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IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant,

vs.

JOSEPH MORGAN,
Respondent.

NO. 66245

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Clerk of Supreme Court

RESPONDENT'S ANSWERING BRIEF

**APPEAL FROM GRANTING OF PETITION FOR WRIT OF HABEAS
CORPUS EIGHTH JUDICIAL DISTRICT, CLARK COUNTY**

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1 **II. COUNTER STATEMENT OF THE ISSUES**

- 2 A. Whether the District Court properly found that the Grand Jury had been
3 misinstructed as to the offense of Interception of a Wire Communication?
4 B. Whether the Respondent was entitled to a law enforcement exception
5 instruction explaining this Court’s holding in Reyes?

6 **III. COUNTER STATEMENT OF THE FACTS**

7 Respondent Joseph Morgan, hereinafter, “Respondent” was employed as a
8 compliance enforcement investigator for the Nevada Taxi Cab Authority. On
9 December 11, 2012, Respondent’s boss, Chief Investigator Ruben Aquino, either
10 dialed the Respondent’s phone or accepted Respondent’s phone call.¹ A recording was
11 made of the phone call by the Respondent with another phone’s recording function
12 without attachment to the original phone.² The call from Aquino simultaneously
13 broadcasted another conversation between Chief Aquino and Compliance
14 Enforcement Agent Antoine Rivers.³

15 Respondent believed that the Aquino and Rivers were conspiring to illegally
16 undermine the integrity of an upcoming internal affairs investigation.⁴ When
17 Respondent learned of the ongoing misconduct he determined that he had a legal and
18 professional responsibility to record and disclose the misconduct to fellow
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24 ¹ Record on Appeal (hereinafter “ROA”) 49.

25 ² ROA 63.

26 ³ ROA 50-51.

27 ⁴ ROA 24-25. The recording, along with the Respondent’s impressions about the
28 impropriety and possible illegality of the conversation between Aquino and Rivers,
was sent to various enforcement agents and the Governor. ROA 273-274.

1 Compliance Investigator Michael Kelly. Agent Kelly was contacted immediately.⁵
2 Agent Kelly testified that Morgan was going to turn the recording into authorities
3 because it contained a prohibited discussion about an ongoing internal affairs
4 investigation.⁶ Respondent and another Compliance Investigator prepared an accurate
5 transcription of the recording.⁷ The transcription was prepared because the
6 Respondent wanted “to make sure it was accurate.”⁸ Investigator Dudley, who
7 assisted with the preparation of the transcription, also assisted the Respondent in
8 attempting to clean up the recording so that background noise could be filtered from
9 the recording.⁹

13 During the grand jury proceeding a grand juror inquired about the substance of the
14 conversation between Chief Aquino and Investigator Rivers. However, the Deputy
15 Attorney General presenting the case prevented disclosure of this subject area to the
16 Grand Jury.¹⁰ The Grand Jury was prevented from hearing evidence that the call was
17 received and recorded in furtherance of Respondent’s duties as a law enforcement
18 officer. Respondent argued that the failure to disclose the nature of the conversation
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24 ⁵ ROA 48.

25 ⁶ ROA 49.

26 ⁷ ROA 51.

27 ⁸ ROA 52-54.

28 ⁹ ROA 52-54.

¹⁰ ROA 75.

1 between Aquino and Rivers prevented the grand jury from the proof that legally
2 justified interception.

3 Respondent also argued that no interception occurred. It was argued that the legal
4 definition of consent as it applies to the statutory definition of “intercept” NRS
5 179.430 was not fully explained to the Grand Jury, though the Grand Jury specifically
6 asked for a copy of applicable statutes.¹¹ It was argued that the Grand Jury was
7
8 misinformed because it was not told of the statutory definition of “oral
9 communication” as provided for in NRS 179.440 and used within the definition of
10
11 “intercept”.¹²
12

13 The Grand Jury inquired whether it was the State’s position that, “... on the basis
14 of the statute that any recording of a telephone conversation is illegal?”¹³ The Deputy
15 Attorney General responded, “You know it’s not for me to make argument here today.
16 It’s an excellent question for you to discuss with your grand jurors. I believe I’ve
17 given you the instructions that define Nevada law as to the component.”¹⁴
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19

20 **IV. SUMMARY OF ARGUMENT**

21 The Grand Jury was not informed that when Chief Investigator Aquino
22 voluntarily telephoned or accepted a voluntarily placed call from the Respondent, he
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25 ¹¹ ROA 85-86.

