

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * *

DOMONIC MALONE,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

CASE NO. 61006

Electronically Filed
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Tracie K. Lindeman
Clerk of Supreme Court

APPELLANT'S APPENDIX

VOLUME 5

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

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I N D E X

<u>Volume</u>	<u>Document Name/File Date</u>	<u>Page No.</u>
1	AMENDED INFORMATION (8/30/06)	046-053
18	COURT EXHIBITS ADMITTED AT TRIAL (UNFILED)	3652-3695
19	CRIMINAL COURT MINUTES (UNFILED)	3780-3927
7	DOCUMENTS PER COURT ORDER (6/22/11)	1312-1347
7	EX PARTE COMMUNICATIONS (DEFENDANT MEMORANDUM TO COURT) (PRO PER) (6/29/11)	1348-1353
5	EX PARTE MOTION FOR EXPENSES FOR PRIVATE INVESTIGATORS (PRO PER) (2/1/10)	977-978
1	INFORMATION (8/2/06)	001-008
17	INSTRUCTIONS TO THE JURY (1/31/12)	3431-3492
1	JOINDER WITH CO-DEFENDANT JASON McCARTY'S MOTION TO SEVER (10/25/06)	116-117
6	JUDGMENT OF CONVICTION (JURY TRIAL) (McCARTY) (4/6/11)	1287-1291
18	JUDGMENT OF CONVICTION (JURY TRIAL) (MALONE) (5/8/12)	3772-3776
7	JURY LIST (1/13/12)	1487
14	MALONE'S OBJECTIONS TO THE STATE'S PROPOSED TRIAL PHASE JURY INSTRUCTIONS (1/26/12)	2971-2984

<u>Volume</u>	<u>Document Name/File Date</u>	<u>Page No.</u>
7	MOTION FOR COMPLETE ROUGH DRAFT TRANSCRIPT OF (CASE NO. C224572-1) (PRO PER) (6/29/11)	1365-1452
2	MOTION FOR DISCOVERY OF INSTITUTIONAL RECORDS AND FILES NECESSARY TO A FAIR TRIAL (5/24/07)	292-299
7	MOTION FOR DISCOVERY OF PROSECUTION RECORDS FILES AND INFORMATION NECESSARY TO A FAIR TRIAL (PRO PER) (6/29/11)	1354-1364
6	MOTION FOR (FULL TRANSCRIPTION) DISCOVERY OF PROSECUTION RECORDS, FILES AND INFORMATION NECESSARY TO A FAIR TRIAL (PRO PER) (1/8/11)	1276-1277
5	MOTION FOR JUDICIAL DETERMINATION OF STANDBY COUNSELS OBLIGATIONS PURSUANT TO HOLLAWAY V. STATE (5/2/10)	990-997
6	MOTION FOR PARALEGAL; FINANCIAL ASSISTANCE; MEDICAL; PRIVATE INVESTIGATORS(S) (PRO PER) (7/8/10)	1110-1113
6	MOTION FOR PARALEGAL - (REHEARING) (PRO PER) (8/9/10)	1149-1152
5	MOTION FOR TRIAL (SPEEDY) AND OR IN THE ALTERNATIVE MOTION TO WITHDRAW COUNSEL (PRO PER) (12/3/09)	876-878
2	MOTION IN LIMINE TO BAR IMPROPER PROSECUTORIAL ARGUMENT (5/24/07)	265-287
2	MOTION IN LIMINE TO PROHIBIT ANY REFERENCES TO THE FIRST PHASE AS THE "GUILT PHASE" (5/24/07)	259-261

<u>Volume</u>	<u>Document Name/File Date</u>	<u>Page No.</u>
4	MOTION IN LIMINE TO PROHIBIT INTRODUCTION OF HEARSAY STATEMENTS MADE BY CO-DEFENDANT MCCARTY AND OTHERS THAT REFERENCE DEFENDANT MALONE AT THE TIME OF TRIAL (8/20/09)	641-660
5	MOTION IN LIMINE TO PROHIBIT INTRODUCTION OF HEARSAY STATEMENTS MADE BY CO-DEFENDANT MCCARTY AND OTHERS THAT REFERENCE DEFENDANT MALONE AT THE TIME OF TRIAL (3/25/10)	1021-1041
2	MOTION TO COMPEL DISCLOSURE OF EXISTENCE AND SUBSTANCE OF EXPECTATIONS, OR ACTUAL RECEIPT OF BENEFITS OR PREFERENTIAL TREATMENT FOR COOPERATION WITH PROSECUTION (5/24/07)	288-291
3	MOTION TO DISMISS COUNSEL (PRO PER) (1/7/09)	607-608
3	MOTION TO DISMISS FOR FAILURE TO PRESERVE EVIDENCE, OR, IN THE ALTERNATIVE, MOTION FOR CORRECTIVE INSTRUCTION (1/31/08)	572-577
5	MOTION TO DISMISS FOR PROSECUTORIAL MISCONDUCT GROUNDS BRADY VIOLATION OR IN THE ALTERNATIVE THE JURY TO BE INSTRUCTED ON MALONE'S EXACT WHEREABOUTS DURING THE TIME OF THE MURDER(S) (PRO PER) (11/1/10)	1240-1257
6	MOTION TO DISMISS STAND-BY COUNSEL (PRO PER) (1/8/11)	1278
2	MOTION TO FEDERALIZE ALL MOTIONS, OBJECTIONS, REQUESTS AND OTHER APPLICATIONS FOR THE PROCEEDINGS IN THE ABOVE ENTITLED CASE (5/24/07)	262-264

<u>Volume</u>	<u>Document Name/File Date</u>	<u>Page No.</u>
5	MOTION TO PRESERVE AND PRODUCE EVIDENCE INCLUDING POTENTIALLY EXCULPATORY EVIDENCE (PRO PER) (2/1/10)	957-976
18	MOTION TO RECUSE THE CLARK COUNTY DISTRICT ATTORNEY'S OFFICE (2/6/12)	3698-3702
3	MOTION TO RECUSE THE CLARK COUNTY DISTRICT ATTORNEY'S OFFICE OR IN THE ALTERNATIVE MOTION IN LIMINE TO PROHIBIT INTRODUCTION OF STATEMENTS MADE BY CO-DEFENDANT HERB AT THE TIME OF TRIAL (1/12/09)	609-616
1	MOTION TO SEVER (McCARTY) (10/9/06)	054-071
1	MOTION TO SEVER (MALONE) (10/25/06)	092-115
5	MOTION TO SUPPRESS STATEMENTS OF CORRENA PHILLIPS OR IN THE ALTERNATIVE MOTION IN LIMINE TO PROHIBIT INTRODUCTION OF STATEMENTS MADE BY STATE WITNESSES "PHILLIPS" AT THE TIME OF TRIAL (PRO PER) (8/2/10)	1140-1148
4	MOTION TO SUPPRESS STATEMENTS OF DEFENDANT, OR IN THE ALTERNATIVE, MOTION IN LIMINE (9/18/09)	696-703
2	MOTION TO SUPPRESS STATEMENTS OF DONALD HERB, OR IN THE ALTERNATIVE MOTION IN LIMINE TO PROHIBIT INTRODUCTION OF STATEMENTS MADE BY CO-DEFENDANT HERB AT THE TIME OF TRIAL (5/25/07)	300-317
4	MOTION TO WAIVE TRIAL BY JURY ON ALL COUNTS ALLEGING THE NAMED VICTIM MELISSA ESTORES (10/1/09)	755-763
18	NOTICE OF APPEAL (6/5/12)	3777-3779

<u>Volume</u>	<u>Document Name/File Date</u>	<u>Page No.</u>
4	NOTICE OF DEFENDANT'S WITNESSES (10/6/09)	775-783
4	NOTICE OF EXPERT WITNESSES (9/21/09)	704-744
7	NOTICE OF EXPERT WITNESSES (11/16/11)	1469-1470
1	NOTICE OF INTENT TO SEEK DEATH PENALTY (8/30/06)	017-045
4	NOTICE OF WITNESSES (10/02/09)	765-771
5	OPPOSITION TO DEFENDANT MALONE'S MOTION FOR RECONSIDERATION OF WRIT OF HABEAS CORPUS (4/9/10)	1045-1093
3	OPPOSITION TO DEFENDANT MALONE'S MOTION TO DISMISS FOR FAILURE TO PRESERVE EVIDENCE, OR IN THE ALTERNATIVE, MOTION FOR CORRECTIVE INSTRUCTION (2/25/08)	578-592
2	OPPOSITION TO DEFENDANT MALONE'S MOTION TO SUPPRESS STATEMENTS OF DONALD HERB, OR IN THE ALTERNATIVE MOTION IN LIMINE TO PROHIBIT INTRODUCTION OF THE STATEMENT MADE BY THE CO-DEFENDANT HERB AT THE TIME OF TRIAL (6/14/07)	337-351
2	OPPOSITION TO DEFENDANT'S MOTION TO FEDERALIZE ALL MOTIONS, REQUESTS AND OTHER APPLICATIONS FOR THE PROCEEDINGS IN THE ABOVE ENTITLED CASE (6/6/07)	320-323
3	OPPOSITION TO DEFENDANT'S MOTION TO RECUSE THE CLARK COUNTY DISTRICT ATTORNEY'S OFFICE, OR IN THE ALTERNATIVE, MOTION IN LIMINE TO PROHIBIT INTRODUCTION OF STATEMENTS MADE BY CO-DEFENDANT HERB AT THE TIME OF TRIAL (1/28/09)	622-625

<u>Volume</u>	<u>Document Name/File Date</u>	<u>Page No.</u>
2	ORDER (DENYING PETITION FOR WRIT OF HABEAS CORPUS) (1/18/07)	257-258
2	ORDER (COURT RULINGS ON MOTIONS) (7/24/07)	410-414
3	ORDER DENYING DEFENDANT'S MOTION TO DISMISS FOR FAILURE TO PRESERVE EVIDENCE, OR IN THE ALTERNATIVE, MOTION FOR CORRECTIVE INSTRUCTION (3/27/08)	599-600
4	ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS STATEMENTS OF DEFENDANT (10/22/09)	874-875
5	ORDER GRANTING DEFENDANT'S MOTION (2/26/10)	988-989
5	ORDER GRANTING DEFENDANT'S MOTION FOR ACCESS TO LAW LIBRARY (PRO PER) (9/27/10)	1201-1202
18	ORDER GRANTING DEFENDANT'S MOTION TO PRECLUDE EVIDENCE OF OTHER BAD ACTS EVIDENCE ENTITLED MOTION IN LIMINE TO BAR IMPROPER PROSECUTORIAL ARGUMENT (2/3/12)	3696-3697
1	PETITION FOR WRIT OF HABEAS CORPUS (11/6/06)	118-152
16	POINTS AND AUTHORITIES IN OPPOSITION TO THE INTRODUCTION OF THE NON-TESTIFYING CO-DEFENDANT'S RECORDED TELEPHONE CALL (1/27/12)	3173-3200
16	POINTS AND AUTHORITIES IN REPLY TO DEFENDANT'S OPPOSITION TO THE INTRODUCTION OF THE NON-TESTIFYING CO-DEFENDANT'S RECORDED TELEPHONE CALL (1/27/12)	3201-3206
5	RENEWED MOTION TO SEVER (McCARTY) (3/18/10)	929-956
4	REPLY TO OPPOSITION TO MOTION (8/27/09)	683-689

