IN THE SUPREME COURT OF THE STATE OF NEVADA

DOMONIC MALONE

Appellant,

vs.

THE STATE OF NEVADA

Respondent.

Docket No. 61006

Direct Appeal From A Judgment of Conviction
Eighth Judicial District Court
The Honorable Michael Villani, District Judge
District Court No. C224572

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case Authority

Statute Authority

Other Authority

I. JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction, enter pursuant to a jury verdict, for two counts of first degree murder with use of a deadly weapon and other offenses. The judgment of conviction was filed on May 8, 2012. 18 App. 3772. A timely notice of appeal was filed on June 5, 2012. 18 App. 3777. This Court has jurisdiction over this appeal pursuant to NRS 177.015.

II. STATEMENT OF THE ISSUES

A. Whether the district court violated Malone's constitutional rights by revoking his right of self-representation without legitimate cause.

B. Whether the district court erred in instructing the jury.

III. STATEMENT OF THE CASE

On August 2, 2006, the State charged Appellant Domonic Malone and Jason McCarty with numerous offenses involved with the deaths of Charlotte Compado and Victoria Magee. Malone was charged as follows: Count 1 - First Degree Kidnapping (Melissa Estores); Count 2 - Battery with Substantial Bodily Harm (Estores); Count 3 - Conspiracy To Commit Kidnapping (Estores); Count 4 - First Degree Kidnapping (Estores); Count 5 - Battery With Substantial Bodily Harm (Estores); Count 6 -

Robbery (Estores); Count 7 - Conspiracy to Commit Kidnapping (Estores, Combado and/or Magee); Count 8 - Pandering (Combado); Count 9 - Pandering (Magee); Count 10 - Conspiracy to Commit Murder; Count 11 - Conspiracy to Commit Burglary; Count 12 - Burglary (Leonard Robinson); Count 13 - First Degree Kidnapping (Combado); Count 14 - First Degree Kidnapping (Magee); Count 15 - Murder With Use of a Deadly Weapon (Combado); Count 16 - Murder With Use of a Deadly Weapon (Magee); Count 17 - Robbery With Use of A Deadly Weapon (Combado); and Count 18 - Robbery With Use of A Deadly Weapon (Magee). 1 App. 1-8. Both Malone and McCarty entered pleas of not guilty to the State's charges. 1 App. 12-13. On August 30, 2006, the State filed an Amended Information, which charged the same offenses as the original Information. 1 App. 46-53.

On August 30, 2006, the State filed its Notice of Intent to Seek Death Penalty against Malone and alleged 13 aggravating circumstances. 1 App. 17-28.

McCarty filed a motion to sever his trial from Malone's trial. 1 App. 54. The State opposed the motion. 1 App. 72. Malone also filed a motion to sever and joined in McCarty's motion. 1 App. 92, 116. The State opposed Malone's motion. 1 App. 153. Following argument from counsel, the district court initially denied the motions to sever. 2 App. 218, 239.

Malone filed a motion to federalize all motions, objections and other

applications. 2 App. 262. The State opposed the motion. 2 App. 320. The district court denied the motion. 2 App. 396, 413.

The trial date was vacated and postponed on several occasions. See 19 App. 3782 (establishing an initial trial date of January 8, 2007); 3790-93 (trial date postponed until August 13, 2007, because of scheduling conflicts with a prosecuting attorney and McCarty's counsel); 3796 (over Malone's objection, trial date postponed until March 17, 2008, because of scheduling conflicts with a prosecuting attorney and McCarty's counsel), 3802 (trial date postponed until August 4, 2008, because of scheduling conflicts with McCarty's counsel); 3813 (over Malone's objection, trial date postponed because of scheduling conflicts with McCarty's counsel); 3815 (over Malone's objection, a new trial date of January 5, 2009, is set and district court admonishes counsel that this matter will proceed to trial on that date regardless of any other trial settings); 3822 (trial date vacated because of scheduling conflict with McCarty's counsel, new date of October 12, 2009, established). On October 12, 2009, the trial date was vacated because of a family emergency involving counsel for McCarty. 19 App. 3838. The trial was rescheduled April 5, 2010, and a secondary trial date of October 11, 2010, was also given. 5 App. 881-82, 19 App. 3840-41.

Several proceedings were held concerning Malone's motions to dismiss his counsel. Ultimately, the district court conducted a Faretta canvass and allowed

Malone to represent himself, but then the district court, over Malone's objection, revoked that decision and appointed the Special Public Defender's Office to represent him. These matters are discussed in detail below.

On March 18, 2010, at a time when Malone represented himself, McCarty filed a renewed motion to sever based upon the district court's order allowing Malone to represent himself . 5 App. 929. The State opposed the motion. 5 App. 1042. On March 25, 2010, during a hearing concerning scheduling, over Malone's objection, the April trial date was vacated and the trial was set for October, 2010, because of medical problems with Malone's stand-by counsel. 5 App. 1014-16; 19 App. 3851.

On April 13, 2010, the district court heard argument from counsel on the severance motion. 5 App. 1094. The issue was addressed again on April 29, 2010. 5 App. 1106. The district court severed the trials.[1] 5 App. 1106-07. The trials were ordered to go back to back, with McCarty's trial first, with an October 2010, trial date. 5 App. 1108. Malone's trial was scheduled to follow McCarty's trial, with a tentative date of November 1, 2010. 6 App. 1233; 19 App. 3870.

On October 26, 2010, Malone, his stand-by counsel, and the State appeared

[1]McCarty was convicted of Counts 3 through 17, which included two counts of first degree murder. 6 App. 1287. He received the death penalty for the two murder convictions and various other terms for the remaining offenses. 6 App. 1290-91. His direct appeal remains pending before this Court in Docket No. 58101.

before the district court for Calendar Call. 6 App. 1259. All parties were ready to proceed with the trial. 6 App. 1259-60. Over Malone's objection, the case was continued until June, 2011. 6 App. 1262. Malone stated that he was ready to go, he had being doing research in the legal library, and he had reviewed the evidence code. 6 App. 1266. On November 23, 2010, a new trial date of January 9, 2012, was established. 19 App. 3876.

Calendar Call was held on January 3, 2012. 7 App. 1481. Trial began on January 10, 2012. 19 App. 3888. The jury was selected on January 13, 2012.[2]

Malone filed written objections to the State's proposed jury instructions. 14 App. 2971. Details are discussed below. Oral objections were entered on the record and are also discussed below. 17 App. 3408.

At the end of the State's case, on January 30, 2012, the State filed a Third Amended Information. 17 App. 3398. Malone was charged as follows: Count 1 - Battery with Substantial Bodily Harm (Melissa Estores); Count 2 - Conspiracy To Commit Kidnapping (Estores); Count 3 - First Degree Kidnapping (Estores); Count 4 - Battery With Substantial Bodily Harm (Estores); Count 5 - Robbery (Estores); Count 6 - Pandering (Magee); Count 7 - Conspiracy to Commit Burglary; Count 8 -

[2]Issues concerning jury selection are not presented in this appeal. The transcripts of jury selection have been omitted from the appendix.

Conspiracy to Commit Kidnapping (Combado and/or Magee); Count 9 - Conspiracy to Commit Murder; Count 10 - Burglary; Count 11 - First Degree Kidnapping (Combado); Count 12 - First Degree Kidnapping (Magee); Count 13 - Murder With Use of a Deadly Weapon (Combado); Count 14 - Murder With Use of a Deadly Weapon (Magee); Count 15 - Robbery With Use of A Deadly Weapon (Combado); and Count 16 - Robbery With Use of A Deadly Weapon (Magee). 17 App. 3398-3404. The jury began deliberations at 3:11 p.m. on January 31, 2012. 17 App. 3624.

During deliberations, the jurors submitted several notes to the district court. A juror asked for clarification of instruction #24, concerning burglary, and was instructed that "The Court is not at liberty to supplement the jury instructions." 18 App. 3693. A juror asked the following: Instruction #3, page 3, count 7 lines 4 & 5 contradict Instruction #8, can we get further instruction because we can not agree which one to follow?" 18 App. 3694. The Court answered "The jury is instructed to look at all instructions as a whole." 18 App. 3694.

On February 1, 2012, the jury returned its verdict. 18 App. 3634. The jury found Malone guilty of Count 1 - Battery with Substantial Bodily Harm; Count 2 - Conspiracy To Commit Kidnapping; Count 3 - First Degree Kidnapping; Count 4 - Battery; Count 7 - Conspiracy to Commit Burglary; Count 8 - Conspiracy to Commit Kidnapping; Count 9 - Conspiracy to Commit Murder; Count 11 - First Degree

Kidnapping; Count 12 - First Degree Kidnapping; Count 13 - Murder With Use of a Deadly Weapon (Combado) (with special verdict noting unanimous verdicts that the murder was wilful, deliberate and premeditated; the murder was committed during the perpetration of a kidnapping; and the murder was committed during the perpetration of robbery); Count 14 - Murder With Use of a Deadly Weapon (Magee) (with special verdict noting unanimous verdicts that the murder was wilful, deliberate and premeditated; the murder was committed during the perpetration of a kidnapping; and the murder was committed during the perpetration of robbery); Count 15 - Robbery With Use of A Deadly Weapon; and Count 16 - Robbery With Use of A Deadly Weapon. 18 App. 3635-37, 3646-51. The jury found Malone not guilty of Count 5 - Robbery; Count 6 - Pandering; and Count 10 - Burglary. 18 App. 3635, 3647-48.