26 ¹² ROA 242- State’s instructions provided to the Grand Jury.

27 ¹³ ROA 88.

28 ¹⁴ ROA 88.

1 legally consented to engaging in a wire or oral communication. This consent brought
2 the Respondent's conduct outside the enforcement prohibitions of NRS 200.620.
3 There was no "intercept" within the meaning of Nevada's wiretap statutes.
4

5 The State's failure to provide the Grand Jury with the statutory definition of
6 "oral communication" prevented the Grand Jury from a fair and just deliberative
7 process. Also, the Grand Jury was not properly instructed as to the law enforcement
8 exception to the enforcement prohibitions of NRS 200.620. The failure to properly
9 instruct on this exception, combined with the misleading characterization that
10 Respondent was not acting in a law enforcement capacity, caused the charge to be
11 founded on less than probable cause.
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14 **V. ARGUMENT**

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16 **I. The District Court properly found that the Grand Jury had been**
17 **misinstructed as to the offense of interception of wire**
18 **communication.**

19 The Respondent was charged with Interception of Wire Communication in
20 violation of NRS 200.620. The State defined the prohibited act to the Grand Jury as
21 follows: "Intercept" (is the) aural acquisition of the contents of any wire or oral
22 communication through the use of any electronic, mechanical, or other device or of
23 any sending or receiving equipment." However, the statutory definition of "oral
24 communication" was not provided. The legal implication of Aquino placing the call to
25 the Respondent or accepting the call from the Respondent was not properly or fairly
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1 explained to the Grand Jury.

2 A call that is voluntarily placed or received under these circumstances is not
3 “intercepted”. Equally important, the nature of the conversation that the Respondent
4 heard between Aquino and Rivera was crucial to establishing exemption from legal
5 liability. The Respondent was entitled to have the Grand Jury know that an “oral
6 communication” within the meaning of Nevada’s prohibition on the interception of
7 wire or oral communications means “any verbal message uttered by a person
8 exhibiting an expectation that such communication is not subject to interception,
9 under circumstances justifying such expectation”.¹⁵ The fact that this phone call was
10 voluntarily placed by Chief Aquino removes it from the enforcement prohibitions of
11 Nevada’s wiretap laws.
12

13 In Reyes, this Honorable Court cited Ladrey for the proposition that “No one is
14 bound to answer a ringing telephone. If he does pick up the receiver, he is not required
15 to talk to the outside caller. If he chooses to talk, he may well understand that the
16 calling party, the original “sender” may have others listening to the conversation,
17 whether in a group around the caller’s telephone or on an extension attached to it.”¹⁶
18 This baseline determination of consent and expectation of privacy was not provided to
19 the grand jury. Without provision and explanation of NRS 179.440 defining “oral
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26 ¹⁵ NRS 179.440 “oral communication” defined.

27 ¹⁶ Reyes, supra at 546, quoting Ladrey v. Commission on Licensure to Practice, 261
28 F.2d. 68 (D.C. Cir. 1958)

1 communication”, the Grand Jury was unfairly positioned to find a violation of NRS
2 200.620 on less than probable cause. The definition of “oral communication” is a *sine*
3 *qua non* of an informed grand jury deliberative process.
4

5 The State argues that “the grand jury was properly instructed because it was
6 told that the elements are a wire communication was intercepted.”¹⁷ By only including
7 the definition of “wire communication” and not “oral communication” the State made
8 legal conduct illegal. Consent and the law enforcement exception established in
9 Reyes, are not affirmative defenses. Rather, they are legal doctrines providing legal
10 justification for the conduct at issue. Law enforcement should not be placed in the
11 untenable position of presumed felonious conduct in such situations.
12

13
14 In Reyes, this Court cited McDermott finding that, “Although New Jersey was
15 a one-party consent State, the quoted ruling by the McDermott court construes the
16 New Jersey counterpart to Nevada’s statute without reference to consent and in a
17 manner totally consistent with the State’s position concerning the absence of an
18 unlawful eavesdropping in instances where a telephone or telephone extension is used
19 by an investigative or law enforcement officer in the ordinary course of his duties.”¹⁸
20 The Court concluded that recording of the legally overheard conversations did not
21 constitute an “intercept”.
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¹⁷ Answering Brief at p.10.

