit had no reasonable expectation of privacy because "he was illicitly occupying the premises without consent or permission"); Whiting v. State, 389 Md. 334, 363, 885 A.2d 785, 802 (2005) (finding that a defendant squatting in a house had no reasonable expectation of privacy because he did not lawfully own, lease, control, occupy, or possess the premises searched); State v. Cleator, 71 Wash. App. 217, 222, 857 P.2d 306, 309 (1993) (finding that a defendant who unlawfully lived in a tent on public land lacked a reasonable expectation of privacy because "he had no right to remain on the property and could have been ejected at any time.").[2] See also United States v. Schram, 901 F.3d 1042, 1046 (9th Cir. 2018) ("Like a burglar, trespasser, or squatter, an individual violating a court no-contact order is on property

[2]This decision was arguably called into question by Washington's subsequent decision in State v. Pippin, 200 Wash. App. 826, 403 P.3d 907 (2017), in which the Court found that the warrantless search of a tent violated the defendants' rights. Id. at 846, 403 P.3d at 917. However, unlike in Cleator, the Pippin decision was based not on Fourth Amendment jurisprudence, but on a provision in the Washington Constitution mandating that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." Id. at 834-35, 403 P.3d at 912; Wash. Const. art. I, § 7.

that the law prevents him from entering. We therefore hold that such an individual lacks a legitimate expectation of privacy in that place and may not challenge its search on Fourth Amendment grounds.").

Further, this very Court has long-recognized that a trespasser does not have a reasonable expectation of privacy in the property on which he trespasses. In State v. McNichols, 106 Nev. 651, 652-53, 799 P.2d 550, 551 (1990) this Court found that a former occupant who had re-entered a house from which he had been evicted had no reasonable expectation of privacy because the re-entry into the house was a trespass. This Court found that while the former occupant may have had a subjective expectation of privacy, "this expectation was not one that society is prepared to recognize as reasonable." Id. at 652, 799 P.2d at 551. This Court found that the individual had lost his legal interest in the property upon foreclosure, and lost any possessory interest upon his eviction. Id. Accordingly, the former occupant's "trespassory re-entry did not create an objective expectation of privacy." Id.

So too here, any expectation of privacy Ornelas may have had was not one which society is prepared to recognize as reasonable. She also had no ownership, lawful possession, or lawful control of the area that was searched. If she was using the tent as a residence, then she was trespassing on private property.

The district court does not appear to have understood that a person's status as a trespasser is critical when determining if an individual possessed a reasonable expectation of privacy. During argument, the State informed the district court that the property where the tent was located had a "no trespassing" sign posted, that Ornelas and Lewis were not the owners of the property, and that the rightful owners would be available to testify at an evidentiary hearing. I AA 109. Neither Ornelas nor Lewis has ever disputed this fact or claimed ownership or authorization to erect a tent in this location. The district court declined to hold an evidentiary hearing on this critical issue, but complained that there was nothing in the record to show that the area was private property. II AA 107-08. The State indicated that an evidentiary hearing could establish those facts. II AA 108. The district court then concluded that if information as to who owned the lot was not included in the police report, then the police could not have known it at the time. II AA 108. It is unclear why the court assumed that if something is not included in a police report, then the police must have been unaware of it, or why the court was focused on the state of mind of the police officers. The purpose of a police report is not to refute a Fourth Amendment claim, but to establish probable cause for an arrest or the filing of charges. Further, the determination as to whether or not a defendant's Fourth Amendment rights were violated is dependent upon the totality of the circumstances in a particular case, and

is not limited to what the police officers believed at the time of the search. The state of mind of the police is not determinative as to whether or not Ornelas had a legitimate expectation of privacy.

