IN THE SUPREME COURT OF THE STATE OF NEVADA

LEQUANA BROWN,

Appellant,

v.

STATE OF NEVADA,

Respondent.

CASE NO: 84042

APPELLANT'S OPENING BRIEF

Appeal From Denial of Post-Conviction Habeas Petition

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal. Lequana Brown is represented by Steven S. Owens, Esq, of Steven S. Owens, LLC, who is a sole practitioner and there are no parent corporations for which disclosure is required pursuant to this rule.

DATED this 3rd day of February, 2022.

/s/ Steven S. Owens
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JURISDICTIONAL STATEMENT

This appeal is from Findings of Fact, Conclusions of Law, and Order filed on January 3, 2022, which denied a petition for post-conviction relief from a criminal conviction pursuant to a guilty plea. 2 AA 415. Appellate jurisdiction in this case derives from NRAP 4(b)(1) and NRS 34.575(1). The Notice of Appeal was timely filed on January 3, 2022.

ROUTING STATEMENT

This matter is presumptively assigned to the Court of Appeals because it is a postconviction appeal that involves a challenge to a judgment of conviction or sentence for offenses that are not a category A felony. See NRAP 17(b)(3).

STATEMENT OF THE ISSUES

I. **APPELLANT IS ENTITLED TO WITHDRAW HER GUILTY PLEA TO CORRECT A MANIFEST INJUSTICE**

II. **APPELLANT IS ENTITLED TO WITHDRAW HER PLEA BASED UPON INEFFECTIVE ASSISTANCE OF COUNSEL**

STATEMENT OF THE CASE

On October 16, 2019, a grand jury convened and received testimony against Appellant Lequana Brown resulting in the return of a true bill. 1 AA 1-97. A formal Indictment was filed in court the next day charging Brown along with other co-defendants with multiple counts of Conspiracy to Commit Robbery, Robbery With

Use of a Deadly Weapon, Burglary, Grand Larceny, and Obtaining and Using Personal Identifying Information of Another. 1 AA 101, 102-7. Brown appeared in custody, represented by counsel Carl Arnold, and pleaded not guilty on October 24, 2019, receiving a speedy trial setting within 60 days for January 6, 2020. 1 AA 108. The state filed a motion for consolidation of cases which was opposed by co-defendants who also responded by filing a motion to sever. 1 AA 109, 118, 119. On December 19, 2019, both motions were denied, and the trial date was vacated and reset for March 30, 2020. 1 AA 132-3.

Preparatory to accepting an offer of negotiation, Brown made an oral motion for release from custody on January 3, 2020, which was denied. 1 AA 134-144. The State filed its Notice of Intent to Seek Punishment as a Habitual Criminal on March 4, 2020. 1 AA 145-6. Eventually, Brown and her co-defendants pleaded guilty on March 12, 2020. 1 AA 147-189. A Guilty Plea Agreement and Amended Indictment were filed in court that same day. 1 AA 190, 200. Shortly thereafter, Brown expressed a desire to withdraw her plea and for appointment of alternate counsel which was granted. 1 AA 202. New counsel, Matthew Lay, confirmed on May 7, 2020. 1 AA 206. The matter was continued for the possible filing of a motion to withdraw guilty plea. 1 AA 211. On June 4, 2020, Brown was not present but counsel represented that after speaking with Brown she was now ready to proceed with sentencing. 1 AA 213. On June 11, 2020, the matter was passed once again

for continuing negotiations. 1 AA 217. On June 16, 2020, the matter was continued again due to errors or changes in the plea agreement paperwork. 1 AA 227. On June 17, 2020, the State filed an Amended Guilty Plea Agreement which had been signed by counsel for Brown. 1 AA 235-244. Finally, on June 18, 2020, Brown appeared in court and proceeded with a new plea canvass pleading guilty to Robbery With Deadly Weapon. 2 AA 245-56. Sentencing occurred immediately after with the judge pronouncing a sentence of two to five years for robbery plus a consecutive two to five years for use of a deadly weapon, to run consecutive to another case Brown had in the system. 2 AA 256-261. The judgment of conviction was filed on June 22, 2020. 2 AA 266-7. No direct appeal was filed.