On February 10, 2012, the jury returned its verdicts for the penalty phase. 18 App. 3704. For each of the two murder counts, the jury found the following aggravating circumstances: (1) prior violent felony of battery with intent to commit a crime; (2) prior violent felony of battery with substantial bodily harm; (3) prior violent felony of first degree kidnapping; (4) murder in the course of a kidnapping; (5) murder in the course of a kidnapping; (6) murder in the course of a robbery; (7) murder in the course of a robbery; (8) the defendant was convicted of more than one offense of murder in the immediate proceeding. 18 App. 3705-06, 3710-12, 3718-21,

3731-34. The jury did not find a proposed aggravating circumstance that the murder was committed to receive money or any other thing of monetary value. 18 App. 3706, 3711, 3721, 3733. The jury found all 32 mitigators proposed by defense counsel. 18 App. 3707-09, 3712-14, 3721, 3734-39. The jury also found two additional mitigators. 18 App. 3709, 3714, 3727, 3739. The jury found that the mitigators did not outweigh the aggravators, but imposed sentences of life without the possibility of parole. 18 App. 3709, 3714, 3729, 3741-42.

On May 24, 2012, Malone filed a proper person motion for a new trial. 18 App. 3743. The district court declined to consider the motion because it was not filed by counsel. 18 App. 3745.

The sentencing hearing was held on April 24, 2012. 18 App. 3751. The district court imposed four consecutive terms of life without the possibility of parole for the two convictions for murder with use of a deadly weapon and various other consecutive terms on the other counts. 18 App. 3767-70.

The judgment of conviction was filed on May 8, 2012. 18 App. 3772. A timely notice of appeal was filed on June 5, 2012. 18 App. 3777. This Opening Brief now follows.

IV. STATEMENT OF THE FACTS

On May 20, 2006, the unclothed bodies of Victoria Magee and Charlotte Combado were found in a desert area, near the I-95 highway between Henderson and Boulder City. The bodies had stab wounds and showed blunt force trama. The State alleged that Domonic Malone and Jason McCarty killed the two women. Malone entered a plea of not guilty to the charges and asserted that he was not responsible for the deaths of the two women.

Magee and Combado were associated with McCarty. Magee was addicted to crack cocaine and she was a prostitute. 8 App. 1559-60; 9 App. 1877. Combado sold drugs to earn money. 8 App. 1557-58. She primarily used methamphetamine. 8 App. 1559. McCarty was Magee's pimp and he supplied drugs to Combado, which she often sold on commission. 12 App. 2497-98.

Magee, Combado and McCarty often operated out of the Sportsman's Royal Manor on Boulder Highway, in Las Vegas. 8 App. 1557-58. Melissa Estores also stayed at the Sportsman's. 8 App. 1557. Estores considered herself to be a hustler, and would do whatever it took to make money, including selling stolen items and selling crack and methamphetamine.[3] 8 App. 1554, 1670, 1673-75. She used weed,

[3]At the time of trial, Estores was on parole for an offense involving a financial forgery laboratory. She also has a felony conviction for unauthorized possession of a credit card. 8 App. 1552, 1664. She is a boxer and boxed in the Golden Gloves.

alcohol, and methamphetamine. 8 App. 1670-72. Estores was sometimes involved in a relationship with Malone. 8 App. 1702-05. She had sold drugs that he fronted to her, but she considered herself to be a "free agent." 8 App. 1555, 1562, 1675. She sometimes received her supply of drugs from Trey Black. 9 App. 1880.

McCarty and Malone were acquaintances. 12 App. 2499, 2558. They both sold drugs and hung out at the Sportsman's, but they did not work for each other and did not share money. 12 App. 2599; 15 App. 3109-10. McCarty was close friends with Donald Herb. 11 App. 2437, 2466; 12 App. 2591; 15 App. 2993. Herb sold drugs with McCarty, they formerly lived together for over two years, and they talked daily. 11 App. 2437, 12 App. 2491, 2588-90; 15 App. 3109-10. They were so close that Herb gave McCarty his new car to drive, while keeping his older and run-down car for himself, because it was less expensive for Herb than renting a car for McCarty to use. 11 App. 2441; 12 App. 2489-91, 2591. McCarty and Herb used and sold

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8 App. 1669. She has beat men. 8 App. 1669. She has tattoos on her knuckles that state "game over." 8 App. 1669. She has a tear drop tattoo on her eye which stood for Make Money Millionaires, which was for her membership in a group of hustlers from California. 8 App. 1689. Estores acknowledged that she had difficulty keeping things straight in her head and had some issues with her memories, especially with timelines. 8 App. 1701. She agreed that she lied to police officers when she told them that she was a stay at home mom. 8 App. 1677. She also lied at the preliminary hearing when she testified that she could not read and about the nature of her familial relationships. 8 App. 1679-80. Several other inconsistencies appeared in her testimony at trial and her statements to the police, as well as her testimony at McCarty's trial. 8 App. 1685-87.

drugs together. 12 App. 2558-59, 2589. McCarty has Cerebral Palsy and had limited use of one arm. 8 App. 1585.

The State alleged that in April of 2006, Malone battered Estores outside of the Sportsman's following an argument over their relationship. 8 App. 1705; 8 App. 1565-67. Estores claimed that Malone said she owed money to Black and also owed money to him, but she denied owing the money. 8 App. 1570. Estores claimed that Malone pulled off her jewelry and threw it into the nearby pool. 8 App. 1572. She then claimed that Malone repeatedly hit her and kicked her in the head. 8 App. 1572-73. She believed the problem between the two of them did not involve money, but was about their personal relationship. 8 App. 1707. Estores claimed at trial that she received extensive injuries as a result of the confrontation, but did not stay at the hospital because they were going to make a police report.[4] 8 App. 1575-76. About a week later, she renewed her working relationship with Malone. 8 App. 1577. They also had sex once after this incident and did not have any additional problems until the middle of May, 2006. 8 App. 1578.

The State claimed that on May 16, 2006, Estores met Combado at the Sportsman's. 8 App. 1579, 1718. Estores was selling drugs, while Combado was

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[4]The jury found Malone guilty of the lesser included offense of battery, but did not find that Estores suffered substantial bodily harm. 18 App. 3635, 3646.

gambling with money that she owed for drugs. 8 App. 1581-82, 1722; 9 App. 1754. Estores helped Combado sell some drugs to earn some of the money, but Combado continued to gamble the money. 8 App. 1582, 1722. McCarty arrived that morning and talked with Estores and Combado. 8 App. 1587. Malone was not present. 8 App. 1728.

Estores, Combado and McCarty left the Sportsman's, in Herb's green car, and went to the Oasis Motel. 8 App. 1590-91. Malone was not present. 9 App. 1739. Estores claimed that McCarty agreed to pay Combado $150 if she would get Magee to come to the motel because Magee owed McCarty $80. 8 App. 1595-97; 9 App. 1744, 1756. Christina and McCarty left the hotel room. 8 App. 1598; 9 App. 1745. Later, Estores looked out the motel window and saw Combado walking with her arm around Magee. 8 App. 1599; 9 App. 1757. Estores left the hotel room, met McCarty, smoked a blunt (marijuana rolled in a cigar wraper) and discussed a business relationship wherein Estores would sell drugs for McCarty. 8 App. 1599-1600, 1611; 9 App. 1762-63, 1817-18.

Ultimately, Estores, McCarty, Combado, Magee, Malone and Herb met at the Sahara Hotel and drove away in Herb's green car. 8 App. 1605; 9 App. 1772; 12 App. 2502. They drove to Herb's house and dropped him off. 8 App. 1607; 9 App. 1777. The others drove to the Sportsman's. 8 App. 1609. There was a lot of anger

from McCarty and Magee seemed scared. 8 App. 1609. Malone was quiet and did not say anything. 8 App. 1610. There were no issues between Estores and Malone. 8 App. 1610. Combado seemed happy about the fact that she was in charge of Magee. 9 App. 1790.

At the Sportsman's, McCarty, Combado, and Magee got out of the car. 8 App. 1610; 9 App. 1784. Magee was to meet a trick and then she was to give the money to McCarty. 8 App. 1610; 9 App. 1785. Malone did not say anything to Magee. 8 App. 1786. Malone and Estores sat in the car and casually talked for about half an hour or 45 minutes. 9 App. 1786. They talked about his baby mama, his belief that Estores gave him a sexually transmitted disease, and their relationship. 8 App. 1611; 9 App. 1784, 1787. Estores did not believe she gave him an STD. 8 App. 1611. They discussed the fact that she was in love with Nino and Malone wanting to have a relationship with her. 9 App. 1788. She told him that she was a free agent and did not want to be his girlfriend. 8 App. 1612; 9 App. 1789. This made Malone emotionally upset. 8 App. 1612; 9 App. 1789. Estores and Malone discussed McCarty's offer to do business with her. 8 App. 1612. At trial she could not recall most of the conversation, but she remembers that he was not happy. 8 App. 1613.