27 ¹⁸ Reyes, supra at 547, referring to, State v. McDermott, 167 N.J. Super 271, 400 A.2d.
28 830 (Ct. App. Div. 1979)

1 The Court in McDermott observed that the ... “federal cases under the
2 applicable provisions of the Omnibus Crime Control Act maintain that the recording
3 is immaterial when the overhearing is itself legal.”¹⁹ In Respondent’s case, the
4 overheard conversation between Aquino and Rivers was legal therefore the recording
5 of that conversation is itself legal. The State characterizes the phone call by Aquino as
6 he “...believed he either tried to silence the call and mistakenly hit the answer button,
7 or, did in fact answer the phone and briefly spoke with Morgan but thereafter
8 mistakenly failed to terminate the call.”²⁰ Appellant argues that the fact that the call at
9 issue was voluntarily placed by Aquino to Respondent is not relevant because it is the
10 recording of that call by a separate and discrete device unconnected to the phone that
11 “by definition” is an “interception”.²¹ For purposes of imposing criminal liability upon
12 the Respondent the fact that Aquino voluntarily placed the call to the Respondent is
13 extraordinarily relevant. That fact establishes both consent and a lack of a reasonable
14 expectation of privacy.
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20 Appellant relies upon Lane to support the position that the Respondent is
21 criminally responsible.²² Lane involved a district court’s interpretation of NRS
22 200.620 for purposes of establishing civil discovery sanctions. Lane’s vitality for
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25 ¹⁹ McDermott, supra at 279-280, citations omitted.

26 ²⁰ ROA 31-32.

27 ²¹ Opening Brief at p.18.

28 ²² Lane v. Allstate Insurance Company, 114 Nev. 1176, 969 P.2d. 938 (1998).

1 establishing criminal liability is not so certain. Lane, in an action against his former
2 employer, tape-recorded over 700 telephone conversations with two of the individual
3 defendants and at least 180 witnesses. The district court dismissed the civil action
4 finding that the civil discovery process had been tainted by this evidence. This Court
5 reversed this sanction finding “it would be unfair to conclude that, although Lane’s
6 conduct was intentional and, as we have now determined illegal, Lane intended to
7 violate State law.”²³

10 The dissent in Lane eloquently argued about the pitfalls of attempting to extend
11 that decision into the realm of criminalizing conduct. Justice Springer wrote: “I
12 concur in the judgment of the court in reversing the trial court because it is clear that
13 Mr. Lane could not have intentionally violated NRS 200.620. Only three members of
14 this court can agree as to what the statute means. We certainly cannot hold Mr. Lane
15 criminally responsible for violating a statute the meaning of which cannot be agreed
16 upon by the members of this court.”²⁴ Criminalizing the word “intercept”, by failing to
17 adequately define that word for the Grand Jury, is at the heart of Respondent’s first
18 argument. Justice Springer wrote in Lane that, “There can be no doubt about the
19 “common understanding” of the word “intercept,” and under this understanding, it is
20 idle to argue that when two people are talking to each other, one could be

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27 ²³ Id at 941.

28 ²⁴ Id at 942.

1 “intercepting” the conversation of the other. I think that no one would disagree about
2 the general meaning of “intercept” and it seems odd to me this court would give the
3 word an entirely different meaning when it is applied to two people engaged in “wire
4 communication,” that is to say a telephone conversation.”²⁵

6 In this case it was Aquino who called the Respondent. In this case, criminal not
7 civil liability is at issue. Justice Springer, writing in dissent found issue with the
8 majority interpretation of the word “intercept”. He determined that it is not a violation
9 of NRS 200.260 to tape record a telephone call in which one is a participant:
10

11 The majority holds that tape-recording a telephone conversation falls
12 within the statutory language “intercept any wire communication.”
13 When I saw this, I asked myself first, “What about wireless
14 communications?” “Is it a crime to ‘intercept’ (tape-record, I guess)
15 communications by radio?” The statute restricts itself to “wire
16 communications”; so I must suppose that one can tape-record radio
17 and other “wireless,” two-party conversations. Why would the
18 legislature call recording a telephone conversation an illegal
19 interception and at the same time not consider the recording of a
20 radioed, two-person conversation as being a criminal “interception”? I
21 wonder, too, why the legislature would concern itself with “tape-
22 recorded” conversations and not manually-recorded conversations.
23 One participant in a two-way telephone call could, I assume, dictate
24 the entire conversation for verbatim transcription by a notarial
25 amanuensis. This would result in an accurate, authenticated
26 “recording” of the entire conversation. Perfectly legal under NRS
27 200.620? It would seem so. I do not read in the majority opinion an
28 explanation of why the legislature would want to make it a crime to
tape-record one's own telephone conversation and ignore the

²⁵ Id at 942.