On October 29, 2020, Brown filed a pro se Petition for Writ of Habeas Corpus, a Motion for Appointment of Counsel, and a Motion to Withdraw Counsel. 2 AA 268, 284, 288. The State was ordered to respond to the Petition and filed its Response on December 17, 2020. 2 AA 292, 294-305. The district court then entered a minute order on February 25, 2021, deferring its decision on the habeas petition and granting the motion for appointment of counsel. 2 AA 306-9. Undersigned counsel confirmed on March 9, 2021, and a briefing schedule was set. 2 AA 310-1. Counsel filed a Supplemental Brief in Support of Petition for Writ of Habeas Corpus on June 14, 2021. 2 AA 312-22. The State filed its Response on July 29, 2021. 2 AA 323-38. Brown filed her Reply on August 16, 2021. 2 AA

339-45. The matter was argued on August 26, 2021, after which an evidentiary hearing was ordered in short course. 2 AA 346. On September 2, 2021, Brown's counsel represented that witnesses were unavailable on such short notice and the matter was continued. 2 AA 347. On September 4, 2021, the case was reassigned to a different department. 2 AA 348. Eventually, the evidentiary hearing was held on November 4, 2021, and the district court judge denied the habeas petition at the conclusion. 2 AA 351-413. Written Findings of Fact were filed on January 3, 2022. 2 AA 414-34. Brown filed her timely Notice of Appeal on that same date. 2 AA 435-6.

STATEMENT OF THE FACTS

The crime to which Brown pleaded guilty in the instant case involved a shoplifting incident during business hours at two different sporting goods stores, Champs Sports and Big 5, occurring on June 4th and 23rd, 2019, respectively. 1 AA 102-106. Co-defendants Sarah Gonzalez and Mark Anthony Finks were also involved by distracting store clerks and carrying some merchandise out of the store without paying for it. *Id*. When store clerks forcibly attempted to detain Brown, they said she withdrew a small knife in one incident and co-defendant Finks pulled a pellet gun in the other incident to get away. 1 AA 11-12, 43-44. No one was injured and Brown was eventually arrested.

At the evidentiary hearing held on November 4, 2021, Brown's counsel, Rochelle Nguyen, testified that by the time of her appointment to the case on May 7, 2020, Brown was seeking to withdraw a guilty plea she had entered with prior counsel Carl Arnold, yet Ms. Nguyen admitted that she never filed the motion to withdraw plea. 2 AA 355-356. She recalled that Mr. Arnold's father had passed away and he had stopped communicating with Brown. 2 AA 356-7. Ms. Nguyen determined that Brown did have legitimate ineffective assistance of counsel claims against Mr. Arnold. 2 AA 358. Brown was under the impression that the offer in her case was 6 to 15 years, yet the plea agreement she had entered into with Mr. Arnold was for 8 to 20 years. 2 AA 357. In fact, there were at least three different plea agreements prepared including several counts, cases, and co-defendants and multiple court dates all of which added to Brown's confusion. 2 AA 359-360. Due to Covid-19 protocols, Ms. Nguyen hand-delivered a copy of a new plea agreement to the Clark County Detention Center, but Brown never got it. 2 AA 362. Ms. Nguyen acknowledged that although Brown was charged with numerous counts that potentially carried many years, the offenses were all for retail shoplifting and the supposed use of a BB gun by a co-defendant was a defensible claim. 2 AA 373-4. Also, a videotape of the incident did not show the presence of a knife in Brown's possession. *Id*.