Combado, Magee, and McCarty returned to the car. 8 App. 1613; 9 App. 1789. McCarty said they were going to his house or his mom's house. 8 App. 1614. As

they drove south on Boulder Highway, McCarty and Magee were arguing. 8 App. 1615. Malone was quiet during the drive and was not happy. 9 App. 1792. Estores claimed that McCarty hit her while they were in the car, grabbed her hair and held her down.[5] 8 App. 1615; 9 App. 1792. McCarty drove the car on the freeway, towards Henderson. 8 App. 1615. He stopped the car near a model home at a construction site. 8 App. 1616. McCarty said that he wanted to talk to Magee and said Malone wanted to talk to Estores. 8 App. 1618; 9 App. 1797. Estores claimed that she again discussed her relationships with Malone and Nino, and that Malone then put his arms around her and started hitting her. 8 App. 1798; 9 App. 1798. She claimed that she fell to the ground and that Malone stood on her head with one foot and kicked her in the back of the head with the other.[6] 8 App. 1520; 9 App. 1798. Estores got back in the car and saw that Magee was crying. 8 App. 1622. She was red from being hit in the head. 8 App. 1622; 9 App. 1803. The fight between McCarty and Magee was unrelated to the fight between Estores and Malone. 9 App. 1805. Estores claimed

[5]She did not make this claim at the preliminary hearing. 9 App. 1795.

[6]Photos taken by the police of her injuries, which were admitted at trial, did not include a photo of the back of her head. 9 App. 1800. She did not seek any medical attention for injuries to the back of her head. 9 App. 1803.

that Malone threw items from Estores's purse out the window as they drove.[7] 8 App. 1624.

During the early morning of May 17th, they all drove toward the Hard Rock Hotel. 8 App. 1626; 9 App. 1806. On the way, McCarty told Magee to go out and perform oral sex on someone who was sitting at a bus stop. 9 App. 1807. Malone did not say anything to Magee. 9 App. 1809. Estores and Malone were not involved in that matter. 9 App. 1809. The situation that was going on between Estores and Malone was completely separate and apart from what was going on between McCarty, Magee, and Combado, other than the fact that they were all in the same car. 9 App. 1809.

Estores claimed that upon arriving at the Hard Rock, McCarty gave Combado some drugs, which Estores believed to be methamphetamine. 8 App. 1826; 9 App. 1810. He told Combado to go sell the drugs and make him some money, and told Magee to go do what she needed to do to make some money.[8] 8 App. 1627; 9 App. 1811. Malone did not say anything to Combado or Magee about making money. 9 App. 1811. Estores claimed, however, that Malone told her to make money. 8 App.

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[7]The jury found Malone not guilty of robbery based upon this allegation. 18 App. 3635, 3647-48.

[8]The jury found Malone not guilty of pandering. 18 App. 3635, 3647-48.

1627. He claimed that she owed him approximately $360. 8 App. 1630. He did not give her any drugs to sell. 9 App. 1832. Estores believed that Magee owed McCarty $80 and that Combado had $80 worth of drugs. 8 App. 1630. Combado told Estores that her job was to keep the three women together. 8 App. 1628; 9 App. 1814. Estores claimed that McCarty and Malone told the women that there would be three shallow graves in the desert if they did not make money at the Hard Rock. 8 App. 1628.

The women went to the hotel and cleaned-up in the bathroom. 8 App. 1629; 9 App. 1812-13. Combado told Estores that she had some drugs to sell, but then she went into a bathroom stall with Magee and used methamphetamine together. 9 App. 1813, 1824. This made Estores mad because Combado had already used Demarco's drugs, and now she was smoking the drugs that belonged to McCarty. 9 App. 1813. Estores was also mad at Combado for getting her into the situation. 9 App. 1811, 1814, 1819. The women stayed at the Hard Rock for a couple of hours. 9 App. 1819.

Estores called David Parker and he took them to his house. 8 App. 1633; 9 App. 1821, 1977. They arrived at his house about 4:00 a.m. 8 App. 1636. Estores told Parker what happened and claimed that she needed $3,000. 9 App. 1823, 1826, 1981, 2001, 2008. Parker noticed some scrapes and scratches on Estores, but did not see any visible bleeding and her eyes were not swollen shut. 9 App. 1981, 1988. He

did not call 911 or seek medical attention for her. 9 App. 1827. After resting several hours, the women went to the south Cove apartment complex on Fremont Street. 8 App. 1637; 9 App. 1824, 1982, 2003. Parker stated that the women could have stayed at his house, but Estores wanted to leave because she believed that Parker did not like Combado and Magee. 8 App. 1637; 9 App. 1852, 2004.

At the South Cove, the women went to room 222, which was Leonard Black's room. 8 App. 1640. Ramaan Hall and Malone rented room 217, which was down the hall from room 222. 8 App. 1640; 10 App. 2024. Estores owed money to Black and she sometimes sold drugs for Hall. 9 App. 1829-30. Estores saw Hall at room 217 and talked with him. 8 App. 1642.

After arriving at Black's apartment, Estores left with Black and his cousin Demarco to get cigarettes. 8 App. 1646; 9 App. 1835, 1838. Combado and Magee stayed in the apartment and planned to shower before going out to the streets. 9 App. 1830, 1836. While she was alone with Leonard and Demarco, Estores told Leonard about Combado's decision to sell drugs for McCarty and about the missing drugs. 8 App. 1646; 9 App. 1838. About 45 minutes later, Estores returned to the apartment and saw that Magee and Combado were missing. 8 App. 1646; 9 App. 1839-42. The door to the apartment was open and clothing belonging to the women was on the bed and the floor. 8 App. 1647; 9 App. 1841. The clothes on the floor were the only

clothes Magee and Combado had with them. 8 App. 1647; 9 App. 1841. Their purses were emptied out on the bed. 8 App. 1646. Black was upset about the fact that someone came into his apartment, but was not upset about the fact that the women were taken.[9] 8 App. 1647.

Sarah Matthews, who was the mother of two of Hall's children, claimed that she was standing in the doorway with Hall as Hall talked to Malone and McCarty. 10 App. 2016, 2030.[10] They were mad because they were owed some money. 10 App. 2030. They went to the other apartment and carried a golf club with them as they did so. 10 App. 2030. Matthews claimed that they stayed at the other apartment for 10 or 15 minutes and then walked with Combado and Magee toward the car. 10 App. 2033-34. Matthews further claimed that Malone and McCarty were holding the women by their arms and they were crying. 10 App. 2034. They walked down the

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[9]The jury found Malone not guilty of burglary. 18 App. 3635, 3648.

[10]Matthews used methamphetamine. 9 App. 1882. She has a 2006 felony conviction for trafficking in cocaine. 10 App. 2051. She told the police in 2006 that Hall was not involved in the dope business. 10 App. 2051. When she was first contacted by the police in May of 2006, she told the officers that she was Malone's girlfriend. 10 App. 2052. These were lies. 10 App. 2053. She told officers that Malone called her cell phone a lot, but that was not true. 10 App. 2054. She lied when she told officers that Malone had not called her in the last couple of days before her statement. 10 App. 2054. She claimed she said these things so she could get access to Apartment 217, which was in Malone's name. 10 App. 2055. Hall supplied drugs to Estores, Combado, and Magee. 10 App. 2072.

stairs to the car. 10 App. 2035. Matthews claimed that Malone had the golf club. 10 App. 2035. Matthews believed that these events took place on Tuesday, May 16th or Wednesday, May 17th, and took place in the daytime. 10 App. 2067-68, 2077, 2087-88. In response to juror questions, Matthews testified that she did not remember how it was that Combado's phone came to be in Matthew's apartment. 10 App. 2092. She also testified that she did not remember what the two women were wearing when they were taken to the car. 10 ROA 2092. She did not remember if they were wearing shoes. 10 App. 2093. She testified that they were wearing clothes and were not naked when they were taken out of the apartment. 10 App. 2093.

When Matthews talked with police officers in May of 2006, she did not tell them that she had seen Malone with McCarty and did not state that she had seen Malone with a golf club. 10 App. 2056. When she met with police officers in June of 2006, she told them that the events took place a couple of days before May 21st or 22nd. 10 App. 2057. She told the officers that she had taken Estores and Combado to court and believed that it must have been on Friday, May 19th. 10 App. 2058. In her June statement, she did not tell the police that Malone and the other man went to the other apartment, did not say that they were with Magee and Combado, and did not mention the golf club. 10 App. 2070-71.