1 “interception” of other kinds of two-party, “non-wire”
2 communications and non-electronic or manual recordings.²⁶

3 In Respondent’s case, the Grand Jury had questions about the legal impact of
4 recording a phone call that Aquino voluntarily placed to the Respondent. One juror
5 asked “okay, soon the basis of that statute that any recording of a telephone
6 conversation is illegal?”²⁷ The prosecutor was unable to offer an answer to the Grand
7 Jury.
8

9 The legal concept of “intercept” for purposes of criminalizing conduct cannot
10 be properly explained without also giving the statutory definition of oral
11 communication as found at NRS 179.440. Aquino’s conduct of placing the phone call
12 to Respondent as defined by NRS 179.440 takes Respondent’s conduct outside the
13 realm of criminal punishment. If Aquino placed the call to Morgan he was not
14 exhibiting an expectation that the communication was subject to interception. The
15 same is true if Morgan restated the substance of that call to others or if Morgan
16 recorded that call with a device used in the same manner as an eavesdropper on an
17 extension.
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22 In Lane, Justice Rose, writing in dissent, stated that, “During the 1973 session, the
23 Nevada Legislature made substantial amendments to NRS 200.620 in order to bring
24 Nevada into conformity with federal wiretap statutes that provide for single party
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27 ²⁶ Id at 943.

28 ²⁷ ROA at 89.

1 consent.”²⁸ As a result of this 1973 amendment, federal law’s single party consent
2 format was adopted in both NRS 200.620 and 200.650 with further instructions to
3 make application to a court after interception for purposes of ratifying the
4 interception.²⁹ Justice Rose concluded that, “Based on the 1973 amendments to NRS
5 200.620 Nevada did indeed enact a single party consent rule. However, because of the
6 1985 modification to the definition of “person,” it is very unclear whether NRS
7 200.620 and 200.650 were to apply to all individuals, including law enforcement,
8 whether both sections were to apply to law enforcement, or as Lane argues, whether
9 NRS 200.620 applies only to law enforcement and NRS 200.650 applies to
10 individuals.”³⁰

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14 Should Justice Rose be correct, NRS 200.620 would be susceptible to various
15 interpretations and this Court would then turn to rules of statutory construction for
16 guidance.³¹ Respondent would then be entitled to the primary rule of statutory
17 construction that penal statutes be strictly construed in favor of the accused.³²
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25 ²⁸ Reyes, supra at 944.

26 ²⁹ Id. at 944.

27 ³⁰ Id at 944.

28 ³¹ Id. at 945.

³² Id. at 945.

1 **II. Respondent was entitled to a law enforcement exception**
2 **instruction to the grand jury explaining this Court's holding in**
3 **Reyes.**

4 In Reyes, this Court held that a telephone extension, when used for
5 eavesdropping by an investigative or law enforcement office in the ordinary course of
6 business does not constitute an interception.³³ The Court determined that law
7 enforcement officers are insulated from the proscription against eavesdropping, so
8 long as the eavesdropping occurred in the ordinary course of their duties, which
9 include the investigation of crimes.
10

11 In this case, Respondent was required to provide Chief Aquino with a phone
12 number at which he could be reached during business hours.³⁴ The phone supplied to
13 fulfill this professional demand was the phone Chief Aquino called. In Page, a case
14 relied upon by this Court in deciding Reyes, it was determined that this type of
15 eavesdropping is an ordinary tool of law enforcement officers and is consistent with
16 public policy and that the power to exercise this investigative tool was inherent in the
17 statutory scheme at both federal and state level.³⁵
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21 This Court in Reyes cited to the Adams court because it involved a jurisdiction
22 that required the consent of all participants to a private communication before an
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26 ³³ Reyes, supra at 545, citing State v. Page, 386 N.W. 330 (Minn. Ct. App. 1986) and
18 U.S.C. § 2510 (5).

27 ³⁴ ROA 244

28 ³⁵ Reyes, supra at 545.

1 interception by consent was lawful.³⁶ In Adams, the victim of a sexual assault was
2 asked to eavesdrop on an extension phone while the police, through pretext, called the
3 suspect.³⁷ The Adams court concluded that the use of an extension phone under the
4 direction of the police did not constitute an “electronic, mechanical, or other device”
5 within the meaning of their statute.³⁸ As noted in Reyes, NRS 179.425 defines
6 “electronic mechanical, or other device” as “any device or apparatus which can be
7 used to intercept a wire or oral communication other than: 1. Any telephone ...
8 instrument, equipment, or facility, or any component thereof ... (b) being used by ...
9 an investigative of law enforcement officer in the ordinary course of his duties.”