Next, Lequana Brown took the stand and testified that her attorney Carl Arnold was always late for court and he never took the time to talk to her outside of court. 2 AA 376. She never had a weapon which was borne out on the DVD videotape so she was upset why Mr. Arnold would not answer her phone calls and was not fighting for her. 2 AA 376-377. Mr. Arnold offered to put money on her books if she could find inmates for him whom he could represent in court. 2 AA 377. Mr. Arnold told her had filed a bail motion seeking house arrest, but he actually never did file such a motion. *Id*. Brown signed a plea agreement for 6 to 15 years which was apparently never filed in court. 2 AA 378. Brown never saw nor received in person a copy of the plea agreement which did get filed in court for 8 to 20 years. 2 AA 378-379. Brown came to court many times to plead guilty and the offers kept getting extended and revoked. *Id*. She agreed to the deal for 6 to 15 years and did not understand how the deal changed for 8 to 20 years. 2 AA 379-380. She was very confused and stressed and did not understand the negotiations. *Id*. Because she did not read the plea agreement that got filed, she did not understand that it was for 8 to 20 years. 2 AA 381-382. The agreement she had signed was only for 6 to 15 years. *Id*. During the plea canvass, Brown was pressured and felt like she didn't have a choice but to say yes given there were so many court dates, so many different pleas, and so many different people she was talking to. 2 AA 388. During the history of the case Brown was represented by at least four different attorneys, Carl Arnold,

Roger Bailey, Matthew Lay, and Rochelle Nguyen, which added to Brown's confusion and stress. 2 AA 298-399. She didn't understand how her attorney was telling her one thing and the judge was saying another thing. 2 AA 401. The judge who took the plea would not let Brown explain her confusion and did not want to hear from her. *Id*.

SUMMARY OF THE ARGUMENT

Brown's case was plagued by attorney error, multiple plea agreements, changes in plea deals, and revoking and re-extending offers such that Brown felt hopelessly stressed and confused which ultimately resulted in a plea that was not freely and voluntarily entered. She thought she was getting a deal for 6 to 15 years because that was the deal she signed, but instead got a deal for 8 to 20 years even though she never saw nor signed that plea agreement. The judge and her several attorneys failed to adequately explain the terms of the plea agreements and pressured her to plead guilty. Brown had viable defenses to the shoplifting charges, particularly as to her alleged use of a deadly weapon. But her attorneys did not investigate this issue nor listen to her and also failed to file a motion to withdraw her plea as requested. But for these errors, Brown would not have pleaded guilty and instead would have proceeded to trial.

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ARGUMENT

I. APPELLANT IS ENTITLED TO WITHDRAW HER GUILTY PLEA TO CORRECT A MANIFEST INJUSTICE

The habeas judge erred in finding no reasonable reason why Brown did not understand the proceedings and "chose" to remain confused. 2 AA 410. This Court gives deference to factual findings made by the district court in the course of a motion to withdraw a guilty plea so long as they are supported by the record. *See Little v. Warden*, 117 Nev. 845, 854, 34 P.3d 540, 546 (2001). "When reviewing a district court's denial of a motion to withdraw a guilty plea, this court presumes that the district court properly assessed the plea's validity, and we will not reverse the lower court's determination absent abuse of discretion." *Molina v. State*, 120 Nev. 185, 191, 87 P.3d 533, 538 (2004).

In this case, Brown submits a combination of factors, when viewed based upon the totality of the circumstances, entitle her to withdraw her plea and proceed to trial. NRS 176.165 provides as follows:

> Except as otherwise provided in this section, a motion to withdraw plea of guilty, guilty but mentally ill or nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended. To correct manifest injustice, the court after sentence may be set aside judgment of conviction and permit the defendant to withdraw the plea.

Generally, a post-conviction Petition for Writ of Habeas Corpus is the appropriate remedy to challenge the validity of a guilty plea after sentencing. *Harris v. State*, 130 Nev. Adv. Rep. 47, 329 P.3d 619, 628 (2014). "[T]he burden [is] on the

defendant to establish that his plea was not entered knowingly and intelligently" or that it was a product of coercion. *Id.*; *Gardner v. State,* 91 Nev. 443, 446–47, 537 P.2d 469 (1975).