Herb claimed that McCarty called around 8:30 p.m. on the evening of May

17th, but Herb was unable to join McCarty because of drug court obligations. 12 App. 2508-09. McCarty again called Herb, around 1:00 a.m., on May 18th, and stated that they found the women on the freeway on the way to a spot where they put in some work. 12 App. 2509. Herb claimed that McCarty asked if Herb wanted to come out and Herb said no. 12 App. 2509-10. McCarty later called back and said they were going to leave his car in Arizona and he could either ship it back or he could pick it up. 12 App. 2512. Herb decided to pick up his car and agreed to meet McCarty in the desert. 12 App. 2512. Herb also claimed that during one of several calls to McCarty, as he was driving to the desert, he heard Malone in the background. 12 App. 2517. Herb claimed that Malone said she was not dead yet and that McCarty said to hit her with a rock. 12 App. 2517. Herb claimed that he arrived in the desert area and assisted McCarty and Malone in disposing of evidence, including a golf club shaft, rocks, and a knife. 12 App. 2518-23. Herb provided McCarty money to replace the tires on the car. 12 App. 2529. McCarty left in the green car and Herb drove Malone to his house. 12 App. 2532.

Estores, Leonard, and Demarco went to the Sportsman's. 8 App. 1648, 1716; 9 App. 1841-42. McCarty returned to the Sportsman's. 8 App. 1649. Leonard and Demarco saw McCarty in the parking lot and beat him. 8 App. 1651, 1717; 9 App. 1853, 1859-60; 10 App. 2157. Estores watched the beating and was happy. 8 App.

1651, 1717. McCarty was unconscious when the beating was over. 10 App. 2191. A videotape from May 18, 2006, with time-stamps from 4:12 a.m. to 4:16 a.m., showed a portion of the altercation. 13 App. 2726-29. A police report indicated that paramedics arrived at 4:19 a.m. 13 App. 2736.

Estores claimed that she saw a television news show about discovery of the two bodies and that she then went to the police with information about Magee and Combado. 8 App. 1655; 9 App. 1874; 11 App. 2302. She identified McCarty and Malone as the people she believed to be responsible. 8 App. 1655; 11 App. 2303.

Ultimately, Malone, McCarty, and Herb were arrested and charged with the two murders and other charges. 12 App. 2541-42; 15 App. 3137-42. Herb agreed to testify against Malone and McCarty and was allowed to enter a plea to accessory to murder, which is a probationable offense. 12 App. 2544. Herb admitted during his testimony that he repeatedly lied to the police. 12 App. 2547, 2569-76, 2613-14. He acknowledged that his freedom was everything to him and he did not want to go to prison. 12 App. 2560-61, 2606, 2649.

On June 1, 2006, Herb took police officers out to the desert and assisted them in locating a golf club, knife, and rocks. 12 App. 2543; 15 App. 3144. DNA testing identified Combado as the source of blood on the golf club, and identified blood on the knife as belonging to Magee. 16 App. 3266, 3269-72. On June 2, 2006, McCarty

went to the same area with detectives. 15 App. 3144. He continually looked at the location where the bodies were found. 15 App. 3145. The forensic evidence did not tie Malone to the murders. No DNA, fingerprint evidence, or other examination of the physical evidence placed him at the scene of the crime.

During a search of room 217, detectives impounded a blouse that belonged to one of the victims that was being worn by an occupant of the apartment. 16 App. 3346. A purse belonging to one of the victims was also being used by the woman and was taken by the police. 16 App. 3346.

Extensive cell phone records were introduced. 15 App. 3146-48. These records showed that phones belonging to Malone and McCarty were sometimes in the same areas during the three days at issue, but phone calls from the crime scene were between McCarty and Herb. 15 App. 3159-67; 16 App. 3294-3312. During the day on May 17th, which is when Matthews said that Malone and McCarty took Magee and Combado from the South Cove apartments, Malone's phone was identified with the cell phone tower near Circus Circus and a tower near the Sportsman's. 16 App. 3300-04. It was not until May 18th, after midnight and at a time when it was definitely dark outside, that Malone's phone "pinged" a tower near the South Cove apartments. 16 App. 3307.

V. SUMMARY OF THE ARGUMENT

Malone respectfully submits that he is entitled to a new trial for three reasons: the district court erroneously denied Malone the right to represent himself, it erred by instructing the jury that robbery is a specific intent offense, and it erred by instructing the jury on the presumption of innocence.

As to the first issue, Malone waived his right to counsel and was granted the right to represent himself following a thorough Faretta canvass. He represented himself for well over a year and repeatedly demonstrated his ability to advocate for himself without being disruptive. Nonetheless, the district court revoked Malone's right to represent himself and ordered that he have counsel for the trial. The district court's reasons for doing so, which were based on the complexity of the case and Malone's requests for substituted counsel, were not supported by authority from this Court or the federal courts.

As to the second and third issues, Malone recognizes that existing case authority holds that robbery is a general intent offense and that it is not reversible error to given the presumption of innocence instruction that was given here. He submits that these cases should be overruled and that he should be granted a new trial because of these erroneous instructions.

VI. ARGUMENT

A. The District Court Violated Malone's Constitutional Rights By Revoking His Right of Self-Representation Without Legitimate Cause

Malone's state and federal constitutional rights to due process of law, equal protection, a fair trial, and right of self-representation were violated by the district court's order revoking Malone's right to represent himself at trial. U.S. Const. amend. V, VI, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

1. Standard of Review

The validity of a Faretta waiver, a mixed question of law and fact, is reviewed de novo. United States v. Erskine, 355 F.3d 1161, 1166 (9th Cir. 2004). This Court gives deference to the district court's decision to allow the defendant to waive his right to counsel. Hymon v. State, 121 Nev. 200, 213, 111 P.3d 1092, 1101 (2005). Denial of the right of self-representation is per se reversible error. Id. at 212, 111 P.3d at 1101; McKaskle v. Wiggins, 465 U.S. 168, 177 n.8 (1984).

2. Facts Concerning Malone's Invocation Of His Right Of Self-Representation

On January 7, 2009, Malone filed a proper person motion to dismiss counsel. 3 App. 607. During argument on the motion, he stated that he had not received all discovery from his counsel. 3 App. 618. He referenced a letter that he had sent to the

court and noted that his counsel had not raised issues concerning his unlawful arrest, the use of perjured testimony, and selective prosecution. 3 App. 620. The district court instructed Malone to provide a list of discovery that he was missing and instructed counsel to provide the missing documents. 3 App. 620. He also noted that additional pretrial motions would be filed. 3 App. 621. At a subsequent appearance, the issue was addressed again. 3 App. 635. Discovery was provided to Malone in court and issues concerning pretrial motions were also discussed. 3 App. 635-40.

On December 3, 2009, Malone filed a proper person motion for a speedy trial, or in the alternative, motion to withdraw counsel. 5 App. 876. In the motion he claimed that counsel stated the trial would be postponed for only 18 months, he had not yet seen all of the discovery, and counsel recently used a racist remark. 5 App. 877. The district court heard argument on the motion on December 15, 2009. 5 App. 887. The district court denied the motion because it was filed in proper person at a time when Malone was represented by counsel. 5 App. 888. Malone indicated that he asked his counsel to withdraw, counsel refused, and stated that he would rather represent himself than be represented by his current counsel. 5 App. 888-89. Malone noted his past concerns about counsel and stated that it would be in his best interest to represent himself. 5 App. 889. The district court stated that a Faretta canvass would be set in a couple of weeks. 5 App. 891.

The Faretta canvass took place on January 8, 2010. 5 App. 893. The district court informed Malone that he was not entitled to select his counsel and then conducted a Faretta canvass. 5 App. 895-928. Malone requested standby counsel for the penalty phase of the case. 5 App. 910. He informed the district court that if his trial counsel would have carried out his wishes concerning the case, he would not be seeking to represent himself. 5 App. 912. The district court advised Malone that it did not believe he was making a wise decision. 5 App. 913-14. Malone stated that he did not feel that he had any choice but to represent himself because his many motions to get other attorneys were denied. 5 App. 915. The district court granted the motion, allowed Malone to represent himself, and appointed Malone's counsel as standby counsel. 5 App. 918. Subsequently, in response to a motion by standby counsel, the district court ordered that counsel would represent Malone during the penalty portion of the trial and Malone would represent himself at trial. 5 App. 990, 1009.

While acting in proper person, Malone filed several motions. See 5 App. 957 (discovery motion, filed February 1, 2010)[11]; 6 App. 1110-18 (requesting assistance of a paralegal based upon limitation on law library use at the detention center, and

[11]The document was prepared in pencil and was therefore not legible. 5 App. 980. He was provided with a black felt tip for future documents. 5 App. 983.

requesting the appointment of a new investigator because the previously appointed investigator failed to contact him, filed July 8, 2010); 6 App. 1140 (asking for suppression of the testimony of a witness based upon perjury grounds); 6 App. 1205, 1276, 1305-06 (requesting transcripts of the State's evidence because he was not allowed to have audio or video files at the detention center, filed January 8, 2011); 6 App. 1282 (requesting dismissal of standby counsel because of a conflict, filed January 8, 2011); 7 App. 1353, 1365 (requesting a complete transcript from his co-defendant's trial, filed June 29, 2011); 7 App. 1351 (requesting discovery of the prosecution records, filed June 29, 2011).