<u>Volume</u>	<u>Document Name/File Date</u>	<u>Page No.</u>
3	REPLY TO STATE'S OPPOSITION (1/30/09)	626-630
1	REPORTER'S TRANSCRIPT OF HEARING AUGUST 16, 2006 (5/7/08)	009-016
2	REPORTER'S TRANSCRIPT OF HEARING NOVEMBER 21, 2006 (6/6/08)	218-237
2	REPORTER'S TRANSCRIPT OF HEARING NOVEMBER 30, 2006 (6/6/08)	238-241
2	REPORTER'S TRANSCRIPT OF HEARING DECEMBER 12, 2006 (6/6/08)	242-256
2	REPORTER'S TRANSCRIPT OF HEARING JUNE 22, 2007 (6/6/08)	352-409
3	REPORTER'S TRANSCRIPT OF HEARING SEPTEMBER 11, 2007 (6/6/08)	415-419
3	REPORTER'S TRANSCRIPT OF HEARING NOVEMBER 29, 2007 (6/6/08)	420-571
3	REPORTER'S TRANSCRIPT OF HEARING MARCH 13, 2008 (6/6/08)	593-598
3	REPORTER'S TRANSCRIPT OF HEARING JUNE 24, 2008 (7/2/08)	601-606
3	REPORTER'S TRANSCRIPT OF HEARING JANUARY 20, 2009 (2/17/09)	617-621
3	REPORTER'S TRANSCRIPT OF HEARING FEBRUARY 5, 2009 (2/17/09)	631-640
4	REPORTER'S TRANSCRIPT OF HEARING SEPTEMBER 1, 2009 (9/9/09)	690-695

<u>Volume</u>	<u>Document Name/File Date</u>	<u>Page No.</u>
4	REPORTER'S TRANSCRIPT OF HEARING SEPTEMBER 29, 2009 (3/5/10)	744-754
4	REPORTER'S TRANSCRIPT OF HEARING OCTOBER 6, 2009 (3/5/10)	784-797
4	REPORTER'S TRANSCRIPT OF HEARING OCTOBER 8, 2009 (3/5/10)	847-862
4	REPORTER'S TRANSCRIPT OF HEARING OCTOBER 12, 2009 (3/5/10)	865-873
5	REPORTER'S TRANSCRIPT OF HEARING OCTOBER 27, 2009 (3/5/10)	879-886
5	REPORTER'S TRANSCRIPT OF HEARING DECEMBER 15, 2009 (3/5/10)	887-892
5	REPORTER'S TRANSCRIPT OF HEARING JANUARY 8, 2010 (3/5/10)	893-928
5	REPORTER'S TRANSCRIPT OF HEARING FEBRUARY 16, 2010 (3/5/10)	979-987
5	REPORTER'S TRANSCRIPT OF HEARING MARCH 18, 2010 (4/12/10)	998-1005
5	REPORTER'S TRANSCRIPT OF HEARING MARCH 25, 2010 (4/12/10)	1006-1020
5	REPORTER'S TRANSCRIPT OF HEARING APRIL 13, 2010 (4/14/10)	1094-1104
5	REPORTER'S TRANSCRIPT OF HEARING APRIL 29, 2010 (5/18/10)	1105-1109
5	REPORTER'S TRANSCRIPT OF HEARING JULY 20, 2010 (9/22/10)	1124-1128

<u>Volume</u>	<u>Document Name/File Date</u>	<u>Page No.</u>
5	REPORTER'S TRANSCRIPT OF HEARING JULY 27, 2010 (9/22/10)	1129-1139
5	REPORTER'S TRANSCRIPT OF HEARING AUGUST 12, 2010 (9/22/10)	1153-1164
5	REPORTER'S TRANSCRIPT OF HEARING AUGUST 26, 2010 (9/22/10)	1170-1172
5	REPORTER'S TRANSCRIPT OF HEARING AUGUST 31, 2010 (9/22/10)	1173-1183
5	REPORTER'S TRANSCRIPT OF HEARING SEPTEMBER 14, 2010 (9/22/10)	1186-1194
5	REPORTER'S TRANSCRIPT OF HEARING SEPTEMBER 21, 2010 (9/22/10)	1195-1200
5	REPORTER'S TRANSCRIPT OF HEARING SEPTEMBER 30, 2010 (10/8/10)	1203-1213
5	REPORTER'S TRANSCRIPT OF HEARING OCTOBER 5, 2010 (10/8/10)	1214-1237
5	REPORTER'S TRANSCRIPT OF HEARING OCTOBER 26, 2010 (1/12/11)	1258-1268
5	REPORTER'S TRANSCRIPT OF HEARING NOVEMBER 9, 2010 (1/12/11)	1269-1275
6	REPORTER'S TRANSCRIPT OF HEARING JANUARY 25, 2011 (2/28/11)	1279-1286
6	REPORTER'S TRANSCRIPT OF HEARING JUNE 9, 2011 (7/25/11)	1292-1297
6	REPORTER'S TRANSCRIPT OF HEARING JUNE 21, 2011 (7/25/11)	1298-1311

<u>Volume</u>	<u>Document Name/File Date</u>	<u>Page No.</u>
7	REPORTER'S TRANSCRIPT OF HEARING JULY 19, 2011 (7/25/11)	1453-1459
7	REPORTER'S TRANSCRIPT OF HEARING AUGUST 9, 2011 (9/21/11)	1460-1468
7	REPORTER'S TRANSCRIPT OF HEARING DECEMBER 15, 2011 (12/30/11)	1473-1480
7	REPORTER'S TRANSCRIPT OF HEARING JANUARY 3, 2012 (1/9/12)	1481-1486
8	REPORTER'S TRANSCRIPT OF JURY TRIAL JANUARY 17, 2012 (1/18/12)	1488-1732
9	REPORTER'S TRANSCRIPT OF JURY TRIAL JANUARY 18, 2012 (1/19/12)	1734-2013
10	REPORTER'S TRANSCRIPT OF JURY TRIAL JANUARY 19, 2012 (1/20/12)	2014-2273
11	REPORTER'S TRANSCRIPT OF JURY TRIAL JANUARY 20, 2012 (1/23/12)	2274-2485
12	REPORTER'S TRANSCRIPT OF JURY TRIAL JANUARY 23, 2012 (1/24/12)	2486-2684
13	REPORTER'S TRANSCRIPT OF JURY TRIAL JANUARY 24, 2012 (1/25/12)	2685-2896
14	REPORTER'S TRANSCRIPT OF JURY TRIAL JANUARY 25, 2012 (1/26/12)	2897-2970
15	REPORTER'S TRANSCRIPT OF JURY TRIAL JANUARY 26, 2012 (1/27/12)	2985-3172
16	REPORTER'S TRANSCRIPT OF JURY TRIAL JANUARY 27, 2012 (1/30/12)	3207-3397

<u>Volume</u>	<u>Document Name/File Date</u>	<u>Page No.</u>
17	REPORTER'S TRANSCRIPT OF JURY TRIAL JANUARY 30, 2012 (1/31/12)	3406-3430
17	REPORTER'S TRANSCRIPT OF JURY TRIAL JANUARY 31, 2012 (2/1/12)	3493-3630
18	REPORTER'S TRANSCRIPT OF JURY TRIAL FEBRUARY 1, 2012 (2/2/12)	3631-3645
18	REPORTER'S TRANSCRIPT OF PENALTY PHASE FEBRUARY 10, 2012 (2/15/12)	3703-3717
18	REPORTER'S TRANSCRIPT OF HEARING APRIL 10, 2012 (5/24/12)	3743-3747
18	REPORTER'S TRANSCRIPT OF HEARING APRIL 12, 2012 (5/24/12)	3748-3750
18	REPORTER'S TRANSCRIPT OF HEARING APRIL 24, 2012 (5/24/12)	3751-3771
5	RESPONSE TO STATE'S OPPOSITION TO DEFENDANT'S MOTION TO SUPPRESS STATEMENTS (8/19/10)	1165-1169
1	RETURN TO WRIT OF HABEAS CORPUS (11/22/06)	178-217
4	RECEIPT OF COPY (RAMAAN HALL'S "LYRICS AND ADDITIONAL DISCOVERY) (10/8/09)	800-846
18	SPECIAL VERDICT (2/10/12)	3718-3742
4	STATE OPPOSITION TO DEFENDANT MALONE'S MOTION IN LIMINE TO PROHIBIT INTRODUCTION OF HEARSAY STATEMENTS MADE BE CO-DEFENDANT MALONE AT THE TIME OF TRIAL (8/26/09)	661-682
1	STATE'S OPPOSITION TO DEFENDANT MALONE'S MOTION TO SEVER (11/13/06)	153-177