The district court appears to have accepted the argument in the Motion to Suppress that tents enjoy such special protection under the Fourth Amendment that they can never be searched without a warrant under any circumstances. Ornelas and Lewis cited this Court's decision in Alward v. State, 112 Nev. 141, 912 P.2d 243 (1996), for the proposition that "[w]arrantless searches of tents, therefore, violate the Fourth Amendment." I AA 13. This assertion is flatly wrong because "the Fourth Amendment protects people, not places." Katz, 389 U.S. at 350, 88 S.Ct. at 511. Even houses do not receive such a blanket protection under the Fourth Amendment that all warrantless searches of them automatically violate the Fourth Amendment. Regardless of the type of area that was searched, the correct inquiry for Fourth Amendment purposes is always whether or not the defendant possessed a legitimate expectation of privacy in the area searched and the items seized.

The decisions on which the Motion to Suppress relied are inapposite. These cases involved significantly different factual circumstances than the instant case. In each case, there was no question of fact as to whether or not the defendant was using the tent as a temporary residence, and the courts did not find that the defendant was

a trespasser. In United States v. Gooch, 6 F.3d 673, 676 (9th Cir. 1993), the tent searched was located on a public campground. The Court found that a public campground was essentially "a situation where campers were invited to set up a tent" and therefore such campers had legitimate privacy expectations in these temporary dwellings, similar to guests at a hotel. Id. at 678. In Alward, this Court adopted the reasoning of Gooch, and found that a camper on federal land had a legitimate expectation of privacy in the tent where he camped. 112 Nev. at 150, 912 at 249. This Court also found the defendant was similarly situated to a guest at a hotel. Id.

These cases are clearly inapplicable to the instant case. It was undisputed in both Alward and Gooch that the defendants were in fact temporarily residing in the searched tents. Here, it is unknown if Ornelas was residing in the tent, or if she ever even entered the tent. More importantly, the tent in this case was placed not on a campground, but on private property with a no trespassing sign posted. The tent was in a lot in a commercial area, not a place that could be mistaken for a campground. Ornelas, if she was residing in the tent, was not similarly situated to a guest in a hotel. Residing in that tent would make her a squatter or a trespasser, and would not give her a reasonable expectation of privacy.

The Motion to Suppress also cited the Ninth Circuit case of United States v. Sandoval, 200 F.3d 659, 660–61 (9th Cir. 2000), in which the Court found a

defendant had a reasonable expectation of privacy in a tent he erected on Bureau of Land Management land, despite it being unclear whether or not the defendant was permitted to camp there. The Court noted that it was not overruling its earlier decision that "a squatter in a residential home [does] not have an objectively reasonable expectation of privacy because he [has] no legal right to occupy the home." Id. at 661 (*citing* Zimmerman, 25 F.3d at 787-88). The Court found that a camper on public land had a reasonable expectation of privacy because "public land is often unmarked and may appear to be open to camping." Id. Sandoval must be read in combination with the Ninth Circuit's more recent cases in which the Court clearly stated that trespassers do not possess reasonable expectations of privacy: Schram, 901 F.3d at 1045 ("a defendant may not invoke the Fourth Amendment to challenge a search of land upon which he trespasses"); Struckman, 603 F.3d at 747 (noting that "had [the defendant] been an actual trespasser, he would not have been able to claim the protections of the Fourth Amendment").

The district court clearly erred in finding that Sandoval was a basis for granting the Motion to Suppress. I AA 112-13. Ornelas was not a camper on federal land that could easily be mistaken for a public campground. Unlike the tent in Sandoval, which was "heavily covered by vegetation and virtually impenetrable," the tent in this case was in a lot in a commercial area, exposed an open to public

view. tent in this case was placed on private property with a "no trespassing sign" posted. 200 F.3d at 660. If Ornelas was residing in the tent, then she was a trespasser on private property, and occupied the tent in bad faith, in violation of the "no trespassing" signs. Such occupation is unlawful, and therefore she did not have an objectively reasonable expectation of privacy.

C. The District Court Erred by Suppressing the Evidence from the Tent's Surrounding Area Without a Legal Basis

The district court suppressed all evidence recovered from the tent, as well as the surrounding area of the tent, despite no legal basis being presented for this suppression. I AA 112. The district court did not find, and Ornelas did not argue, that the evidence from the surrounding area—the wheelchair located 25 feet away from the tent—was suppressible as fruits of the poisonous tree. The district court concluded that evidence from the surrounding area was itself seized in violation of the Fourth Amendment. Id.