He requested and received the assistance of a private investigator. 5 App. 920, 977, 982, 988; 6 App. 1110, 1130. He also received the assistance of a forensic expert. 6 App. 1188-89.

During the period that Malone was allowed to represent himself, the district court repeatedly informed Malone of the district court's belief that he was making a mistake by representing himself and otherwise disparaged his decision to represent himself. See e.g. 5 App. 1106; 6 App. 1127, 1138, 1156, 1163, 1180-81, 1190-91, 1295-97, 1309. During each of these court appearances, Malone reaffirmed his desire to represent himself. 5 App. 1106; 6 App. 1127, 1135, 1137-38, 1156, 1181, 1197, 1295-96.

Malone repeatedly demonstrated that he was aware of information relevant to his case. See e.g. 6 App. 1159-61 (accurately correcting the prosecutor regarding whether there was a deadly weapon enhancement of the battery with substantial bodily harm charge); 6 App. 1175 (providing extensive oral argument as to why a prosecution witness should not be allowed to present perjured testimony); 6 App. 1197 (assuring the court that he would conduct voir dire); 5 App. 1107-08 and 6 App. 1192, 1219 (correctly recalling that his trial was scheduled to follow McCarty's, based upon a ruling several months earlier, despite the contrary beliefs of the prosecutor and district court); 6 App. 1259-60 (stating that he was ready for trial, he had been doing research in the legal library and had reviewed the evidence code).[12]

On June 29, 2011, Malone filed a proper person Ex Parte Communication (Defendant Memorandum to Court). 7 App. 1348. In the context of the district court's recent denials of his discovery motions, Malone wrote the following:

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[12]The district court noted that the motion to dismiss counsel and motion for transcripts did not have points and authorities attached to the motions. 6 App. 1285. The court cautioned Malone that if he broke the rules again, he would determine that Malone could not follow the rules, and would have standby counsel appointed as counsel. 6 App. 1286. The motion for discovery stated that it was "based upon previous motion to produce discovery [and] also the factual statements set forth in the Points and Authorities contained therein." 6 App. 1276. The motion to dismiss standby counsel stated that it was "based upon the previous motion to dismiss also factual statements set forth in the Points and Authorities contained therein." 6 App. 1278.

On 6-21-2011 in this honorable court Department 17 where Judge Michael P. Villani presides.

For the record stated he doesn't believe that stand-by counsel Mr. Pike and Mr. Cano of the Special Public Defender Office would not file a motion for discovery is something were missing from the prosecution file.

The courtroom is no place to express belief especially when not based in fact which are contain[ed] in Exhibit A-C; "Provided by the defendant."

This Court now can see that there is a good faith showing by the Defendant that his stand-by counsel are in fact ineffective. See Exhibit A-C.

However, this Court must now take into consideration that it was the prosecutors in the present case who gave the Special Public Defender Office the defective documents in order to hide and/or destroy evidence that could be exculpatory to the defense.

Had not the defendant been forced to represent himself in this case this matter would have been swept under the run until it was [too] late for the defendant to do anything about it.

Being that this is a death penalty case so once the defendant is dead (murdered) there is no correcting that your honor.

Also this Court has been placing a heavier burden on the defendant due to his self representation all the while holding the prosecutor to an even lesser degree than normal standard.

The Defendant did not want to represent himself[.]. [H]e has motion this Court for help only to be denied by this Court on numerous occasion, which created the forced situation.

The Defendant has motion this Court also for a paralegal due to the legal library located in the jail which he resides in the Clark County Detention Center being ineffective.

This Court has blamed it all on the defendant['s] schoice to present himself by foregoing its own duty towards open fairness.

How is the defendant supposed to actually defend himself when this Court is shutting off all avenues for him to do so.

The Defendant has always been more than willing to accept proper assistance in order to regain his freedome however this Court has not allowed him to pursue this goal which is given to all American

citizens.

The Defendant is at the mercy of this Court an cannot due more than which this Court allows him to do which thus far has been nothing.

Maybe in hopes that by overwhelming the Defendant he would somehow see the light and allow Mr. Cano and Mr. Pike to lead him like cattle to his slaughter. By handing over the case back to the Special Public Defender Office.

The Defendant will do no such thing. [H]e is more than ready and willing to fight to the point of death for the rights giving onto him by his beloved country when the 14th Amendment was added to the United States Constitution. The rights of which this Court as representative of the United States is willfully and unlawfully denying him.

The Defendant has always ask[ed] this Court for fairness not for it to be easy for him, only that it be fair . . .

This Court can no longer turn a blind eye to what's going on with the defendant for no matter how you slice it murder is murder directly or indirectly.

7 App. 1348-50. The motion was served on the judge, Special Public Defender, and the State. 7 App. 1351. On July 19, 2011, the district court asked Malone if everything in his pleading was true and correct. 7 App. 1454. Upon receiving the response "Yes, sir" the district court stated as follows:

All right. The – as all parties know, we went through a Faretta Canvassing, a very thorough canvass in this matter.

Mr. Malone has just advised the Court that he was forced to represent him in this case. I'm quoting from his pleading. It said, had not the Defendant been forced to represent him in this case, this matter would have been swept under the rug. Another section in this pleading he states the Defendant did not want to represent himself. So he has motion this Court for help only to be denied by this Court on numerous occasions which I think it says exhorted – exerted the forced situation. And so Mr. Malone has advised me that everything contained in this pleading is correct.

> Sir, if you feel you have been forced to represent yourself and there's – and that you did not want to represent yourself, your request to represent yourself is now vacated or is denied. Also, the Court looks at the – the various cases that state that when a case is overly complex, this Court can also deny someone his right to represent himself; that's Lyons v. State.
>
> And for the Defendant's request or Defendant advising the Court that he was forced and he did not want to represent himself, therefore, his status no longer exists. The Special Public Defender's Office is ordered to represent him no longer as stand-by counsel.

7 App. 1455. Malone informed the district court that the memorandum said that the district court was forcing the Special Public Defender's Office on him and that decision forced him to represent himself. 7 App. 1456. The district court stated that his pleading was clear in stating that he did not want to represent himself. 7 App. 1456.

On August 9, 2011, the district court held a hearing on the Special Public Defender's Motion to Withdraw as Counsel. 7 App. 1460. The matter was placed on calendar based upon a letter sent by Malone. 7 App. 1461. During the hearing, Malone informed the district court that he had a conflict with the Special Public Defender's Office because he believed that they were trying to help the state murder him and it was a feeling that he could not get around. 7 App. 1461. He further explained that he has not been able to properly cooperate with his counsel and his family was not going to cooperate with them. Without discussing privileged

information, he could only say that they could not work together. 7 App. 1462. Malone expressed his belief that his counsel had not provided him with full discovery, while counsel stated that they had provided all of the documents. 7 App. 1464-66. The district court denied the motion.[13] 7 App. 1467.

The Special Public Defender's Office represented Malone at trial.

3. A Defendant Has A Constitutional Right of Self-Representation And That Right Was Violated Here

The United States Supreme Court has long recognized that the Sixth Amendment's right to counsel includes the right to self-representation. Under Faretta v. California, 422 U.S. 806, 834 (1975), a defendant can choose to represent himself, thereby waiving his right to counsel. This right is unqualified so long as the waiver of counsel is intelligent and voluntary. O'Neill v. State, 123 Nev. 9, 17, 153 P.3d 38, 43 (2007). Any defendant who wishes to undertake it must first submit to an examination by the district court. That court must conduct a Faretta canvass "to apprise 'the defendant fully of the risks of self-representation and of the nature of the charged crime so that the defendant's decision is made with a clear comprehension

[13]As Malone is currently represented by the same office that represented him at trial, and because factual allegations in his request to dismiss counsel concern matters outside the record, issues concerning the district court's denial of the motion to dismiss counsel are not presented in this appeal. Malone does not waive these issues, but recognizes that they must be pursued in post-conviction litigation.

of the attendant risks.'" Id. (quoting Johnson v. State, 117 Nev. 153, 164, 17 P.3d 1008, 1016 (2001)) (internal quotations omitted). See also SCR 253 (setting forth in detail the requirements of a Faretta canvass). A district court may deny a defendant's request for self-representation if the request is untimely, the request is equivocal, the request is made solely for the purpose of delay, the defendant abuses his right by disrupting the judicial process, or the defendant is incompetent to waive his right to counsel. Id. at 17, 153 P.3d at 44.

Here, there is no question that Malone's request for self-representation was timely. He asked to represent himself approximately two years before trial and did in fact represent himself for well over a year before the district court reversed its decision allowing self-representation. 5 App. 897; 19 App. 3888. Under these circumstances the request for self-representation was clearly timely. See Gallego v. State, 117 Nev. 348, 357, 23 P.3d 227, 234 (2001) (noting that cases finding untimely requests typically involved requests on the first day of trial and finding that the district court erred in finding the defendant's request to be untimely where he requested to represent himself almost a year before the jury was empaneled). See also Faretta, 422 U.S. at 835 (noting that the defendant requested to represent himself "weeks before trial").