<u>Volume</u>	<u>Document Name/File Date</u>	<u>Page No.</u>
1	STATE'S OPPOSITION TO DEFENDANT MCCARTY'S MOTION TO SEVER (10/23/06)	072-091
2	STATE'S OPPOSITION TO DEFENDANT'S MOTION FOR DISCOVERY OF INSTITUTIONAL RECORDS AND FILES NECESSARY TO A FAIR TRIAL (6/6/07)	330-333
2	STATE'S OPPOSITION TO DEFENDANT'S MOTION FOR DISCOVERY OF PROSECUTION RECORDS, FILES AND INFORMATION NECESSARY TO A FAIR TRIAL (6/6/07)	324-326
2	STATE'S OPPOSITION TO DEFENDANT'S MOTION IN LIMINE TO BAR IMPROPER PROSECUTORIAL ARGUMENT (6/6/07)	327-329
2	STATE'S OPPOSITION TO DEFENDANT'S MOTION IN LIMINE TO PROHIBIT ANY REFERENCES TO THE FIRST PHASE AS THE "GUILT PHASE" (6/6/07)	318-319
2	STATE'S OPPOSITION TO DEFENDANT'S MOTION TO COMPEL DISCLOSURE OF EXISTENCE AND SUBSTANCE OF EXPECTATIONS, OR ACTUAL RECEIPT OF BENEFITS OR PREFERENTIAL TREATMENT FOR COOPERATION WITH PROSECUTION (6/6/07)	334-336
4	STATE'S RESPONSE TO DEFENDANT'S MOTION TO WAIVE TRIAL BY JURY ON ALL COUNTS ALLEGING THE NAMED VICTIM MELISSA ESTORES (10/5/09)	772-774
5	STATE'S OPPOSITION TO MCCARTY'S RENEWED MOTION TO SEVER (4/9/10)	1042-1044
4	SUPPLEMENTAL NOTICE OF WITNESSES (10/7/09)	798-799
4	SUPPLEMENTAL NOTICE OF WITNESSES (10/9/09)	863-864
5	SUPPLEMENTAL NOTICE OF WITNESSES (9/10/10)	1184-1185

<u>Volume</u>	<u>Document Name/File Date</u>	<u>Page No.</u>
5	SUPPLEMENTAL NOTICE OF WITNESSES (10/7/10)	1238-1239
7	SUPPLEMENTAL NOTICE OF WITNESSES (11/30/11)	1471-1472
17	THIRD AMENDED INFORMATION (1/30/12)	3398-3405
18	VERDICT (2/1/12)	3646-3651

Dominic R. Malone #1670891
Clark County Detention Center
320 S. Casino Center Blvd.
Las Vegas, Nevada 89101

Attorney; N/A
Pro, se

DISTRICT COURT
CLARK COUNTY, NEVADA

FILED

DEC 03 2009

John D. Johnson
CLERK OF COURT

STATE OF NEVADA

Plaintiff,

vs.

Dominic Ronaldo Malone
#1670891
Defendant

) Case No.: C224572
)
) Dept. No.: 17
)
) Docket No.: _____
)
)
)

12/15/09

Motion for trial (Speedy) and or in the alternative
Motion to withdraw Counsel;

Comes now the defendant Dominic Ronaldo Malone, and moves this Honorable Court to grant this Motion for trial and or in the alternative Motion to withdraw counsel.

This motion is based upon all papers and documents on file, factual Statement set forth in the points and Authorities, contained therein.

Points and Authorities

I'm requesting a speedy trial and would like to revoke my previous entry of my waived speedy trial rights.

N.R.S. 174.511 Right of State to trial within 60 days after arraignment; exceptions. The court may postpone the trial if:

1. It finds that more time is needed by the defendant to prepare his defense;

Attorney Mr. Charles Cano mis represented me when he instructed me to waived

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CLERK OF THE COURT

0876

1 this valuable right when he told me that this case would only take (18)
2 mos.

3 He has of yet stolen me all of the discovery, He also recently used racist
4 remarks as of late.

5 Conclusion

6 I pray that this motion gets granted as the defendant is at the
7 mercy of the Special Public Defender office,
8

9
10
11
12
13
14
15
16 DATED THIS 30th day of November, 2009.

17 I, Dominic A. Malone, do

18 solemnly swear, under the penalty of perjury, that

19 the above Motion is accurate,

20 correct, and true to the best of my knowledge.

21 NRS 171.102 and NRS 208.165.

22 Respectfully submitted,

23 Dominic A. Malone
24 Dominic A. Malone #11,7891

25 Defendant

AOR

PROPER PERSON SETTINGS

CASE #C224572

DEPARTMENT:17

DEFENDANT:DOMONIC R. MALONE #1670891

DATE FILED:December 3, 2009

**MATTERS TO BE HEARD:MOTION FOR TRIAL (SPEEDY) AND OR IN THE
ALTERNATIVE MOTION TO WITHDRAW COUNSEL.**

HEARING DATE: 12/15/2009

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- ☐ **PUBLIC DEFENDER**
- ☒ **PROPER PERSON**
- ☐ **ATTORNEY GENERAL**
- ☒ **ATTORNEY OF RECORD**

Special Public Defender

1 TRAN

COPY

FILED

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

MAR 5 9 50 AM '10

CLERK OF THE COURT

5
6 THE STATE OF NEVADA,)

7 Plaintiff,

8 vs.

9 DOMONIC RONALDO MALONE,
10 JASON D. McCARTY,

11 Defendant.)

CASE NO. C224572

DEPT. XVII

12 BEFORE THE HONORABLE MICHAEL P. VILLANI, DISTRICT COURT JUDGE

13
14 TUESDAY, OCTOBER 27, 2009

15 **RECORDER'S TRANSCRIPT OF HEARING RE:**
16 **STATUS CHECK: TRIAL SETTING / POSSIBLE CONFLICT**

17 **APPEARANCES:**

18 For the State:

MARC DiGIACOMO, ESQ.
CHRISTOPHER LALLI, ESQ.
Deputy District Attorneys

19
20 For the Defendant, Malone:

CHARLES A. CANO, ESQ.
RANDALL H. PIKE, ESQ.
Special Public Defenders

21
22
23 For the Defendant, McCarty:

ANTHONY P. SGRO, ESQ.
CHRISTOPHER R. ORAM, ESQ.

24
25 RECORDED BY: MICHELLE L. RAMSEY, COURT RECORDER

1 LAS VEGAS, NEVADA; TUESDAY, OCTOBER 27, 2009

2 [Proceeding commenced at 8:35 a.m.]

3
4 THE COURT: All right, 224572, State versus Domonic Malone, Jason
5 McCarty. We have Mr. Sgro and Mr. Oram for Mr. McCarty. Mr. Cano and Mr. Pike
6 for Mr. Malone. Mr. Lalli and Mr. DiGiacomo for the State. This is a status check
7 and possible trial setting and also whether or not there was a conflict; Mr. Sgro?

8 THE DEFENDANT, MALONE: Excuse me, Your Honor. May I speak to my
9 attorney just for one second?

10 THE MARSHAL: You have to speak up.

11 THE DEFENDANT, MALONE: I would like to speak with my attorney for a
12 second.

13 THE COURT: All right. Why don't you go ahead.

14 MR. LALLI: Your Honor, while that's happening, may I inquire whether the
15 Court received Mr. Sgro's affidavit?

16 THE COURT: Yes, I did.

17 MR. LALLI: Okay. Thank you.

18 THE COURT: That was the affidavit regarding the reasons --

19 MR. LALLI: Yes.

20 THE COURT: -- for the continuance.

21 MR. LALLI: Right.

22 THE COURT: Yes, I did receive that and reviewed it.

23 MR. DIGIACOMO: Judge, in discussion among counsel, we were talking
24 about potentially an April date. Mr. Oram and I have a Capital case starting March
25 22nd. Because of the length of this case, we'd like to set it April 5th with an

1 understanding that we may have to get a late start that week or start on the 12th.
2 Because of the age of this case, we don't want to set it out any farther and my
3 understanding after talking to your Clerk is the next time we may all be available
4 would be October and that's just too far, so we're hoping the Court can
5 accommodate us. I know we might trail into your civil stack.

6 THE COURT: You may get a specific date. So if we're going to have the
7 jury questionnaire we can't have a hundred and fifty people sort of on hold.

8 [Colloquy between the Court and the Clerk]

9 THE COURT: We have another murder case that's with a firm setting.

10 MR. DIGIACOMO: Defendant's name?

11 THE COURT: Schneider.

12 THE CLERK: Schneider. It doesn't ring a bell.

13 MR. DIGIACOMO: I can't imagine that's a 250 case, Judge. This a 3 ½
14 year old 250 case.

15 MR. FIGLER: Schneider is a 250 case, Judge.

16 MR. DIGIACOMO: It is 250?

17 MR. FIGLER: Yeah. I'm on it.

18 THE CLERK: There you go.

19 THE COURT: Excuse me, Mr. Figler, do you know how long that case is
20 scheduled to take, Schneider?

21 MR. FIGLER: It'll take probably with the penalty phase it's going to be six
22 days. Shortest four days. Not a long trial.

23 [Colloquy between the Court and the Clerk]

24 MR. DIGIACOMO: That is the likelihood of cases going forward as we've
25 seen in this case, Judge, can we take a double stack in the April date. Obviously,

1 you know, if we prioritize the case, but at least that keeps the date for us, Judge.

2 THE COURT: We'll set you in April, but understand that it may not go and
3 the next date would be October.

4 MR. DIGIACOMO: Do you want to double set it now so you don't set
5 anything else on the October stack?

6 THE COURT: All right. We'll do that as well.

7 THE CLERK: Okay, so our first setting; Calendar Call will be March 30th at
8 8:15 with a Trial date of April 5th at 10 a.m. And our back-up date will be October 5th
9 for Calendar Call at 8:15 with a Trial date of October 11th at 10 a.m.

10 MR. LALLI: Is the week before that October date available?

11 THE CLERK: That is the -- no.

12 MR. DIGIACOMO: That's the earliest October date?

13 THE CLERK: That's the end of our civil stack.

14 MR. DIGIACOMO: You do?

15 THE CLERK: I gave you the first of our criminal.

16 MR. LALLI: So it's --

17 THE CLERK: October 11th, so you have five weeks.

18 THE COURT: I think one of our other cases in April is a penalty case from
19 1984. I don't know if your office has that, Mr. Pike, or not.

20 MR. PIKE: I'm -- we seem to collect some of those old things. Dust them off
21 the shelf.

22 THE COURT: Last time you were here right before the trial there was some
23 issues of some disc or some discovery issues; have all those been resolved?

24 MR. PIKE: We were provided a number of discs and we believe that we
25 have them all including the videos that we requested.

1 MR. SGRO: We just need a -- Mr. DiGiacomo made representations to me
2 on the phone which are fine, but I think because we brought it up in Court perhaps
3 you could put on the record with respect to the Lucero's interview there's a portion
4 that is referenced in the transcript of the interview. Apparently the disc either was
5 not going or does not exist. I can't remember now because of all the activity that's
6 going on, but if Mr. DiGiacomo could just perfect the record and let us know formally
7 the outcome of those two discs I think that would put that matter to bed.