13 The State’s partial instruction to the Grand Jury denied the protection afforded
14 by Reyes. In a memorandum from Charles D. Harvey, the Administrator of the
15 Taxicab Authority concerning Respondent’s leave pursuant to investigation,
16 Respondent was specifically instructed that, “while on administrative leave with pay,
17 you are to provide Chief Aquino with a phone number at which you may be reached
18 during regular business hours. You must remain available to promptly report to the
19 work site other location if so directed.”³⁹ Respondent had both a duty and legal
20 exemption as a law enforcement officer to listen and report what he believed to be a
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25 _____
26 ³⁶ Id at 545 citing Adams v. State, 43 MD. App. 528, 406 A.2d. 637 (1979)

27 ³⁷ Reyes, Id at 545.

28 ³⁸ Reyes, supra at 546-547, citing Adams v. State, supra.

³⁹ ROA 244.

1 corrupt conversation between Aquino and Rivera. The prosecutor gave an abbreviated
2 instruction on this point.⁴⁰ However, this abbreviated instruction did not adequately
3 explain the Respondent's exemption to criminal liability under Reyes.⁴¹
4

5 The issue in Reyes was whether eavesdropping, occurring without the consent
6 of all parties to the conversation is authorized under Nevada law if done by a law if
7 done by a law enforcement officer acting within the ordinary course of their duties. In
8 Reyes, the Supreme Court found in interpreting NRS 200.620, NRS 179.410 to
9 179.515, inclusive, that it was both reasonable and lawful for a police
10 agent/interpreter to listen on an extension telephone while an informant arranged a
11 drug deal with a target. Respondent is deserving of the very same consideration.
12
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14 The nature of the conversation between Aquino and Rivera was crucial to
15 determining whether the Respondent acted within the course of his law enforcement
16 duties. Neither the facts nor the law that would have exempted Respondent's conduct
17 from criminal liability were adequately presented to the grand jury.
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20 No social relationship existed between Chief Aquino and the Respondent.
21 Chief Aquino underscored the exclusively professional nature of the calls placed to
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27 ⁴⁰ Opening brief citing ROA 26.

28 ⁴¹ State v. Reyes, 107 Nev. 191, 808 P.2d. 544 (1991)

1 Respondent on December 11, 2012 when he testified that ... “I was calling him to
2 schedule an appointment to meet with him.”⁴²

3 The legal definitions of Nevada’s wiretap statute are found at NRS 179.410 et.
4 seq.⁴³ The federal wiretap statute, upon which Nevada’s is based, came as a result of
5 the United States Supreme Court’s decision in Katz.⁴⁴ The legislative history of Title
6 III demonstrates that Congress intended the definition of oral communication to
7 parallel the reasonable expectation of privacy set out in Katz.⁴⁵ The Adams court
8 made it clear, “if the extension was furnished to the subscriber by a communications
9 common carrier in the ordinary course of its business and was used by the subscriber
10 in the ordinary course of business or if the extension was used by an investigative or
11 law enforcement officer in the ordinary course of his duties, the telephone extension
12 would not be an “electronic, mechanical, or other device” as defined in the act, and
13 there would be no “interception.” This expansive definition coupled with reasonable
14 expectations of privacy lead to the conclusion that listening on the phone while
15 recording with another phone should not preclude the Reyes law enforcement
16 exemption.
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25 ⁴² ROA 46.

26 ⁴³ 18 U.S.C. 2510 et. seq.

27 ⁴⁴ Katz v. United States, 389 U.S. 347 (1967).

28 ⁴⁵ Kee v. City of Rowlett, 247 F.3d. 206, 211 N.7 (5th Cir. 2001) S. Rep. No. 90-1097 (1968).

1 CONCLUSION

2 It is respectfully prayed that the District Court's Order granting Respondent's
3 Petition for Habeas Corpus be upheld.
4

5 Dated this 19th day of November, 2014.

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CERTIFICATION 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 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points of more and contains 3,893 words or does not exceed 30 pages.
3. **Finally, I hereby certify** that I have read this Respondent reply 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 Nevada Rules of Appellate Procedure.

Dated this 19th day of November, 2014.

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