Malone's request was not equivocal. Circumstances nearly identical to those

presented here were presented in Gallego. In that case, the district court appointed the State Public Defender to represent the defendant. Id. at 358, 23 P.3d at 234. The defendant filed a motion to represent himself and during subsequent hearings the defendant repeatedly said that he was not satisfied with his appointed attorneys and wanted the district court to appoint new attorneys. Id. The district court found the defendant's request to represent himself to be equivocal because he asked for appointment of substituted counsel in addition to his request to represent himself. Id. at 359, 23 P.3d at 235. This Court found that the record did not support the district court's finding. Id. Specifically, this Court found that the request for substitution of counsel was relevant to the request for self-representation, but it was not dispositive. Id. This Court noted that "numerous courts have recognized that a request to proceed without counsel can be unequivocal even if in the alternative the defendant would prefer a different attorney. Id. (citing Hamilton v. Groose, 28 F.3d 859, 862 (8th Cir. 1994); Adams v. Carroll, 875 F.2d 1551, 1444-45 (9th Cir. 1989) and several additional cases). Other courts are in accord. See United States v. Mendez-Sanchez, 563 F.3d 935, 946 (9th Cir. 2009) ("A conditional waiver can be stated unequivocally, as for example when a defendant says in substance: 'If I do not get new counsel, I want to represent myself.' There is a condition, but the demand is unequivocal); State v. Jordan, 44 A.3d 794, 809 (Conn. 2012) (collecting cases and

noting the rule that if a defendant requests alternative relief of either new counsel or self-representation, his request to represent himself is not equivocal). "Although an unequivocal request for self-representation can be conditional 'it must speak to self-representation and not simply to a dissatisfaction with current counsel,' and 'a court can insist that the defendant explicitly choose to proceed pro se once informed that a substitution of counsel will not be permitted.'" Gallego, 117 Nev. at 235, 23 P.3d at 235 (quoting Wayne R. LaFave et al., *Criminal Procedure*, § 11.5(b) at 573, and (d), at 582 (2d ed. 1999)). Here, the district court informed Malone that substituted counsel would not be appointed and then gave Malone the choice of proceeding with the Special Public Defender's Office or self-representation. 5 App. 889, 891, 894. Malone repeatedly said that under these circumstances, he wanted to represent himself. 5 App. 889 (Malone stated that he would "rather represent himself than to be represented by the ones I'm currently represented by. If that's what I have to do, that's what I'm going to do."); 5 App. 894-95, 912-13, 915. His decision was in no way equivocal.

Malone's request for self-representation was not made for the purpose of delay. As noted above, he made his request far in advance of the trial and did not request a delay in the trial date based upon his decision to represent himself. 3 App. 607 (motion to dismiss counsel, filed January 7, 2009); 5 App. 876 (proper person motion

for a speedy trial and or in the alternative motion to withdraw counsel, filed December 3, 2009); 5 App. 897 (Faretta canvass held January 8, 2010, approximately two years before trial). Rather, Malone continually objected to delays in the trial date and expressed a strong desire to take the case to trial as soon as possible. See e.g. 6 App. 1262 (objecting to a continuance of the trial date and noting that he had been waiting to go to trial for four years).

The district court did not make any finding that Malone was disruptive to the judicial process and the record would not support any such finding. Malone recognizes that "the right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law." Faretta, 422 U.S. at 835 n.6. "An accused has the right to conduct his own defense provided that he is 'able and willing to abide by rules of procedure and courtroom protocol.'" Gallego, 117 Nev. at 361, 23 P.3d at 236 (quoting McKaskle, 465 U.S. at 173). The types of abuses found in other cases were not present here. See e.g. Gallego, 117 Nev. at 361, 23 P.3d at 236 (defendant insisted on presenting evidence of guilt during the penalty phase, refused to wear a hearing aid yet complained that he could hear, refused on numerous occasions to participate in pretrial hearings, and at least twice turned his back on the judge); Vanisi v. State, 117 Nev. 330, 340, 22 P.3d 1164, 1171 (2001) (defendant had interrupted

prior hearings by blurting out statements in a loud voice, talked while others were speaking in court, stood up and engaged in unsettling rocking motions, repeated himself over and over, spoke loudly to himself; exhibited difficulty in processing information, took an extremely long time to respond to the court's questions, refused to answer the court's questions, and had a history of aggressive and disruptive behavior in prison); Tanksley v. State, 113 Nev. 997, 1000-02, 946 P.2d 148, 149-51 (1997) (defendant had a prior trial before the same district court judge in which the judge found his self-representation to be pathetic and disruptive; during a pretrial hearing the defendant was disrespectful, was held in contempt, and had his mouth taped shut). A request for self-representation should not be denied solely because of the inherent inconvenience often caused by *pro se* litigants. Tanksley, 113 Nev. at 1001, 946 P.2d at 150; Lyons v. State, 106 Nev. 438, 444 n.1, 796 P.2d 210, 217 n.1 (1990). This factor weighed in favor of Malone's continued self-representation and against the district court's decision to revoke that right.

Finally, in revoking Malone's right of self-representation, the district court found that it was entitled deny Malone's right to represent himself because of the complexity of the case. 7 App. 1455 (citing Lyons v. State, 106 Nev. 438, 796 P.2d 210 (1990)). In Vanisi, this Court made it clear that "though this factor is relevant on the issue of whether a defendant's decision to waive counsel was made understanding

the potential consequences of the decision, it is not an independent basis for denial of a motion for self-representation." Vanisi, 117 Nev. at 341; 22 P.3d at 1171-72. "The district court should inquire of a defendant about the complexity of the case to ensure that the defendant understands his or her decision, and in particular, the difficulties he or she will face proceeding in proper person. But to regard the complexity of the case and related fair-trial concerns as considerations independent of this inquiry, we conclude does not comport with the law on self-representation." Id at 1172. (citing Godinez v. Moran, 509 U.S. 389, 400 (1993)). The district court clearly erred and misapplied the law in finding that the complexity of the case served as a basis for revoking Malone's right to represent himself.

The district court lacked any valid reason to revoke Malone's right of self-representation. Each relevant factor supported Malone's decision and none of the factors supported the district court's revocation of Malone's rights under Faretta.

4. Malone Is Entitled To A New Trial

"[I]t is one thing to hold that every defendant, rich or poor, has the right to the assistance of counsel, and quite another to say that a State may compel a defendant to accept a lawyer he does not want." Faretta, 422 U.S. at 833.

> It is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts. But where the defendant will not voluntarily accept

> representation by counsel, the potential advantage of a lawyer's training and experience can be realized, if at all, only imperfectly. To force a lawyer on a defendant can only lead him to believe that the law contrives against him. Moreover, it is not inconceivable that in some rare instances, the defendant might in fact present his case more effectively by conducting his own defense. Personal liberties are not rooted in the law of averages. The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of "that respect for the individual which is the lifeblood of the law." Illinois v. Allen, 397 U.S. 337, 350-351 (Brennan, J., concurring).

Faretta, 422 U.S. at 834. The district court violated Malone's constitutional right of self-representation by revoking his right to represent himself at trial. The judgment of conviction must therefore be reversed and this matter remanded for a new trial.

B. The District Court Failed to Properly Instruct the Jury On Robbery and The Presumption of Innocence

Malone's state and federal constitutional rights to due process of law, equal protection, a fair trial and right to proper jury instructions were violated by the district court's rejection of his proffered instructions and the district court's acceptance of the State's erroneous proposed instructions. U.S. Const. amend. V, VI, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

1. Standard of Review

This court reviews a district court's decision settling jury instructions for an abuse of discretion or judicial error, Funderburk v. State, 212 P.3d 337, 339 (Nev. 2009) (citing Brooks v. State, 124 Nev. 203, 206, 180 P.3d 657, 658-59 (2008)). However, whether the instruction was an accurate statement of the law is a legal question that is reviewed de novo. Id. (citing Nay v. State, 123 Nev. 326, 330, 167 P.3d 430, 433 (2007)).

Whether jury instructions omit or misstate elements of a statutory crime, or adequately cover a defendant's proffered defense, are questions of law reviewed de novo. United States v. Stapleton, 293 F.3d 1111, 1114 (9th Cir. 2002). Denial of a jury instruction based on a question of law is reviewed de novo. United States v. Wiseman, 274 F.3d 1235, 1240 (9th Cir. 2001).

2. Robbery Must Be Defined As A Specific Intent Offense

The jury instructions on robbery, including the instruction on robbery as a predicate offense for first degree felony murder, defined robbery as a general intent offense. Malone recognizes that these instructions are supported by existing case authority, but urges this Court to overrule this authority by holding that robbery is a specific intent offense.

Malone objected to jury instructions which defined robbery as a general intent offense and provided points and authorities in support of his argument that robbery

should be defined as a specific intent offense. 14 App. 2971; 17 App. 3408-09. The district court overruled the objections and instructed the jury without the specific intent element. 17 App. 3409, 3455. The district court also rejected Malone's proposed instruction for a lesser included offense of larceny, based upon the State's argument that robbery is a general intent offense and larceny is a specific intent offense, so it is not a lesser included. 17 App. 3427.