The Motion to Suppress did not provide a legal or factual basis for this conclusion, as it alleged the search that violated the Fourth Amendment was the unzipping of the tent prior to seeking a warrant. I AA 14. The wheelchair was seized from *outside* the tent. The area outside the tent was not a defined residential curtilage in which Ornelas had a reasonable expectation of privacy. See United States v. Dunn, 480 U.S. 294, 299, 107 S.Ct. 1134, 1139 (1987). Nor did Ornelas or Lewis offer

such argument. The argument offered was that the tent was Lewis' home, and therefore he had a legitimate expectation of privacy as to the items therein. But neither Lewis nor Ornelas maintained that they had a legitimate expectation of privacy in the surrounding area, or the wheelchair that was 25 feet away from the tent.

The exclusionary rule only allows for the exclusion of evidence that was obtained in violation of the Fourth Amendment. See, e.g., Mapp v. Ohio, 367 U.S. 643, 654-55, 81 S.Ct. 1684, 1691 (1961). Even if this Court found that the officers violated Ornelas' Fourth Amendment rights by unzipping the tent, that would not render the wheelchair suppressible. The wheelchair was not discovered as a result of the unzipping of the tent. When there is no causal connection between a Fourth Amendment violation and the collection of an item of evidence, that evidence is not suppressible. Wong Sun v. United States, 371 U.S. 471, 488, 83 S. Ct. 407, 417 (1963).

The wheelchair also was not concealed from public view, and thus Ornelas had neither a subjective nor objectively reasonable expectation of privacy in it. Katz, 389 U.S. at 351, 88 S.Ct. at 511; Riley, 488 U.S. at 451-52, 109 S.Ct. at 697; Greenwood, 486 U.S. at 40-41, 108 S.Ct. at 1628-29. The wheelchair could also have been seized pursuant to the plain view exception, as the officers were aware

the wheelchair appeared to be the same stolen wheelchair observed on the video surveillance. I AA 23; Ford v. State, 122 Nev. 796, 803–04, 138 P.3d 500, 505 (2006) (finding evidence lawfully seized under the plain view exception when "the intrusion of the police is lawful, the discovery of the incriminating evidence by the police is inadvertent, and it is immediately apparent that the items they observed may be evidence of a crime."). Therefore, the district court clearly erred by suppressing evidence recovered from the area surrounding the tent and this decision must be overturned.

II. THE DISTRICT COURT ERRED BY SUPPRESSING ALL INCRIMINATING EVIDENCE AS "FRUIT OF THE POISONOUS TREE"

Even if this Court were to find Ornelas' Fourth Amendment rights were violated by the unzipping of the tent, this Court must find that the district court erred by issuing an overly broad suppression order. The district court suppressed virtually all incriminating evidence, even that which was causally unconnected to the search of the tent, as "fruit of the poisonous tree." All of this evidence was either collected prior to the search of the tent, seized pursuant to a search warrant not based upon the search of the tent, was attenuated from the search of the tent, or was subject to the doctrines of independent source and inevitable discovery. Further, the district court's suppression of all evidence relating to Ornelas' identity goes beyond what can

legally be suppressed as a consequence of a Fourth Amendment violation.

The district court suppressed the following items as fruits of the poisonous tree:

1) Lewis' handprint recovered from the exterior wall of storage unit B145
2) Any and all statements made by from Lewis and Ornelas
3) All evidence related to the identities of Lewis and Ornelas
4) Evidence obtained from the Lincoln Navigator
5) Evidence obtained from the Fun City Hotel Room

I AA 113.