The district court may grant a post-conviction motion to withdraw a guilty plea that was not entered knowingly and voluntarily in order to correct a manifest injustice. *Rubio v. State*, 124 Nev. 1032, 1039, 194 P.3d 1224 (2008). Manifest injustice may also be demonstrated by a "failure to adequately inform a defendant of the consequences of his plea." *Id.* Citing *Paine v. State*, 110 Nev. 609, 619, 877 P.2d 1025, 1031 (1994) *overruled on other grounds by Leslie v. Warden*, 118 Nev. 773, 780–81, 59 P.3d 445–46 (2002).

"[A] guilty plea is a grave and solemn act to be accepted only with care and discernment." *Brady v. United States*, 397 U.S. 742, 748, 90 S. Ct. 1463 (1970); *Parker v. State*, 100 Nev. 264, 265, 679 P.2d 1271 (1984) ("Entry of a guilty plea is a solemn process"). The longstanding test for determining the validity of a guilty plea has been "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *North Carolina v. Alford*, 400 U.S. 25, 31, 91 S. Ct. 160, 27 l. Ed. 2d 162 (1970); *Hill v. Lockhart*, 474 U.S. 52, 56, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985). [A] Plea cannot support a judgment of guilt unless it [is] voluntary in a constitutional sense." "A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a

conviction; nothing remains but to give judgment and determine punishment." *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); *Kercheval v. United States*, 274 U.S. 220, 223, 47 S. Ct. 582, 71 L. Ed. 1009 (1927).

The Court must set aside a guilty plea when the record does not disclose that the defendant understood the elements of the offense and the defendant did not make a factual statement constituting admission to the charge. *Tiger v. State*, 98 Nev. 555, 558, 654 P.2d 1031 (1982); *Love v. State*, 99 Nev. 147, 148, 659 P.2d 876 (1983); *Barlow v. State*, 99 Nev. 197, 198, 660 P.2d 1005 (1983). "In reviewing an attack on a guilty plea a court must consider whether the plea was voluntarily entered as well as whether, considered as a whole, the process by which the plea was obtained was fundamentally fair." *Taylor v. Warden*, 96 Nev. 272, 274, 607 P.2d 587 (1980). Further, the Nevada Supreme Court has held the court should consider the "totality of the circumstances". *Rubio*, 124 Nev. at 1046. *See also Little v. Warden*, 117 Nev. 845, 851, 34 P.3d 540, 544 (2001).

When viewed based upon the totality of the circumstances, Brown submits she is entitled to withdraw her plea and proceed to trial due to a manifest injustice. The confusing and protracted process by which the plea in this case was entered undermines any conclusion that it was knowingly, intelligently, and voluntarily given. Initially, the record reflects that by November 19, 2019, an offer was made by the State for Brown to plead guilty to two counts of robbery with use of a deadly

weapon, one count in this case and the other count in another case[1], and stipulate to 6 to 15 years in prison. 1 AA 118. Additional offers were also made to co-defendants, all contingent on one another, and all offers were eventually revoked on December 5, 2019. 1 AA 131.

Yet, on January 3, 2020, there were additional negotiations with Brown agreeing to plead guilty if she could get house arrest, but the court denied this request. 1 AA 134-139. Confusingly, the offers that had been revoked on December 5, 2019, had apparently been re-offered before being revoked yet again. 1 AA 141. To punish Brown for holding up the global plea negotiation and to apply additional pressure to Brown, the State filed a notice of habitual criminal treatment, despite one of the priors being only for drugs. 1 AA 145. Then, on March 12, 2020, apparently another offer had been extended and Brown said she needed time to think about it, but the prosecutor said she needed to plead guilty, "right now, otherwise its going to be revoked and there won't be any other offers made." 1 AA 150. In the midst of the plea canvass, Brown had questions about why there was a deadly weapon enhancement when no weapon was used and the prosecutor revealed that part of the plea deal was "fictional." 1 AA 156-7. The paperwork then had to be "straightened out" so it would instead be just a robbery in that case, no weapon, but still stipulating