At common law, robbery was a specific intent crime and required "a felonious taking of money or goods of any value from the person of another or in his presence against his will, by violence or putting him in fear." State v. Olin, 725 P.2d 801, 806 (Idaho 1986). "Felonious taking" refers to the specific intent to deprive the owner of his property." Bell v. State, 394 So.2d 979 (Fla.1981); see also People v. Ford, 388 P.2d 892, 906 (Cal. 1964) (an essential element of robbery is a specific intent to steal); Moyers v. State, 197 S.E. 846, 847 (Ga. 1938) (although the statute's definition of robbery does not expressly say so, it implies an intent to steal); State v. Hollyway, 41 Iowa 200, 202 (1875) (in robbery it is essential that the taking of the goods be specifically intended to deprive the owner of his property); People v. Koerber, 155 N.E. 79, 82 (N.Y. 1926) (the gist of robbery is larceny by force from a person and the gist of larceny is taking and carrying away of property of another with the specific intent to steal the property); State v. Slingerland, 19 Nev. 135, 138, 7 P.

280, 283 (1885).

Some jurisdictions still require proof of the specific intent to rob. Allen v. State, 857 A.2d 101, 128 (Md. App. 2004) (robbery is a specific intent crime); Simmons v. U.S., 554 A.2d 1167, 1169 (D.C. 1989) (specific intent to steal is an element of robbery); Com. v. Stewart, 547 A.2d 1189, 1191 (Pa. Super. 1988) (specific intent to deprive is required for robbery conviction). Other jurisdictions, however, hold that robbery is a general intent crime. People v. Simms, 736 N.E.2d 1092, 1115 (Ill. 2000) (robbery is a general intent crime, for which proof that the prohibited harm was intended is not necessary to support conviction); State v. Augustine, 545 So. 2d 1203, 1205 (La. Ct. App. 4th Cir. 1989) (prosecution in robbery case was under no obligation to establish specific intent, as element has been removed from most recent definition of armed robbery); Litteral v. State, 97 Nev. 503, 505-06, 634 P.2d 1226, 1227 (1981) (robbery under statute is a general intent crime), overruled on other grounds by Talancon v. State, 102 Nev. 294, 721 P.2d 764 (1986).

NRS 200.380 defines robbery as "the unlawful taking of personal property from the person of another, or in his presence, against his will, by means of force or violence or fear of injury, immediate or future, to his person or property, or the person or property of a member of his family, or of anyone in his company at the time of the

robbery." The statute is silent as to intent. Where a statute creating or describing a criminal offense uses a general term that is not defined, the general practice is to give the term its common-law meaning. See U.S. v. Gray, 448 F.2d 164, 167 (9th Cir. 1971); Adler v. Sheriff, Clark County, 92 Nev. 641, 643, 556 P.2d 549 (1976) (applying common law definition of extortion). See also U.S. v. Gonzales, 456 F.3d 1178, 1182 (10th Cir. 2006); State v. Gallegos, 228 N.W.2d 615 (Neb. 1975); U.S. v. Everett, 700 F.2d 900, 904 (3d Cir. 1983) (applying common law definition of attempt). Where a statute forbids but does not define an offense, the definition may be obtained from the common law. NRS 1.030. See State v. Mattan, 300 N.W.2d 810, 813 (Neb. 1981); State v. Vance, 403 S.E.2d 495, 501-02 (N.C. 1991).

Prior to 1981, Nevada case law defined robbery as a specific intent crime. Turner v. State, 96 Nev. 164, 165, 605 P.2d 1140, 1141 (1980); Brimmage v. State, 93 Nev. 434, 443, 567 P.2d 54, 60 (1977); State v. Sala, 63 Nev. 270, 287, 169 P.2d 524, 533 (1946). That is, the "taking" in the robbery must have been committed with the specific intent to permanently deprive the owner of her property. Turner, 96 Nev. at 165. Currently, and quite inexplicably, Nevada defines robbery as a general intent crime. See Litteral, 97 Nev. at 506, 634 P.2d at 1227 (holding NRS 200.380 is silent as to intent so robbery in the state of Nevada is a general intent crime), overruling Turner, 96 Nev. 164, 605 P.2d 1140. The Court in Litteral instructed "robbery under

statute is a general intent crime which is meant to include all violent takings from the person or presence of another" and "no intent is necessary except the intention of doing the act denounced by the statute." Id. Twenty years later, in Leonard v. State, the Court made it clear that robbery in Nevada does not require specific intent; "pursuant to Nevada's robbery statute… it is not necessary that force or violence involved in the robbery be committed with the specific intent to commit robbery." 117 Nev. 53, 76-77, 17 P.3d 397, 412 (2001). Rather, the Court held, "a robbery may be shown where a defendant simply takes advantage of the terrifying situation he or she created and flees with the victim's property." Id. (quoting Norman v. Sheriff, 92 Nev. 695, 697, 558 P.2d 541, 542 (1976)). See also Chappell v. State, 114 Nev. 1403, 1408, 972 P.2d 838, 841 (1998).

Malone submits that Litteral was wrongly decided and that Turner provided the appropriate analysis of the intent element of the offense of robbery. In light of the ambiguity of the statute, the common law history, and the rule of lenity, Haney v. State, 124 Nev. 408, 412, 185 P.3d 350, 353 (2008), U.S. v. Santos, 553 U.S. 507, 514 (2008), this Court should conclude that robbery is a specific intent offense and should overrule Litteral and its progeny.

Even if this Court concludes that robbery as a stand-alone offense, should be a general intent offense, it should nevertheless find that robbery, when used as a basis

for felony-murder, must be defined as a specific intent offense. Under the felony-murder doctrine, the commission of a felony serves as a substitute for establishing the mens rea element of first-degree murder. McConnell v. State, 121 Nev. 25, 30, 107 P.3d 1287, 1290 (2005). When the underlying felony is robbery, the felonious intent, or intent to rob, serves as a substitute for the malice requirement for murder. State v. Contreras, 118 Nev. 332, 334, 46 P.3d 661, 662 (2002); Com. v. Prater, 725 N.E.2d 233, 241-42 (Mass. 2000). "Felonious intent" with respect to robbery translates to a specific intent to permanently deprive the owner of his property, and must have been formed prior to, or at the time of, the murder to act as a substitute for malice. Slingerland, 19 Nev. 135, 7 P.3d at 283; Nay v. State, 123 Nev. 326, 332-33, 167 P.3d 430, 434-35 (2007); People v. Horning, 102 P.3d 228, 250 (Cal. App. 2004); State v. Cheatham, 6 P.3d 815, 820 (Idaho 2000); State v. Sherrill, 657 S.W.2d 731, 737 (Mo. Ct. App. S.D. 1983). A murder that precedes formation of the intent to rob is not within the perpetration of robbery, and, thus, is not felony murder. Nay, 167 P.3d at 434-35; People v. Reynolds, 186 Cal. App. 3d 988 (1986); Com. v. Spallone, 406 A.2d 1146, 1147 (Pa. Super. 1979). Thus robbery as an element of felony murder must require a showing of specific intent to rob. Id; U.S. v. Lilly, 512 F.2d 1259, 1261 (9th Cir. 1975). To hold otherwise would allow an individual to be convicted of first-degree murder without having the specific intent to commit any crime, let

alone the requisite mens rea to commit first-degree murder. Id. To the extent that this Court's existing case-law holds to the contrary, see e.g. Leonard, 117 Nev. at 77, 17 P.3d at 412, those cases should be overruled.

Requiring that a robbery used to establish felony-murder must be established as a specific intent offense is consistent with federal constitutional authority, and authority from this Court, that requires that the state's death penalty scheme narrow the class of persons eligible for the death penalty. In McConnell v. State, 120 Nev. 1043, 1066 & n. 62, 102 P.3d 606, 622 & n. 62 (2004), this Court recognized that "'[a]t a bare minimum . . . a narrowing device must identify a more restrictive and more culpable class of first degree murder defendants than the pre-Furman capital homicide class.'" (Quoting Richard A. Rosen, *Felony Murder and the Eighth Amendment Jurisprudence of Death*, 31 B.C.L. Rev. 1103, 1124 (1990)). As set forth above, authority from this Court established that in 1972, when the Supreme Court decided Furman v. Georgia, 408 U.S. 238 (1972), robbery in Nevada was a specific intent offense. By changing the definition of robbery and omitting the specific intent element, Nevada expanded the class of persons eligible for the death penalty, in contravention of the requirements of Furman as explained in Gregg v. Georgia, 428 U.S. 153 (1976) and Lowenfield v. Phelps, 484 U.S. 231 (1988). Requiring the element of specific intent for robbery offenses that are used to establish felony-

murder would be consistent with the narrowing requirement of the Eighth Amendment, as explained in McConnell.