Assuming for the sake of argument that the officers' unzipping of the tent was a Fourth Amendment violation, none of these items were properly suppressed as "fruit of the poisonous tree." The sole argument offered to support suppression of this evidence was that Lewis was established as a suspect solely from the prints recovered from the tent, and therefore all of the evidence recovered afterward "flowed from" the search of the tent and was tainted. I AA 15. This argument is contrary to law. Ironically, this argument contradicts the sole case cited in an effort to support it. In Segura v. United States, 468 U.S. 796, 815, 104 S.Ct. 3380, 3391 (1984) the United States Supreme Court stated that it has "never held that evidence is fruit of the poisonous tree simply because it would not have come to light but for the illegal actions of the police." (internal quotations omitted). "Suppression is not warranted unless 'the challenged evidence is in some sense *the product of* illegal

government activity." Id. (emphasis added) (quoting United States v. Crews, 445 U.S. 463, 471, 100 S. Ct. 1244, 1250 (1980)).

Evidence is not "fruit of the poisonous tree simply because it would not have come to light but for the illegal actions of the police." Wong Sun, 371 U.S. at 487-88, 83 S.Ct. at 417. The relevant question is whether the evidence was obtained "by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." Id. at 488, 83 S.Ct. at 417 (quotation omitted). "[E]xclusion may not be premised on the mere fact that a constitutional violation was a 'but-for' cause of obtaining evidence." Hudson v. Michigan, 547 U.S. 586, 592, 126 S. Ct. 2159, 2164 (2006).

None of the excluded "fruits" evidence could conceivably be considered a product of the search of the tent. This evidence was not obtained as a result of the search of the tent, and therefore is not suppressible. The alarm activation at Storage One was an independent and intervening act that purged the taint of the allegedly illegal search of the tent. See Wong Sun, 317 U.S. at 488, 83 S.Ct. at 417. This independent and separate incident lead to the discovery of the Lincoln Navigator, a discovery of a new burglary at Storage One, and the identification of co-conspirator Faulkner. Further, Lewis' palm print and Ornelas' thumb print were obtained from the exterior of unit B-145, which connected them to the original burglary that

occurred three days before the search of the tent. Thus, the identification of Lewis and Ornelas as suspects was attenuated from the search of the tent, was attributable to an independent source, and was subject to inevitable discovery. The State addresses the specific items of suppressed "fruit" evidence as follows.

A. Lewis' Handprint

Lewis' handprint recovered from the exterior wall of storage unit B145 was inappropriately suppressed due to a lack of a causal connection between the search of the tent and the collection of the handprint. Even when a Fourth Amendment violation has occurred, a court may admit evidence if the causal connection between the illegal conduct and the acquisition of the evidence is sufficiently attenuated. Wong Sun, 371 U.S. at 488, 83 S. Ct. at 417. Suppression is not warranted if "the chain of causation proceeding from the unlawful conduct has become so attenuated or has been interrupted by some intervening circumstance so as to remove the "taint" imposed upon that evidence by the original illegality." Crews, 445 U.S. at 471, 100 S. Ct. at 1250. In Brown v. Illinois, 422 U.S. 590, 603-04, 95 S.Ct. 2254, 2261-62 (1975) the United States Supreme Court listed three factors for courts to consider in determining whether the causal chain is sufficiently attenuated: 1) the time elapsed between the constitutional violation and the acquisition of the evidence; 2) the

presence of intervening circumstances; 3) the purpose and flagrancy of the misconduct.

Here, Lewis' handprint is obviously not causally connected to the search of the tent because it was collected *three days prior* to the search of the tent. It was collected from the exterior wall of storage unit B-145 by a crime scene analyst on December 8, 2018. I AA 28. The officers did not discover the tent until December 11, 2018. I AA 22, 33. Thus, there is absolutely no causal connection between the search of the tent and the collection of the handprint. To be suppressible as fruits of an illegal search, the evidence must be collected *subsequent to* the illegal search. See, e.g., Segura, 468 U.S. at 804, 104 S. Ct. at 3385 (defining fruit of the poisonous tree as "evidence later discovered and found to be derivate of an illegality"). Thus, the handprint cannot be conceivably viewed as fruit of the poisonous tree and its suppression was unwarranted.