[1] Presumably, the other case was C-19-344268-2 where Brown was charged with multiple counts of Burglary, Grand Larceny, and Robbery along with a co-defendant.

to four to ten years, and pleas in both cases would be taken at the same time. 1 AA 158. When Brown tried to explain her understanding of the weapon usage, the judge expressed frustration and said, "I don't have time to play games here." 1 AA 158-60. The paperwork was then "fixed," but during the plea colloquy on the other case Brown got confused about which robbery incident was being addressed and she insisted that she had not used any force in the taking of that property. 1 AA 166-9. After being pressured by her attorney and the judge, Brown finally capitulated that she had used force in the other case. 1 AA 170-2. Brown then pleaded guilty in the instant case. *Id*.

Prior to sentencing, Brown sought to dismiss her counsel and was heard in court on April 30, 2020, where she said she wanted to withdraw her plea because she had been misled by counsel. 1 AA 203. On June 11, 2020, new counsel represented there was another case in Henderson that was listed in the PSI, but which needed to be included in the negotiations so two new guilty plea agreements were needed. 1 AA 217-225. On June 16, 2020, the paperwork still was not in order necessitating yet another continuance. 1 AA 227-233. Without first withdrawing from the prior plea or agreement, an amended guilty plea agreement was filed on June 17, 2020, which was signed by counsel Nguyen rather than by Brown herself. 1 AA 235-244. Finally, the next day on June 18, 2020, Brown pleaded guilty to one count of robbery with deadly weapon in the present case. 2 AA 248-252. Brown

represented at that time that she had not received a copy of the amended guilty plea agreement which had already been signed by counsel for her and filed with the court without Brown ever having seen it. 2 AA 247. But the plea proceeded, nonetheless.

The facts and circumstances show that undue pressure and stress was placed upon Brown over an extended period of time in order to induce her guilty plea. Multiple changes in plea offers, continual revising of written plea agreements, incorrect paperwork, contingent offers designed to turn and pressure co-defendants against each other, frivolous filing of habitual charges, and the multiplicity of charges and cases combined to create a hopelessly confusing situation such that Brown's will was overborne, and the plea was not freely and voluntarily entered. The district court judge erred in finding otherwise.

II. APPELLANT IS ENTITLED TO WITHDRAW HER PLEA BASED UPON INEFFECTIVE ASSISTANCE OF COUNSEL.

The habeas judge acknowledged she had concerns about Carl Arnold's representation, but erred in concluding that Ms. Nguyen's representation was competent enough that Brown's plea should not be withdrawn due to ineffective assistance of counsel. 2 AA 410. "A claim of ineffective assistance of counsel presents a mixed question of law and fact, subject to independent review." *Evans v. State*, 117 Nev. 609, 622, 28 P.2d 498, 508 (2001). "However, the district court's purely factual findings regarding [claims] of ineffective assistance of counsel are

entitled to deference on subsequent review by this court." *Lara v. State*, 120 Nev. 177, 179, 87 P.3d 528, 530 (2004).

Brown submits she received ineffective assistance of counsel before, during, and after entry of plea. Defendants are entitled to effective assistance of counsel in the plea-bargaining process, and in determining whether to accept or reject a plea offer. *Lafler v. Cooper*, 556 U.S. 156, 132 S. Ct. 1376 (2012); *see also McMann v. Richardson*, 397 U.S. 759, 771, 90 S. Ct. 1441, 1149 (1970) (Constitution guarantees effective counsel when accepting guilty plea). Similarly, a "defendant has the right to make reasonably informed decision whether to accept a plea offer." *Turner v. Calderon*, 281 F.3d 851, 880 (9th Cir. 2002) (quoting *United States v. Day,* 969 F.2d 39, 43 (3rd Cir. 1992)).