8 MR. DIGIACOMO: Judge, during the Lucero interview, the interview was
9 tape recorded by the detective. I believe [indecipherable]. It was also -- had the
10 ability to be viewed video tape and whether or not the actual recorder or not there is
11 no tape, there is no disc in evidence of video of Mr. Lucero and Mrs. Lucero's
12 interview. So whether or not it was recorded and then not maintained or it was
13 never recorded which was the possibility it was audio recorded, there just isn't a
14 disc.

15 I told Mr. Sgro that. I've also had the detective go through each and
16 every disc that's impounded into evidence because that's how Henderson does it.
17 Made a copy of each and every disc that's impounded into evidence and each and
18 every disc in the case has been turned over to Mr. Sgro and I told him that's the
19 extent of representation.

20 THE COURT: Mr. Sgro?

21 MR. SGRO: Well, obviously our concern which probably would a table for
22 another day would be whether or not they destroyed any evidence in the case. The
23 concern is the Lucero's interview are somewhat important to the case and there's a
24 video that's referenced in the transcript that reports things that don't appear any
25 where in the -- there's a transcript that just cuts off and then resumes with a

1 significant portion of a conversation that was not available any more.

2 And just so you know, Your Honor, the Lucero's are friends of some
3 of the witnesses. They're friends or acquaintances of the victims in the case. They
4 go together to the police department to be interviewed and after the wife gives her
5 statement, the wife and husband according to the transcript engage in a heated
6 discussion and argue about what was said and should they have said this or that;
7 that's what I'm gleaning from the context. That angered conversation which could
8 from our perspective include things like I can't believe you say that. You know that
9 what you just said wasn't true. I mean, I'm clearly speculating, but that anger fight
10 about why certain things were said that's what's missing.

11 So it's somewhat disconcerting to have that not available in any form
12 whatsoever. Not even audio tape.

13 MR. DIGIACOMO: Well, and here's what I would said to Mr. Sgro, he's free
14 to file any motions. As I read the police report, the detective had a recorder with
15 him. When he was in the room, it was recorded. When he left the room, he
16 watched on the [indecipherable] ability to watch what's going on in the room, made a
17 police report as to what they were talking about then went back in and continued the
18 recording. And that recording was maintained and transcribed.

19 There is no -- I do not believe as I stand here, but I don't want to
20 represent that to the Court that there was a video ever made of the incident. And it's
21 just the detective's observations which Mr. Sgro has seen in the police report. If he
22 feels that there is a basis for filing some sort of motion, he's free to file the motion,
23 but I don't know what else I can tell them at this point.

24 THE COURT: Was it just a live feed, is that what it was?

25 MR. DIGIACOMO: Correct. It's a live feed into the room.

1 THE COURT: Well, Mr. Sgro, if you want, you know, go ahead and file a
2 motion on that issue, but as the parties may know I typically will order that defense
3 counsel and one of the Deputy District Attorneys actually meet with the detective to
4 go over their file to make sure that defense counsel has everything in their file. I'm
5 sure the D.A. turns over everything in their file.

6 MR. DIGIACOMO: That's actually happened --

7 THE COURT: They may not get everything from the detective.

8 MR. DIGIACOMO: -- on multiple occasions in this case --

9 THE COURT: Right.

10 MR. DIGIACOMO: -- coming up on this trial setting. On multiple occasions
11 both defense attorneys have met with the detectives, gone over their books and only
12 came up with -- Mr. Cano said that he didn't go through each and every disc to
13 make sure he had each and every disc. And that's when we went back down there
14 and got each and every disc to make sure they had those, Judge. So that's all
15 happened at this point. And they're also obviously free to go back down there if they
16 still think they're missing anything.

17 THE COURT: All right. I'll just wait for any other motion. And if there's any
18 other discovery issues, I'd appreciate it well before the trial date 'cause we don't
19 want to bump it again that's for sure. So we'll be at end of 2011.

20 MR. SGRO: Yes, sir.

21 THE COURT: All right.

22 MR. SGRO: Thank you.

23 MR. CANO: Thank you.

24 MR. SGRO: With respect to the -- the conflict issues is that matter now not
25 an issue because it's not been raised with this Court. I did contact the Bar as you

1 requested, but I don't know how you want to handle it at this juncture.

2 THE COURT: Well, maybe more of an issue of if I recall the State's -- I
3 mean, the Special P.D.'s client.

4 MR. PIKE: That's correct, Your Honor. We did an investigation in
5 relationship to that. Did some interviews. Actually went over to the jail with
6 permission of counsel to interview -- to flush out the relationship.

7 MR. CANO: We did speak with Ron [indecipherable] he's a person in
8 question that was maybe the cause of this conflict or reasons why there would be.
9 We determined that we don't feel that there is one at this point in time, Your Honor.

10 THE COURT: Okay, I appreciate that. All right. Thank you, everybody.

11 MR. CANO: Thank you.

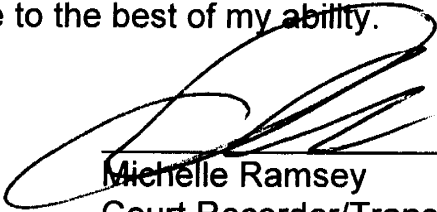
12 MR. LALLI: Thank you, Your Honor.

13 MR. DIGIACOMO: Thank you, Judge.

14 [Proceeding concluded at 8:46 a.m.]

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22 ATTEST: I hereby certify that I have truly and correctly transcribed the audio/video
23 proceedings in the above-entitled case to the best of my ability.

24 
25 Michelle Ramsey
Court Recorder/Transcriber

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Ann L. Blum
CLERK OF THE COURT

COPY

DISTRICT COURT
CLARK COUNTY, NEVADA

CASE NO. C224572

DEPT. XVII

DOMONIC RONALDO MALONE,

Defendant.

BEFORE THE HONORABLE MICHAEL P. VILLANI, DISTRICT COURT JUDGE

TUESDAY, DECEMBER 15, 2009

**RECORDER'S TRANSCRIPT OF HEARING RE:
DEFENDANT'S PRO PER MOTION FOR SPEEDY TRIAL AND MOTION
TO WITHDRAW COUNSEL**

APPEARANCES:

For the State:

CHRISTOPHER LALLI, ESQ.
Deputy District Attorney

For the Defendant, Malone:

RANDALL H. PIKE, ESQ.
CLARK W. PATRICK, ESQ.
Special Public Defenders

RECORDED BY: MICHELLE L. RAMSEY, COURT RECORDER

1 **LAS VEGAS, NEVADA; TUESDAY, DECEMBER 15, 2009**

2 [Proceeding commenced at 8:23 a.m.]

3
4 THE COURT: C224572, Domonic Malone. Mr. Malone is present in custody
5 with Mr. Pike, Mr. Patrick here.

6 MR. PIKE: And Mr. Lalli.

7 THE COURT: Defendant's Pro Per Motion for Speedy Trial. And pursuant
8 to EDCR if he is represented by counsel, you cannot file a pro per motion. If you
9 want to file that on his behalf, Mr. Pike or Mr. Patrick, you can do so.

10 MR. PIKE: Your Honor, it --

11 THE COURT: And Mr. Lalli for the State.

12 MR. PIKE: -- right. The Court Clerk accepted it. I can't file a motion. He's
13 making allegations against co-counsel and that -- so, if you want me to put a cover
14 sheet on it I can do that, but other than that, it's not something that I can file on his
15 behalf.

16 THE COURT: Okay. Mr. Lalli, anything to add?

17 MR. LALLI: No. Our position is the one adopted by the Court.

18 THE COURT: I'm going to deny the motion. It's not properly filed. Sir, if you
19 have some motions you want to file or you want filed --

20 THE DEFENDANT: Your Honor --

21 THE COURT: -- listen very carefully, sir. You are free -- your attorneys are
22 free to file any motion they deem appropriate. Since they represent you, you cannot
23 file it on your own behalf. You can talk to them and request them to file whatever
24 motions you warrant. So I'm denying it without prejudice.

25 THE DEFENDANT: Your Honor --

1 THE COURT: So if they think there's merit to it, they'll refile it on your
2 behalf.

3 THE DEFENDANT: Mr. Villani, along with that motion is an attorney that is
4 to withdraw counsel on my case; that's what I had asked them to do that and he
5 refused to do so.

6 THE COURT: Why? Are you going to hire your own attorney, sir?

7 THE DEFENDANT: No. Your Honor, I rather represent myself then to be
8 represented by the ones I'm currently represented by. If that's what I have to do,
9 that's what I'm going to do.

10 THE COURT: Okay, sir, we can have a -- I can give you a Faretta Canvass
11 not today. We can go through that, but understand that if I accept your -- your
12 request to represent yourself and right before trial, you can't come in and say oh by
13 the way --

14 THE DEFENDANT: No, I understand.

15 THE COURT: -- I don't want to represent -- sir, I don't want to represent
16 myself. If you're going go through this, then you're going to be your own attorney.
17 You have very serious charges. You've got murder kidnapping charges and I think
18 that would be -- you'd be well served to stay with your counsel here. And if there's a
19 personality conflict, I'm sure the three of you can work that out.

20 THE DEFENDANT: Your Honor, I brought this to your attention once before
21 and you said that they would have everything I asked for done by the time of my
22 trial. It has yet to be done. So I figured that it be best in my interest to represent
23 myself if I can make sure the things that I want done get done. That's it. You know,
24 so --

25 THE COURT: What do you want to be accomplished?

1 THE DEFENDANT: I have already submitted that in the motion once before.

2 THE COURT: Okay. What do you want? What do you want to
3 accomplished?

4 THE DEFENDANT: I wanted to see all the evidence that was against me.

5 THE COURT: Okay. Have you given --

6 THE DEFENDANT: I wanted them to call the certain witnesses that I had
7 wanted to call on my own. I have -- it's a whole host of many things, Your Honor. I
8 don't have no issue with them on a personal level, it's just with the case level.

9 THE COURT: Okay.

10 THE DEFENDANT: So in order for me to be represented properly, I must
11 represent myself.

12 THE COURT: Okay, Mr. Pike, have you given him all the discovery?

13 MR. PIKE: Yes, Your Honor. I went through and cataloged all of the
14 discovery. I've gone over it with him. I've provided it with him. I've got a receipt
15 indicating that he got everything that we received. We were prepared to go to trial
16 the last time as Your Honor's aware. It was continued based upon an issue with the
17 Co-defendant.