Ornelas may attempt to argue that while the handprint was recovered prior to the search of the tent, it was identified as belonging to Lewis after the search of the tent. It is true that Lewis was initially identified because his fingerprints were found on items recovered from the tent, and matched his fingerprints that were in AFIS. I AA 27. Lewis' known prints were compared with the handprint on unit B-145. I AA 30. However, as discussed more fully *infra*, a defendant's identity itself is not

suppressible as a result of a Fourth Amendment violation, and the fact that his fingerprints were already in the AFIS database means that his identity was subject to inevitable discovery. Thus, the district court clearly erred in suppressing Lewis' handprint.

B. All Statements

All statements made by Lewis and Ornelas were inappropriately suppressed because neither Lewis nor Ornelas demonstrated that they made any statements that were causally related to the alleged Fourth Amendment violation. It is unclear exactly what statements from Ornelas have been suppressed, as the record indicates her only statement at this point in the case was her invocation of her right to consult with an attorney, following being informed of her Miranda rights. I AA 29. The district court appears to have assumed that if any statements exist, they must be causally linked to the alleged Fourth Amendment violation.

Here, the sole basis offered for suppression of these statements was that Lewis and Ornelas would never have been located by the police if the allegedly illegal search had not occurred. This "but-for" argument is legally inadequate. Hudson, 547 U.S. at 592, 126 S. Ct. at 2164. Accordingly, the blanket order of suppression of all statements must be overturned.

C. All Evidence Related to Identity

The district court erred in suppressing "all evidence related to the identities of Lewis and Ornelas. Even if a Fourth Amendment violation occurred, the identity of a defendant is never suppressible. "The 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred." I.N.S. v. Lopez-Mendoza, 468 U.S. 1032, 1039, 104 S. Ct. 3479, 3483–84 (1984). See also United States v. Garcia-Beltran, 443 F.3d 1126, 1132 (9th Cir. 2006) ("evidence concerning the identity of a defendant, obtained after an illegal police action, is not suppressible as 'fruit of the poisonous tree.'"); United States v. Guzman-Bruno, 27 F.3d 420, 421 (9th Cir. 1994), as amended (Sept. 23, 1994) ("A defendant's identity need not be suppressed merely because it is discovered as the result of an illegal arrest or search.").

Furthermore, evidence related to the identities of both Lewis and Ornelas are admissible pursuant to the doctrine of inevitable discovery. See Nix v. Williams, 467 U.S. 431, 444, 104 S.Ct. 2501, 2509 (1984). The fingerprints of both Lewis and Ornelas were contained in the AFIS database, and therefore the prints collected from Storage One would have eventually been identified, whether or not the tent was searched. Accordingly, the suppression of this evidence must be overturned.

D. All Evidence Recovered From the Lincoln Navigator

The district court erred by suppressing the evidence recovered from the Lincoln Navigator because this evidence was subject to both the attenuation and independent source doctrines. The discovery and search of the Lincoln Navigator had no causal relationship to the allegedly illegal search of the tent. Brown, 422 U.S. 590, 603-04, 95 S.Ct. 2254, 2261-62; Nardone v. United States, 308 U.S. 308, 60 S.Ct. 266 (1939). The discovery of the Lincoln Navigator was due to an intervening event – the officers hearing the security alarm activate at Storage One as a result of the second burglary incident. I AA 24; II AA 212-13. Several hours also elapsed between the search of the tent and the discovery of the Lincoln Navigator. The tent was searched at approximately 9:05pm and the Lincoln Navigator was discovered at approximately 11:58pm. I AA 24, 33. Thus, the relationship between the unzipping of the tent and the discovery of the Lincoln Navigator is clearly attenuated, such that any "taint" from the search of the tent was sufficiently purged by the intervening burglary incident.