The jury found Malone guilty of two counts of robbery with use of a deadly weapon, and found him guilty of first degree murder, in part, based upon a felony murder theory with robbery as a predicate offense. 18 App. 3635-37, 3646-51. The jury also found aggravating circumstances for these robberies, even though it did not return the death penalty for Malone. 18 App. 3705-06, 3710-12, 3718-21, 3731-34. The State's arguments for these robbery allegations were that Malone and McCarty took clothing belonging to Combado and Magee and then left their bodies unclothed in the desert. 1 App. 7. Thus, the State's allegation was not a typical robbery in which the defendant is accused of stealing money or valuable property for personal gain, but instead involved an allegation that clothing was removed and disposed of for some other purpose, such as destroying evidence. Moreover, Malone was charged with conspiracy to commit murder and the jury might have found Malone guilty of robbery based upon the conspiracy, without a finding that Malone personally committed the offenses or had the specific intent that the robbery offenses be committed. Under these circumstances, had the jury been instructed that robbery was a specific intent offense, the jury might have reasonably found that Malone did not have the specific intent to steal and was therefore not guilty of robbery or felony-

murder based upon the robbery predicate offense.

Malone urges this Court to find that robbery is a specific intent offense, to reverse his convictions for robbery, and remand for a new trial with proper instructions to the jury.

3. The District Court Erred In Instructing The Jury On The Presumption Of Innocence

The district court erred, and violated Malone's constitutional rights by doing so, in giving an instruction on the presumption of innocence which was misleading and which relieved the State of its burden of proof. Moreover, the district court erred in accepting the State's proposed instruction rather than the two statutory instructions on the presumption of innocence. Malone recognizes that this instruction is supported by existing case authority, but respectfully submits that this Court has not fully analyzed this issue and he urges this Court to overrule existing authority by holding that the district court must instruct the jury on the presumption of innocence in accord with Nevada statutes.

Malone objected to a jury instruction which defined the presumption of innocence. The district court overruled the objection and instructed the jury with use of the State's proposed instruction. 14 App. 2971; 17 App. 3417, 3480. Specifically, Malone objected to the first paragraph of Instruction No. 45:

> The Defendant is presumed innocent until the contrary is proved. This presumption places upon the State the burden of proving beyond a reasonable doubt every material element of the crime charged and that the Defendant is the person who committed the offense.

The portion of Instruction No. 45 at issue here is the first paragraph and not the second paragraph (which defined reasonable doubt). Malone recognizes that NRS 175.211 mandates the second paragraph of the instruction and recognizes that this Court has repeatedly affirmed the constitutionality of the reasonable doubt definition provided for in the second paragraph of this instruction. See e.g. Buchanan v. State, 119 Nev. 201, 221, 69 P.3d 694, 708 (2003); Lord v. State, 107 Nev. 28, 38, 806 P.2d 548, 554 (1991). The first paragraph of this instruction is not mandated by statute.

Either of Nevada's two instructions on the presumption of innocence appropriately represent the presumption of innocence concept:

NRS 175.191 provides the following:

> A defendant in a criminal action is presumed to be innocent until the contrary is proved; and in case of a reasonable doubt whether the defendant's guilt is satisfactorily shown, the defendant is entitled to be acquitted.

NRS 175.201 provides the following:

> Every person charged with the commission of a crime shall be presumed innocent until the contrary is proved by competent evidence beyond a reasonable doubt; and when an offense has been proved against the person, and there exists a reasonable doubt as to which of two or more degrees the person is guilty, the person shall be convicted

only of the lowest.

As noted above, Malone requested that this Court give the statutory definitions of the presumption of innocence in lieu of the non-statutory definition provided by the State.

Instruction No. 45's definition of the presumption of innocence is also erroneous because there is no instruction defining which elements of the offenses are material, and that without such an instruction, the jurors may speculate as to which are material and which are not. The failure to do so renders the instruction confusing and misleading, and lessens the State's burden of proof as the jury may decide, without guidance, that it is free to determine which elements of the offenses are material and which are immaterial.

Recently, in Nunnery v. State, 263 P.3d, 259-60 (Nev. 2011), this Court addressed this issue though it did not address the statutory issue set forth above. In rejecting this issue, this Court found that it "has repeatedly upheld such language" and cited to Morales v. State, 122 Nev. 966, 971, 143 P.3d 463, 466 (2006); Crawford v. State, 121 Nev. 744, 751, 121 P.3d 582, 586 (2005); Gaxiola v. State, 121 Nev. 633, 650, 119 P.3d 1225, 1233 (2005); and Leonard v. State, 114 Nev. 1196, 1209, 969 P.2d 288, 296 (1998). Nunnery, 263 P.3d at 259-60. None of these cases, however, addressed the issue presented here. Rather, in Morales, 122 Nev. at 970-711, 143 P.3d at 466, this Court found that the jury was properly instructed on a

firearm offense and properly instructed that they were required to find the defendant guilty beyond a reasonable doubt on each element in order to reach verdicts of guilty. There was no challenge to the use of the term "material" within the instruction and no discussion as to whether the district court should be obligated to inform the jury which elements are material when using this instruction. In Crawford, 121 Nev. at 750-51, 121 P.3d at 586-87, this Court accepted, but found harmless, a defendant's argument that the district court erred in refusing to give a proposed jury instruction on the State's burden to prove that the defendant did not act in the heat of passion. In addressing the issue, this Court noted that the jury was given a general instruction on reasonable doubt, which included the "every material element" language at issue here, but it did so in the context of evaluating whether the defendant was prejudiced by the refusal to give his proffered instruction. Id. at 751, 121 P.3d at 587. This Court did not address whether the district court erred in failing to define the "material elements" of the offense. Id. In Gaxiola, 121 Nev. at 647-50, 119 P.3d at 1232-33, this Court considered a defendant's challenge to a "no corroboration" jury instruction in a sexual assault case. After a lengthy discussion, in which this Court found that the instruction was correct, it stated in passing that "it is therefore appropriate for the district court to instruct the jurors that it is sufficient to base their decision on the alleged victim's uncorroborated testimony as long the testimony establishes all the

material elements of the crime." Id. at 650, 119 Nev. at 1233. This Court in no way considered the instruction at issue here and did not address whether the district court is obligated to inform the jury of which elements are material when using this instruction. Finally, in Leonard, 114 Nev. at 1209, 969 P.2d at 296, this Court held that the district court did not deny the defendant the presumption of innocence by instructing the jury to do "equal and exact justice between the Defendant and the State of Nevada." This Court found that the equal and exact justice instruction did not concern the presumption of innocence, and noted that a separate instruction informed the jury that the State has the burden or proving beyond a reasonable doubt every material element of the crime and that the defendant was the person who committed the offense. Id.

Prior to Nunnery, this Court neither considered nor analyzed the issue presented here: must the jury be instructed as to which elements are material if a jury instruction states that the State is obligated to prove beyond a reasonable doubt only those elements that are "material." In other words, this Court had not addressed the issue of whether an instruction which invites the jury to determine materiality for itself is proper. Prior opinions mentioning the concept of "material element" did not address this specific issue. The mere fact that this Court has generally discussed "material elements," within contexts entirely different from the issue presented here,

is insufficient to establish that this Court "has repeatedly upheld such language." See generally Anderson v. Harless, 459 U.S. 4, 6-7 (1982) (concluding that issues must be specifically raised and finding failure to exhaust state remedies where the defendant challenged a malice instruction and argued it was reversible error, but did not specifically present a federal constitutional claim: "It is not enough that all the facts necessary to support the federal claim were before the state courts . . . or that a somewhat similar state-law claim was made.") (citations omitted). Nunnery should therefore be overruled as to this issue.

Malone submits that the first paragraph of Instruction No. 45 is unconstitutional. "In state criminal trials, the Due Process Clause of the Fourteenth Amendment 'protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'" Cage v. Louisiana, 498 U.S. 39 (1990) (quoting In re Winship, 397 U.S. 358, 364 (1970)). "This reasonable-doubt standard 'plays a vital role in the American scheme of criminal procedure.'" Id. (quoting Winship, 397 U.S. at 363). The instruction here failed to comply with Winship and Cage in that it allowed the jury to speculate as to which elements of the offenses were material and which were not.

In the alternative, Malone submits that all instructions setting forth the elements of the offenses should affirmatively state that each of the elements are

material and must be established beyond a reasonable doubt by the State.

The district court's instruction on the presumption of innocence was erroneous. Malone submits that Nunnery should be overruled, the district courts should be directed by this Court to use the statutory definitions on the presumption of innocence, and this matter should be remanded for a new trial.

VII. CONCLUSION

Malone respectfully submits that his judgment of conviction should be vacated and this case should be remanded for a new trial.

DATED this 14th day of January, 2013.

Respectfully submitted,

/s/ JONELL THOMAS

By:_____

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CERTIFICATE OF COMPLIANCE

1. I hereby certify this brief does comply with the formatting requirements of NRAP 32(a)(4).

2. I hereby certify that this brief does comply with 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 Word Perfect Office 11 in 14 point font of the Times New Roman style.

3. I hereby certify that this brief does comply with the word limitation requirement of NRA 32(a)(7)(A)(ii). The word count is 13,819.

4. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular, NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 14th day of January, 2013

/s/ JONELL THOMAS

_____

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 14th day of January, 2013, copy of the foregoing Opening Brief (and Appendix) was served as follows:

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