18 Now, when the Defendant comes in and says he doesn't have a
19 personal issue and he's filed a motion with the Court saying he wants us recused
20 because he believes one of us to be racist, then there is a big problem with that.
21 When he comes in as being disingenuous and what his motion is. And I've litigated
22 issue and issue and issue on this case and we have been prepared for trial. He
23 wants to invoke his -- reinvoke his right to a speedy trial. He waived that. We've
24 been prepared for trial. Your Honor's tried to set firm dates. In fact, you double set
25 it in April so that we can get an early setting for that. So the two things that he's

1 bringing before you at this point in time have nothing to do with the fact that he
2 doesn't have discovery and now he's just throwing that out there because he's not
3 getting any play on the racist thing. And so --

4 THE DEFENDANT: Actually --

5 THE COURT: Sir, one at a time.

6 MR. PIKE: -- so if he's -- I understand that he's frustrated that he's been in
7 jail for a long time. We've been prepared for this. We've gone back and we've
8 conducted a full and thorough factual investigation. We've completed a full and
9 thorough mitigation investigation and we're prepared to go to trial in April setting.
10 There has been nothing dilatory in our actions and we've not hidden anything from
11 him and I've personally can represent to the Court that I have cataloged every piece
12 of paper that we received and I've made that available to him.

13 THE DEFENDANT: And I'm telling the Court that I have not received all
14 that. There's video in this case that I have not seen yet, but that's not what I had
15 included.

16 THE COURT: All right. What we'll do, sir, we'll set a Faretta Canvass in a
17 couple of weeks here and understand if I accept your request to represent yourself
18 that's it.

19 THE DEFENDANT: Okay.

20 THE COURT: All right. And you're going to go to trial on murder charges,
21 first degree kidnapping charges. I can tell you I've had both Mr. Pike and Mr. Patrick
22 before me and they have zealously represented their clients in all occasions.
23 They've filed ever conceivable motion. They did not roll over and play dead. I can
24 assure you of that. I think you're making a very poor decision here.

25 THE DEFENDANT: That's a decision that I feel that I can make.

1 THE COURT: That's fine. And that's what you're going to stand by. All
2 right. We'll have -- we'll do this on a Friday a couple of weeks here.

3 THE CLERK: Next Friday, January 8th.

4 THE COURT: All right. January 8th; how's that Mr. Lalli?

5 MR. LALLI: That's fine, Your Honor. Thank you.

6 THE CLERK: At 8:15.

7 MR. PIKE: Your Honor, Mr. Cano and another representative from the office
8 will be there. I'm having surgery that day.

9 THE COURT: Okay. How's 9 o'clock work?

10 MR. LALLI: 9 o'clock.

11 THE COURT: We're double checking here to see if we have other matters
12 on. All right. We'll put it at 9 o'clock.

13 And, sir, if you have -- if you have second thoughts about it, just
14 you're free to contact your attorneys here and perhaps they'll come down and meet
15 with you to clear up any misunderstandings. Do you understand that?

16 THE DEFENDANT: Yes, sir.

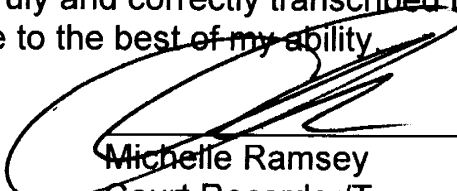
17 THE COURT: All right.

18 THE DEFENDANT: Thank you.

19 [Proceeding concluded at 8:30 a.m.]

20 * * * * *

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22 ATTEST: I hereby certify that I have truly and correctly transcribed the audio/video
23 proceedings in the above-entitled case to the best of my ability.

24 
Michelle Ramsey
25 Court Recorder/Transcriber

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4 DISTRICT COURT

Ann L. Williams
CLERK OF THE COURT

5 CLARK COUNTY, NEVADA

6
7 THE STATE OF NEVADA,

8 Plaintiff,

9 vs.

10 DOMONIC RONALDO MALONE,

11
12 Defendant.

CASE NO. C224572

DEPT. XVII

13
14 BEFORE THE HONORABLE MICHAEL P. VILLANI, DISTRICT COURT JUDGE

15 FRIDAY, JANUARY 8, 2010

16 **RECORDER'S TRANSCRIPT OF HEARING RE:**
17 **FARETTA CANVASS**

18 **APPEARANCES:**

19 For the State:

MARC DiGIACOMO, ESQ.
CHRISTOPHER LALLI, ESQ.
Deputy District Attorneys

22 For the Defendant:

23 DAVID M. SCHIECK, ESQ.
CHARLES A. CANO, ESQ.
Special Public Defenders

24
25 RECORDED BY: MICHELLE L. RAMSEY, COURT RECORDER

1 **LAS VEGAS, NEVADA; FRIDAY, JANUARY 8, 2010**

2 [Proceeding commenced at 9:13 a.m.]

3
4 THE COURT: Case Number C224572, State versus Domonic Malone. Mr.
5 Malone's present in custody with counsel, Mr. Schieck, Mr. Cano; and Mr. Lalli and
6 Mr. DiGiacomo for the State.

7 Mr. Malone?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: Last time we were in Court, I think you had voiced some
10 dissatisfaction with one of your attorneys. I think you had alleged that one of them
11 made a racial slur towards you --

12 THE DEFENDANT: Yes, sir.

13 THE COURT: -- is that correct, sir?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: And was it based upon that racial slur that you have the
16 desire now to represent yourself?

17 THE DEFENDANT: It wasn't that alone, sir. It was an ongoing thing, but
18 yes that was the final straw. Yes, sir.

19 THE COURT: Do you understand, sir, that you can't pick and choose your
20 attorneys? You can't say well I like one of the attorneys sitting at the desk and so
21 appoint me another attorney; do you understand that?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: Just for the record, I'm going to give some -- Wes, just for the
24 record -- Wes, can you hand -- it's a copy of the Information to the Defendant. I'm
25 assuming he's seen that before and I just want to make sure he has it here in Court.

1 Sir, have you reviewed the -- the Information that's been filed against
2 you?

3 THE DEFENDANT: Yes, sir. Yes, sir.

4 THE COURT: You've read all the charges that have been filed?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: And you understand that the State is seeking the death
7 penalty against you?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: And you still wish to represent yourself?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: Okay, sir, you can put on the record here; what's your
12 educational background?

13 THE DEFENDANT: I have a GED, sir.

14 THE COURT: All right. And have you ever studied law or taken any legal
15 classes?

16 THE DEFENDANT: No, sir.

17 THE COURT: Have you ever represented yourself in any criminal case
18 whether a felony, gross misdemeanor or misdemeanor case?

19 THE DEFENDANT: No, sir.

20 THE COURT: You have any health issues, sir, that you believe might affect
21 your ability to represent yourself?

22 THE DEFENDANT: The fact right now I can't see. No, sir.

23 THE COURT: Okay, well, let's talk about that. What do you mean you can't
24 see?

25 THE DEFENDANT: I almost could see colors without my glasses. I couldn't

1 even see you right now, but I hear you.

2 THE COURT: You can't see me?

3 THE DEFENDANT: No. I see colors. I see, you know, I know you wearing
4 black and you got some white up in it.

5 THE COURT: Are you able to see someone's facial features?

6 THE DEFENDANT: No, sir.

7 THE COURT: All right, sir, because there'll be witnesses testifying and
8 sometimes their demeanor on the stand could lead an attorney to -- to believe that
9 perhaps they're not being honest on the stand. Could lead an attorney to believe
10 that they are concerned about a line of questioning 'cause they can see perhaps see
11 some body language. And you're telling me that you're eyesight would prevent you
12 from seeing that; is that correct?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: Are there some glasses that would help you or just you just
15 have an eye condition that unfortunately is permanent?

16 THE DEFENDANT: No. I wear glasses. And I had got some, right.
17 Unfortunately, less than 30 days in wearing them 'cause the back of them was a
18 little bit short so they kept sliding on my face. And I do the important work up in the
19 units. I was catching the sheets and the glasses slipped on my face and right in
20 front of me and then it fell and cracked the glasses. Like I have them here.

21 MR. LALLI: Your Honor, can the record just reflect that he actually is holding
22 up --

23 THE DEFENDANT: Yeah, I'm holding it.

24 MR. LALLI: -- a pair of glasses in a bag?

25 THE COURT: He has it like in a Ziploc bag. Yes.

1 THE DEFENDANT: And this is how it came to me, in the bag. They cracked
2 like right here, like that.

3 THE COURT: All right, but right now, sir, if we went to trial today you would
4 not be able to see someone's facial expressions; is that correct?

5 THE DEFENDANT: No, sir. No, I would not.

6 THE COURT: And would you be able to see any gestures that a witness
7 would make?

8 THE DEFENDANT: No, sir. I can't barely see you now. Like I told you --
9 like I stated earlier, the only thing I see is colors.

10 THE COURT: You have any other health issues, sir?

11 THE DEFENDANT: No, sir.

12 THE COURT: Are you on -- are you taking any type of medication?

13 THE DEFENDANT: No, sir.

14 THE COURT: Have you been prescribed any type of medication?

15 THE DEFENDANT: No, sir.

16 THE COURT: Have you ever been treated for any mental illness?

17 THE DEFENDANT: Can you be more specific, sir?

18 THE COURT: Well, regarding any mental depression. I mean there's a list
19 of types of mental illness. I can't give you an all encompassing list, but like
20 depression, schizophrenia, bipolar. I mean, I'm not trying to limit different types of
21 mental illness, but have you ever been diagnosed with any type of mental illness?

22 THE DEFENDANT: I do not know if I have been diagnosed, but between the
23 ages of I think 15, maybe 16 years I was in Charter for awhile. Yes.

24 THE COURT: Charter Hospital here?

25 THE DEFENDANT: Yes.

1 THE COURT: Okay. Do you know why you were there?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: Why?

4 THE DEFENDANT: Attempted suicide, sir.

5 THE COURT: Okay. And that was as a --

6 THE DEFENDANT: That was as a young adult, Your Honor.

7 THE COURT: I'm sorry, how old were you when that happened?

8 THE DEFENDANT: Between the ages of 15 and maybe 16.

9 THE COURT: How old are you now, sir?

10 THE DEFENDANT: I am 29, sir.

11 THE COURT: But since that time you have not had any other issues?

12 THE DEFENDANT: No, sir.

13 THE COURT: Has anyone threatened you to waive your right to have an
14 attorney?

15 THE DEFENDANT: No, sir.

16 THE COURT: Do you understand that you have the right to be represented
17 by a licensed attorney? Actually in this type of case to be represented by two
18 licensed and well experienced attorneys?

19 THE DEFENDANT: Yes, sir, that was my understanding of the 250 case
20 being -- being a capital punishment; that was my understanding of it. Yes, sir.