Further, the evidence recovered from the Lincoln Navigator is admissible pursuant to the independent source doctrine. See Murray v. United States, 487 U.S. 533, 536-37, 100 S.Ct. 2529, 2532-33 (1988); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392, 40 S. Ct. 182, 183 (1920). Under this doctrine, even if

police engage in illegal investigatory activity, evidence will be admissible if it is discovered through a source independent of the illegal activity. When evidence is discovered pursuant to a search warrant not based upon evidence discovered via illegal means, then the evidence is admissible because it was obtained independently of the initial illegality. See Murray, 487 U.S. at 536-37, 100 S.Ct. at 2532-33 (allowing admission of the evidence obtained through search warrant obtained independently of the initial illegality); Segura, 468 U.S. at 814, 104 S.Ct. at 3390 (finding evidence admissible because search warrant issued solely on basis of information known before previous illegal entry and items not seen by officers during prior illegal search). This is precisely what occurred here. The Lincoln Navigator was searched pursuant to a search warrant application that made no mention of evidence discovered in the tent. I AA 50-59. Accordingly, even assuming *in arguendo* that the search of the tent violated the Fourth Amendment, suppression of this evidence is not warranted because of the independent source.

E. All Evidence Recovered From the Fun City Motel Room

The district court erred by suppressing all evidence recovered from the Fun City motel room because the search of the hotel room was sufficiently attenuated from the search of the tent, and the evidence recovered therein was subject to the doctrine of inevitable discovery. The Fun City hotel room was searched on

December 14, 2018—six days after the search of the tent. Multiple intervening events—the discovery and search of the Lincoln Navigator, the interview of coconspirator Faulkner—occurred between the search of the tent and the search of the hotel room. Thus, under Brown, the search of the hotel room was sufficiently attenuated from the allegedly illegal search of the tent.

Further, the items recovered from the hotel room would inevitably have been discovered in this case, regardless of the search of the tent. A court may admit illegally obtained evidence if the evidence would inevitably have been discovered through independent, lawful means. Nix, 467 U.S. at 444, 104 S.Ct. at 2509. Even if the officers had not searched the tent, the officers would have eventually identified Ornelas as a suspect due to Faulker's confession, surveillance video of Ornelas and Lewis at Storage One in possession of the stolen items, and the fact that Lewis' palm print and Ornelas' thumb print were located on the exterior wall of one of the burglarized units. I AA 30. Both Lewis' and Ornelas' prints were in the AFIS database, and thus they would inevitably have been identified as suspects in this case, and the police would have eventually located Ornelas in the hotel room. I AA 27. Accordingly, there is no basis for the suppression of this evidence as "fruit of the poisonous tree."

/ / /

CONCLUSION

The district court erred in finding that Ornelas' Fourth Amendment rights were violated by the search of the tent. But even if Ornelas had shown that the search of the tent violated her Fourth Amendment rights, the district court would still have erred by issuing an overly broad suppression order in direct contravention of Fourth Amendment "fruit" analysis. The district court also erred by not making the necessary factual findings. Accordingly, the State respectfully requests that this Court overturn the district court's order granting the Motion to Suppress. In the alternative, if this Court finds that there are factual disputes which need to be resolved, then the State respectfully requests that this Court vacate the order and remand the matter for an evidentiary hearing, at which the State would have the opportunity to show that Ornelas had no legitimate expectation of privacy due to her status as a trespasser.

Dated this 28th day of July, 2021.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Karen Mishler*
KAREN MISHLER
Chief Deputy District Attorney
Nevada Bar #013730
Office of the Clark County District Attorney

CERTIFICATE OF COMPLIANCE

1. **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 Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the type-volume limitations of NRAP 32(a)(8)(B) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 8,939 words.
3. **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 28th day of July, 2021.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Karen Mishler*
KAREN MISHLER
Chief Deputy District Attorney
Nevada Bar #013730
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on July 28, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD
Nevada Attorney General

MICHAEL A. TROIANO, ESQ.
Counsel for Appellant

KAREN MISHLER
Chief Deputy District Attorney

/s/ E. Davis
Employee, Clark County
District Attorney's Office

KM//ed