To state a claim of ineffective assistance of counsel that is sufficient to invalidate a judgment of conviction, petitioner must demonstrate that: 1) counsel's performance fell below an objective standard of reasonableness, and 2) counsel's errors were so severe that they rendered the verdict unreliable. *Lozada v. State*, 110 Nev. 349, 353, 871 P. 2d 944, 946 (1994). (Citing *Strickland v. Washington,* 466 U. S. 668, 104 S. Ct. 205, (1984)). In meeting the prejudice requirement of ineffective assistance of counsel claim, a defendant must show a reasonable probability that, but for counsel's errors, he would not have pled guilty. *See also Kirksey v. State*, 112 Nev. 980, 923 P.2d 1102 (1997).

This case is unique in that it contains not one, but two, entries of guilty pleas. 1 AA 190, 235. Soon after pleading guilty the first time, Brown sought to dismiss her counsel and was heard in court on April 30, 2020, where she said she wanted to withdraw her plea because she had been misled by counsel. 1 AA 203. Brown's attorney at the time, Carl Arnold, did not have sufficient contact with her and was generally unavailable for communication to answer questions she had about her case. 2 AA 376. He misrepresented that he had filed a motion for house arrest or bail reduction when he had not. 2 AA 377. Most egregiously, he had a created a conflict of interest by demanding that Brown solicit other clients for him within the prison in exchange for putting money on her books. *Id*. In response, the court agreed to appoint new counsel and Matthew Lay confirmed as counsel on May 7, 2020. 1 AA 206-8. Lay was given just three weeks to get Brown's files from prior counsel and to speak with Brown in prison about withdrawing her plea. On May 28, 2020, Lay's associate Rochelle Nguyen appeared and represented that their office had the files but needed one more week to talk to Brown about filing a motion to withdraw plea. 1 AA 210-11. Ms. Nguyen's review of the file and discussion with Brown confirmed that Carl Arnold was ineffective as counsel. 2 AA 358. On June 4, 2020, Brown was not present in court, but Nguyen represented that Brown would ***not*** be withdrawing her plea and was prepared to go forward with sentencing instead. 1 AA 213-16.

Given the complexity of the multiple plea deals and cases as set forth above, this was inadequate time for new counsel to have reviewed the entirety of all of the files of the several cases, to clear up any confusion, to explain the consequences and undo the effects of the pressure and stress that had been placed upon Brown throughout the history of the case. Instead of withdrawing the plea as Brown had requested, new counsel compounded the problem by talking their client back into accepting basically the same negotiation that Brown had already repeatedly rejected. This was then exacerbated by the new plea agreement which Brown never saw nor signed and remained confused about due to the initial previous offer of six to fifteen years which Brown believed was still in effect.

Had counsel not been deficient in the performance of their duties, the posture of the case would have been different and Brown would not have pleaded guilty. This case has a built-in error of ineffective assistance of counsel that was not cured by discharging Carl Arnold and then appointing Matthew Lay or Rochelle Nguyen for a new plea and sentencing. Brown was denied her opportunity to withdraw her guilty plea as she had demanded and was instead induced by counsel to proceed with a guilty plea with which she continually expressed dissatisfaction and confusion.

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CONCLUSION

Wherefore, Brown respectfully requests this Court reverse the judgment of the district court below based on manifest injustice and ineffective assistance of counsel which rendered her guilty plea invalid and not freely and voluntarily entered.

DATED this 3rd day of February, 2022.

/s/ Steven S. Owens

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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 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)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 4,180 words and 17 pages.
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 3rd day of February, 2022.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on February 3, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON FORD
Nevada Attorney General

ALEXANDER CHEN
Chief Deputy District Attorney

/s/ Steven S. Owens
STEVEN S. OWENS, ESQ.