21 THE COURT: Okay. And the Court has appointed two very experienced
22 attorneys to represent you; do you understand that?

23 THE DEFENDANT: Yes, sir. I'm fully aware of understanding that.

24 THE COURT: And I would assume that together your attorneys probably
25 have defended perhaps 50 death penalty cases or murder cases.

1 THE DEFENDANT: Yes, sir. They do -- they do qualify.

2 THE COURT: Sir, you said before you are aware of the charges filed
3 against you?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: And just for the record you have a copy of the Information?

6 THE DEFENDANT: Yes, sir. You gave me --

7 THE COURT: Do you have of that before today?

8 THE DEFENDANT: Yes, sir, I have. Actually, I have two with me.

9 THE COURT: All right.

10 THE DEFENDANT: You know, 'cause it was amended at one time.

11 THE COURT: Okay.

12 THE DEFENDANT: So, yes, sir.

13 THE COURT: Do you know what the possible defenses are to a murder
14 case?

15 THE DEFENDANT: Yes, sir. I understand that in death cases the -- well the
16 goal, the main goal in a death case is the where at once your secure the life of the
17 Defendant you will try it in your best of interest to try get him acquitted, but it also is
18 a ranges all the way down to I believe a manslaughter; that's the lowest form of
19 murder that my understanding as far as the less of murder it go. So, yes, sir.

20 THE COURT: Do you know how to argue for a lesser included offense?

21 THE DEFENDANT: Just basically understanding of it how it was explained
22 in the legal library that I use at the CCDC. Just limited. Yes, sir.

23 THE COURT: Do you know what aggravating circumstances are?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: What are they?

1 THE DEFENDANT: Aggravator circumstance is the crime itself, criminal
2 history background and the things that would I guess around that right there; that's
3 as much I understand it.

4 THE COURT: Do you know what mitigating circumstances are, mitigating
5 factors?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: I'm not asking for your specific ones, but can you give me a
8 list of general -- general mitigating factors?

9 THE DEFENDANT: My understanding with the one dealing with the life of
10 the individual of background, criminal history background, you know, character in
11 general; that's all I got right now.

12 THE COURT: Sir, do you know what the possible penalties are on murder,
13 first degree murder?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: What are they?

16 THE DEFENDANT: Death is its death, sir.

17 THE COURT: Is that the only possible penalty?

18 THE DEFENDANT: No, sir.

19 THE COURT: What are the other penalties?

20 THE DEFENDANT: I believe it's 25 to life, 50 to life, something like in that
21 range like I said.

22 THE COURT: Are you aware of any other penalties, possible penalties?

23 THE DEFENDANT: Well, first degree now I know is life with, life without.

24 THE COURT: Okay. Do you know what the penalties are for first degree
25 kidnapping?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: What's the penalty?

3 THE DEFENDANT: It's a life sentence, sir.

4 THE COURT: Is that the only penalty?

5 THE DEFENDANT: No, sir. You have a 15 to life. You have a 5 -- you
6 have a 5 to life and you have a 5 to 15, sir.

7 THE COURT: Do you know what the penalty is for battery with substantial
8 bodily harm?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: What's that penalty?

11 THE DEFENDANT: One to six, sir.

12 THE COURT: How about charge of pandering?

13 THE DEFENDANT: I believe that's a 1 to 5 or 1 to 6, sir, as well.

14 THE COURT: Have you researched any of the possible penalties for these
15 charges filed against you?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: You know what the possible penalty is for conspiracy to
18 commit burglary?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: What's that?

21 THE DEFENDANT: That's a gross misdemeanor, sir.

22 THE COURT: How much time can you get for that charge?

23 THE DEFENDANT: Up to 1 year in the County, sir.

24 THE COURT: Any other penalty?

25 THE DEFENDANT: That's the only one I know.

1 THE COURT: How about conspiracy to commit kidnapping; do you know
2 what the possible penalty is for that charge?

3 THE DEFENDANT: That is a 1 to 6, sir.

4 THE COURT: How about robbery with use of a deadly weapon?

5 THE DEFENDANT: It's a 2 to 15, sir. The max I believe is 6 to 15, sir.

6 THE COURT: The maximum is 6 to 15?

7 THE DEFENDANT: I believe so without the use. Yes, sir.

8 THE COURT: Sir, are you familiar with the elements of all the crimes we just
9 went over?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: What's the element of murder?

12 THE DEFENDANT: The victim dead.

13 THE COURT: Okay. Any other elements?

14 THE DEFENDANT: The circumstances surrounding the death, sir. I believe
15 that in the commission of a felonious act, I believe that would be the robbery,
16 burglary that gives it the first degree, sir.

17 THE COURT: Do you know what the definition -- definition is of
18 premeditation?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: What is that definition?

21 THE DEFENDANT: That you thought and planned out and you carried out a
22 murder of a person, sir.

23 THE COURT: How long does that -- how well in advance is that plan have
24 to take place?

25 THE DEFENDANT: In the book, it didn't say no said time, sir.

1 THE COURT: Do you know the definition of malice of forethought?

2 THE DEFENDANT: No, sir. I really don't.

3 THE COURT: How about deliberation?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: And what's the definition of deliberation relating to murder?

6 THE DEFENDANT: With the intentions to commit the murder. Deliberately
7 did it. You know, it wasn't no -- no second thought. This is what you -- basically, a
8 person that was cold-hearted enough to do that, sir.

9 THE COURT: How long does that deliberation have to take?

10 THE DEFENDANT: It really did not say, sir.

11 THE COURT: You understand that if you went to trial and were found guilty
12 of more than one charge, that the Court can sentence you consecutive time?
13 Meaning you would serve one sentence, complete that sentence and then serve a
14 second sentence; you understand that, sir?

15 THE DEFENDANT: Yes, sir, that was my understanding.

16 THE COURT: You understand if you represent yourself, you're on your own,
17 sir. The Court can't help you with the proceedings here; do you understand that,
18 sir?

19 THE DEFENDANT: I must -- well, yes, sir, I understood that, but I was on
20 my own. I had Twombly versus de Papa, but unfortunate due to the incident that
21 happened Monday, I wasn't able to go to legal library, but they cited a -- the same
22 case, but they said it was reversed and they gave me another number. I haven't
23 had a chance to look that over yet. Where I was understanding that I reserved my
24 right to having I think the use of a standby counsel, sir.

25 THE COURT: Do you understand, sir, that as a Judge I cannot help you try

1 your case or advise you how to try your case?

2 THE DEFENDANT: Oh, yes, sir. I'm aware of that, sir.

3 THE COURT: And I cannot help you in any way?

4 THE DEFENDANT: Yes, sir. I understand that.

5 THE COURT: And there isn't two sets of criminal procedure rules; one for
6 attorneys and one for individuals representing themselves. You'll be held to the
7 same standard as an attorney; do you understand that, sir?

8 THE DEFENDANT: Yes, sir. You have asked me that once before, sir.

9 THE COURT: Sir, I just noticed that you looked down at the paperwork in
10 front of you and it appeared to me that you were reading it and its about -- you have
11 to keep it about 6 or 8 inches from your -- from your eyes to read it; is that correct,
12 sir?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: Sir, you understand that the Deputy District Attorneys who will
15 be prosecuting this case are very well experienced, they're skilled, they've been
16 trained quite extensively; do you understand that, sir?

17 THE DEFENDANT: Yes, sir. I'm very well aware of Mr. Lalli and Mr.
18 DiGiacomo, sir.

19 THE COURT: And that you -- it appears that you are unfamiliar with the
20 legal procedures; is that correct, sir?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: Do you understand by your lack of understanding of all of the
23 elements of the crimes, the definition of the elements of the crimes is going to put
24 you at a disadvantage in this case?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: You understand by being a Defendant and in effect your own
2 attorney that could have an adverse impact on you, sir?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: Do you understand that the Court cannot grant you any
5 special library privileges?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: Are you familiar with the Nevada Evidence Code, sir?

8 THE DEFENDANT: I've read some of it, sir, but not all of it. No, sir.

9 THE COURT: Do you know what hearsay is?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: What's hearsay?

12 THE DEFENDANT: Hearsay is -- mean you, as you carry me now, I go to
13 Mr. Cano which you had just told me. Mr. Cano was not there, but what I gave him -
14 - I mean, I was direct evidence, but I told Mr. Cano never make a hearsay, sir.

15 THE COURT: Do you know what the exceptions are to the hearsay rule?

16 THE DEFENDANT: Vaguely. I think a dying declarant is one that I had
17 looked over, so.

18 THE COURT: Do you understand that our evidence code governs what
19 evidence is admissible in inadmissible; do you understand that, sir?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: You understand that if you represent yourself, you have to
22 abide by all the rules of evidence and the criminal rules of procedure?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: Do you know what voir dire means?

25 THE DEFENDANT: Voir dire?

1 THE COURT: Voir dire; do you know what that means?

2 THE DEFENDANT: As we speaking now, I believe so. Yes, sir.

3 THE COURT: Do you know how to conduct a voir dire examination?

4 THE DEFENDANT: I think to my understanding I would not go voir dire. I'd
5 take the word of which is the one speaking of like as today as this is what I'm
6 offering. Like I don't think that I'm offering it as a -- as a truth of the matter. It's just
7 that that's where we're going, sir. This is what this person speaks as of today.

8 THE COURT: Do you know what the term peremptory challenge means?

9 THE DEFENDANT: Sir?

10 THE COURT: Do you know what the term peremptory challenge means?

11 THE DEFENDANT: No, sir.

12 THE COURT: Do you know what the grounds are for excusing a potential
13 juror?

14 THE DEFENDANT: No, sir.

15 THE COURT: Excuse them for cause. Excuse me?

16 THE DEFENDANT: No, sir. I didn't get to the jury part yet, sir, in the book.

17 THE COURT: Do you know what the Crawford Rule is?

18 THE DEFENDANT: No, sir, but I have heard of it. Yes, sir.

19 THE COURT: You know what the best evidence rule is?

20 THE DEFENDANT: No, sir, but I came across that as well.

21 THE COURT: Do you know what the difference is between an open
22 statement and closing argument?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: What's the difference?

25 THE DEFENDANT: Opening statement is all the things that I as I or the

1 District Attorney would represent to the Court as the jury of the case this is how the
2 case is going to go and this is what they tend to prove or disprove. And in my
3 closing argument, I just reinforce that what I said in opening statements, sir. Or
4 something in effect of try to sway the jury in my favor or not in my favor, sir.

5 THE COURT: You know when character evidence is appropriate during the
6 trial, sir?

7 THE DEFENDANT: Well, in the book it didn't tell me how to use it in the
8 trial, but I understand the purpose of a character evidence. Yes, sir.

9 THE COURT: Sir, do you know how to make a proper objection during --
10 during examination of a witness?

11 THE DEFENDANT: Other than what I have seen in the courtroom, sir, that's
12 about the basic minimal knowledge that I know, sir.

13 THE COURT: So you really don't know how to do that do you?

14 THE DEFENDANT: Not as a direct. No, sir.

15 THE COURT: Do you know how to proffer evidence to protect the record for
16 appeal?

17 THE DEFENDANT: Proper evidence to protect the record from appeal?

18 THE COURT: No. How to proffer evidence?

19 THE DEFENDANT: Proffer?

20 THE COURT: Make an offer of proof.

21 THE DEFENDANT: Oh. Yes, sir.

22 THE COURT: Are you familiar with the motion for a mistrial, sir?

23 THE DEFENDANT: No, sir. I'm not familiar with it. I just heard about it, but
24 no, sir, I'm not familiar. I've never looked into that, sir.

25 THE COURT: Do you know what the grounds are for a mistrial?

1 THE DEFENDANT: It's a lot of grounds for a mistrial that I understand.

2 THE COURT: Give me a couple.

3 THE DEFENDANT: I can give you -- well, when we did a motion in limine, if
4 the District Attorney goes beyond their motion of the limine, then a person can
5 request for a mistrial. Something that's procedural incident that a witness are so in
6 a -- we can also request a mistrial, but it's up to the Judge to grant the mistrial or not
7 or just take it up in the Court's of Appeal, sir.

8 THE COURT: Are you aware that if you -- if there's a failure to timely object
9 for a motion for mistrial could be waiving certain mistakes made in the trial; do you
10 understand that, sir?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: So do you understand that if you fail to object to certain
13 evidence that comes into the trial that could have an adverse impact on any appeal
14 you might make?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: Do you realize if you represent yourself, sir, and if you are
17 convicted that you can't complain on appeal that you had a -- that there was
18 ineffective representation?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: So you're clear this means that if you are convicted, you can't
21 complain to the Supreme Court that your attorney, you, didn't do a good job; do you
22 understand that?

23 THE DEFENDANT: Yes, sir, 'cause I was the attorney or primary one.
24 However, it plays out yes I'm the primary attorney, sir. Yes, sir.

25 THE COURT: Sir, it's clear to this Court that you do not completely

1 understand all the elements of the crime, the possible defenses. Since this is a
2 capital murder case you have the right if the jury finds you guilty of first degree
3 murder, you have the right to present mitigating factors on your behalf. It doesn't
4 appear to me that you're aware of all those factors or how to present those.

5 THE DEFENDANT: Yes, sir. That was my understand that being it's a 250
6 case I thought that perhaps that I would be granted the standby counsel that would
7 be somebody that was specialize in the death penalty part of the case, sir. You
8 know, my life is on a death situation, sir.

9 THE COURT: Sir, is one of the reasons why you want to represent yourself
10 was because someone made an alleged racial slur towards you?

11 THE DEFENDANT: That's not the only reason, sir.

12 THE COURT: You made -- you said that last time we were in Court. You
13 said I think one of your defense attorneys said -- made a racial remark towards you.

14 THE DEFENDANT: Yes, sir.

15 THE COURT: Is that one of the reasons you want to represent yourself?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: What's the other reason?

18 THE DEFENDANT: There's certain things that I had wanted the attorney to
19 do and I was told that he would do it or he would get to it, but it never got done. So I
20 figured the only way to get anything done is for me to do it myself.

21 THE COURT: Well, sir, perhaps what you want to be done is not legally
22 proper and that's a decision that your attorneys make or they're in the process of
23 preparing your defense. So what you have asked them to accomplish may not be
24 accomplished at this point, but if it's legally proper I'm sure your attorneys will
25 accomplish whatever request you have if it's proper for your case, if it will assist in

1 your defense; do you understand that?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: Okay. So is it your belief that they will refuse to -- your
4 attorneys are refusing to present evidence that will defend you in this case?

5 THE DEFENDANT: No, sir. I feel that we have two different directions that
6 conflict -- clashes with each other. You know, though that some of those things that
7 we do agree on, there's some things that we do disagree on, sir. And I -- but the
8 things that I had shown them the ones that I feel that adhere to me what's most
9 important I showed that I had legal merit. I showed the -- the mistakes that was
10 made up in that. And I had point out that it was a [indecipherable] that I did make up
11 in that situation, but like I had explained it to them and I think you had explained it to
12 me that the Supreme Court is going to say what Malone failed to do, not what the
13 attorneys failed to do.

14 So these are the things that I had tried to get stressed over to my
15 attorney and that's the reason for me to have to represent myself to properly make
16 sure that I cover all the grounds, sir.

17 THE COURT: But also -- but your -- what I'm hearing from you is that you're
18 requesting that you want to represent yourself, but also have standby counsel; is
19 that correct?

20 THE DEFENDANT: Yes, sir, for the mitigation part, sir. The death part as I
21 understand it. Yes, sir.

22 THE COURT: Do you think you should have an attorney so you don't even
23 get to that part?

24 THE DEFENDANT: Well, sir, I -- I do not wish to get to that point. However,
25 since my 4 years of being here and fortunately this how it is. You know it's nothing

1 that we can do about it, but being that I have like such a scattered amount of
2 charges, I'll be found guilty of something, right. So there was never a doubt in my
3 mind that because of the numerous charges that I will be happy.

4 My thing was that I was just trying to take care of myself. Again, that
5 would [indecipherable]. These are the things that I have I can do, but I understand
6 that I can't fight everybody in this courtroom, sir. So this is just a natural course of
7 highs and lows.

8 THE COURT: You had mentioned earlier, sir, that you had requested your
9 attorneys to pursue certain legal avenues in this case, research certain matters and
10 they have not accomplished that at this time; is that correct?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: Okay. Don't tell us what you have requested.

13 THE DEFENDANT: Oh, no.

14 THE COURT: No. Hang on. Hang on. Don't tell. I'm not asking you to tell
15 what you have requested, but have your attorneys told you that they are going to
16 refuse to follow-up on leads you have given them?

17 THE DEFENDANT: Well, it was --

18 THE COURT: Okay, it's a yes or no, sir, because I don't want to get into the
19 facts 'cause that's not appropriate.

20 THE DEFENDANT: No, sir, it wasn't no directly involved.

21 THE COURT: Okay, so they've never said we're not going to do it. They
22 just -- they just have not accomplished it yet; is that correct?

23 THE DEFENDANT: No, sir. They have not accomplished it yet.

24 THE COURT: So if they had accomplished your request as of this date,
25 would you be seeking to represent yourself?

1 THE DEFENDANT: I believe in my request was I carried out, sir, I don't
2 think that I would still be your courtroom, sir.

3 THE COURT: Okay, but my question is, if all of your requests have been
4 followed, would you still be seeking to represent yourself?

5 THE DEFENDANT: No, sir. I don't think there would be a need to.

6 THE COURT: Well, sir, it's clear to me that you really don't, as I mentioned
7 before, you know all the elements, you know all the defenses. This is a capital case.
8 You're not really familiar with the rules of evidence, criminal rules of procedures and
9 my opinion is it's unwise for you to represent yourself in this case because of the
10 various serious charges; do you understand that, sir?

11 THE DEFENDANT: Yes, sir. I understand that for anybody that's in this
12 type of situation as I qualify, it is a very dangerous situation here even though I'm
13 trying to get everything to protect my life. I could also be in return doing everything
14 possibly to make it easier for my life to be taken from me, sir. I understand that. But
15 I feel that's what I have to do because as -- when you -- when I first came into your
16 courtroom and I had addressed the issue to you about these trials they keep trying
17 to go to trial and I told you at one time about the attorneys and stuff, you said that
18 they would have enough time to do it. Come trial which was set for October of I
19 believe 2009. So in that timeframe I was like going over which I had told me that it
20 would be able to get done, but it has not get done. So I don't think that that would
21 ever be a chance it will be done. So I humbly waited as much you had directed me
22 to do which was get on time to do it and it had yet to be done. So I'm my back
23 against the wall and this is the only option that I have so I must stick it. I do not want
24 it, but I have too.

25 THE COURT: Well, what I've heard from you is they have completed this

1 request of yours that you wouldn't be here this morning.

2 THE DEFENDANT: Yes, sir.

3 THE COURT: And, sir, like I had mentioned to you before, it's clear to this
4 Court you really don't have a grasp of the law, the evidence, rules of procedure, the
5 specific elements of the crime, the defense of the crime that -- that your request
6 here is, at least in my opinion, is not well founded; do you understand that, sir?

7 It's against your best interest to represent yourself in this case. You
8 have two very seasoned attorneys. I don't know if Mr. Schieck's going to be
9 representing you in this case --

10 THE DEFENDANT: No, Mr. Schieck is not.

11 THE COURT: -- but I think Mr. Pike was your attorney and I've had a case
12 with Mr. Cano, Mr. Pike and they're very experienced attorneys and I can tell you
13 they aggressively defend their clients; do you understand that, sir?

14 THE DEFENDANT: Sir, yes, sir. I understand what you're telling me, sir,
15 right. And it's kind of like a double standard like to a certain because personally
16 they are all good people, you know. They just different. We're a different people. I
17 don't have a problem with them as a personal level like he's a human being, he's a
18 nice guy, he's a decent human being. Both of them are and Mr. Schieck is too and
19 so is Mr. DiGiacomo. I haven't really dealt with Mr. Lalli before, sir.

20 In the process of doing that though, its like this is my life here. And I
21 just can't -- I cannot leave no -- no rooms for -- wiggle room for that, you know. This
22 is a court proceeding. This is not like me and him can go barbeque or anything like
23 that. This is like work. And this is my life, so this is something that I hold dear to
24 me, sir. So I must protect it at all costs even if it is going up against a well trained
25 machine, sir.

1 THE COURT: Do you think you'll protect your rights better having two
2 seasoned attorneys representing you versus somebody that really doesn't have any
3 clue as to the criminal procedure?

4 THE DEFENDANT: Yes, sir, I do believe that, but I believe that the results
5 that I'm trying to avoid would be eminent by keeping them, sir.

6 THE COURT: You have anything to add Mr. Schieck or Mr. Cano? No?

7 MR. CANO: No, Your Honor.

8 THE COURT: Okay. Mr. Lalli, Mr. DiGiacomo?

9 MR. LALLI: Your Honor, I think it's important for the Defendant to
10 acknowledge that there is a Co-defendant in this case; that Co-defendant is
11 represented by two very experienced attorneys and during the course of the trial
12 they could very well suggest that this Defendant, Mr. Malone, is culpable as
13 opposed to their own client. So in addition to the rigors of defending a case, he
14 would also be called upon to deal with that potential as this trial unfolds. I would
15 want to make sure he's aware of that as well.

16 THE COURT: Do you understand that, sir?

17 THE DEFENDANT: Yes, sir. It was my --

18 THE COURT: Next, sir, you could have not only the 2 prosecutors arguing
19 against you. You could have the 2 attorneys who represent the Co-defendant argue
20 against you. You could have 4 attorneys arguing against you; you understand that?

21 THE DEFENDANT: Sir --

22 THE COURT: You understand that, sir?

23 THE DEFENDANT: Yes, sir. Since we had started this case, that's been my
24 whole understanding that I was going up against 4 attorneys, sir. That's how it
25 seemed like it was playing out in the previous Courts, sir.

1 THE COURT: Do you think you would have a better chance of meeting
2 some of these charges if you had two seasoned attorneys helping to fight for your
3 rights?

4 THE DEFENDANT: Sir, well I still -- look, two people versus four people yes
5 they're seasoned, they're a great, sir, but you're still outnumbered and though they
6 will fight the best way you can and with the ability you can you still end up losing
7 because you're outnumbered. So even if I do it by myself or with them, I still see the
8 same adverse effect.

9 What unfortunately without going into details the Co-defendant and I
10 recognize that --

11 THE COURT: No. Don't talk about the facts of the case, sir.

12 THE DEFENDANT: No, I'm not, sir. It's -- it's one of those -- it's like a
13 poster thing with that, sir. So pretty much show and tell with that one, sir. So that's
14 the only thing that I have.

15 THE COURT: And after everything you've been advised of this morning, sir,
16 you still wish to represent yourself?

17 THE DEFENDANT: Yes, sir. I feel as though I have no choice, sir.

18 THE COURT: And it's your decision this morning voluntary on your part to
19 represent yourself?

20 THE DEFENDANT: Well, as I sit up in this courtroom, sir, yes I try many
21 times to get other attorneys, but I was denied. I was unsuccessful in getting those.
22 So, therefore, the only option that I have is this. I can't say that if I put a gun to my
23 head anything like that 'cause nobody had done that, but I feel that this is the only
24 option I have. So, yes, sir, I have to take it. I feel as I'm compelled to take it, sir.

25 THE COURT: And you understand the difficulty of representing yourself?

1 THE DEFENDANT: Yes, sir. It's a very difficult situation.

2 THE COURT: Well, the Court does find that the Defendant has knowingly
3 and voluntarily waived his right to counsel. Although it's a, you know, a bad decision
4 on your part, sir. I am concerned about your physical limitations specifically your
5 eyesight. And you had mentioned that you can't even see my face, any facial
6 expressions and it appears to me during these proceedings you've been trying to
7 read a paper in front of you and you have to place it 6 to 8 inches from your eyes to
8 read it.

9 THE DEFENDANT: I was given Rule 253, a copy of it.

10 THE COURT: No. I understand that, I'm just saying but it looks like when
11 you read you have to put it like 6 to 8 inches from your -- from your face.

12 THE DEFENDANT: A little bit closer, yeah. That's what calling wearing
13 glasses I believe.

14 THE COURT: I think this Court has discretion not to grant his motion to
15 represent himself. I find that his physical limitation of his eyesight is substantial
16 enough that it's not appropriate that he represent himself in this matter.

17 MR. LALLI: Your Honor, may I be heard?

18 THE COURT: Yes.

19 MR. LALLI: Based upon the canvass, it is our position that he meets
20 eligibility for self representation. We would also suggest to the Court that it is his
21 constitutional right to do so. I share the same concerns that the Court has with
22 respect to his eyesight. I think the reason the Defendant's not wearing glasses was
23 because the frame of the glasses broke and then the actual lense is out.

24 THE DEFENDANT: Yes.

25 MR. LALLI: So I think perhaps the Court's concerns could be allayed if

1 simply there were some order in place for him to get those glasses repaired.

2 In addition, we would certainly urge the Court to appoint Mr. Cano
3 and Mr. Pike as standby counsel and certainly they can help facilitate things like the
4 repair of his glasses and those sorts of ancillary things that he might not be able to
5 do on his own, but we believe that this canvass has satisfied the constitutional
6 requirements of self representation.

7 THE COURT: Mr. Schieck?

8 MR. SCHIECK: Our position is the State shouldn't have a position on
9 whether or not he qualifies; that's the Court's decision.

10 THE COURT: Yes. You're absolutely correct.

11 MR. SCHIECK: Obviously it's much easier for the State to go to trial against
12 Mr. Malone representing himself than it is going with -- with attorneys representing
13 him. So I don't think the State's position on that should bare any weight with this
14 Court.

15 With respect to the glasses, he does have them here and we can see
16 about getting that remedied, but I don't think the State's position on that should --
17 should hold any water here. And we're not taking any position; that's the decision
18 the Court has to make in that respect.

19 THE COURT: I didn't -- my question was if they just had anything to add
20 here. It's clearly the Court's duty to make it's own decision in this matter. And as I
21 had mentioned, I do find that he is competent to waive his constitutional right to
22 represent himself as his own attorney. I do believe that there hasn't been any
23 pressure put on him, that he's waiving his right to counsel freely, voluntarily and
24 knowingly. And he has a full appreciation of the waiver and its consequences, the
25 many negative consequences in this case.

1 However, because of certain -- like I said, his eyesight issues and
2 due to the nature of these charges, I am going to appoint the Special Public
3 Defender's Office as standby counsel in this case.

4 THE DEFENDANT: See, and that's what I was trying not to do because I
5 figured that as much as a standby counsel would be one counsel is the one I was
6 trying to remove.

7 THE COURT: Well, sir, I'm going to appoint standby counsel. You can --
8 you can request help from them or not; that's strictly up to you.

9 THE DEFENDANT: It was -- it wasn't that, sir. It's just that in the process of
10 me doing all this that I had not attached to the -- the -- the motion for ineffective
11 assistance of counsel was 1983 because they don't put those in a legal library. You
12 have to send out for those and I had sent out for them and I had got them. I just had
13 not went to the procedural process of putting those together, sir. And I was trying to
14 avoid all of that doing -- trying through the Special Public Defender's Office 'cause I
15 don't really want to wish to do that. I just wish to just continue on with my case and
16 get on with my life.

17 However, as like -- as I knew that was also an option as well to just to
18 sue the office and I really [indecipherable] what I'm trying to do that, sir.

19 THE COURT: Well, I understand that, sir, but I'm nevertheless I'm
20 appointing them standby counsel and they can assist you with any investigation of
21 this case; and also if you don't, Mr. Schieck, if you could -- I don't know if you want
22 to contact the appropriate people so that we can get him his glasses fixed. Or,
23 Officer, do you know they go about doing that?

24 [Colloquy between the Correction's Officer and Defendant]

25 THE COURT: Is it just the frame broken, sir, is that the problem?

1 THE DEFENDANT: Yeah, just a little snap thing and the bottom of the
2 glasses was short that's why they kept slipping off my face.

3 MR. SCHIECK: Your Honor, in fact, we arranged to get those glasses from
4 Mr. Malone, send him out to have his eyes examined and had those glasses
5 provided to him. It may just take a drop of superglue to fix.

6 THE COURT: Okay.

7 MR. SCHIECK: It's a small bottom portion of the frame. And if we -- if we
8 could take possession of those today we could probably glue those and get them
9 back to him.

10 THE DEFENDANT: [indecipherable]

11 THE COURT: Okay, sir, do you have any objection to Mr. Cano or Mr.
12 Schieck taking possession of your glasses to see if they can repair the frame?

13 THE DEFENDANT: No, sir. I just got to get them information that's helping
14 them out. Yes, sir.

15 THE COURT: Okay. Just like there's a piece of paper in that bag?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: All right. If you can remove the paper and then give the
18 glasses to the Correction Officer and she can hand it to the attorneys and they'll see
19 what they can do to have the frame repaired.

20 All right. Now we just need -- do we have a trial date; correct?

21 MR. LALLI: Yes, Your Honor.

22 MR. SCHIECK: Could I address the issues of standby counsel, Your Honor?

23 THE COURT: Yes.

24 MR. SCHIECK: And clearly Rule 253 does not contemplate the standby
25 counsel is -- is required to advise the client or to provide legal advice to Mr. Malone.

1 He's chosen and this Court has allowed him to represent himself and that is standby
2 means we are -- we are simply standing by. We are not providing advice to Mr.
3 Malone; that's my understanding of standby counsel.

4 Additionally, we are not a copy service and we are not a runner
5 service for Mr. Malone. He is representing himself. We will accommodate and
6 providing him things regarding his case, but nothing further. And the concept that
7 they're going to be wild goose chases undertaken at the expense of the County
8 because Mr. Malone is choosing to represent himself is not going to happen. And
9 certain decisions that legal counsel make in a case having to do with -- with
10 representing any case are based on those years of experience on what, you know,
11 what his wild goose chase and what is not. And so I think there needs to be an
12 understanding that standby counsel is not a runner service.

13 THE COURT: I think -- do you understand that, Mr. Malone?

14 THE DEFENDANT: Yes, sir. My only thing I needed was a private
15 investigator and my whole case file; that's it. It's just only certain witnesses that I
16 had wanted to talk too that's already up on this --

17 THE COURT: Well, you're not going to use their investigator.

18 THE DEFENDANT: That's all I have

19 THE COURT: We can have another -- sir, listen. We'll have an investigator
20 appointed for you.

21 THE DEFENDANT: Yes.

22 THE COURT: Okay, but you're not going to use the Special Public
23 Defender's investigator.

24 THE DEFENDANT: Uh-huh.

25 THE COURT: 'Cause basically you say you don't want their services, but

1 I'm going to have them standby. Again, which just means if you have a question for
2 them perhaps some procedures, I don't know what question you may have, but they
3 could give you some information, but they're not your attorney; do you understand
4 that?

5 THE DEFENDANT: Oh, yes. I understand that. You know, ever since you
6 told me I haven't made an effort to call the office or whatever. You know, I just --
7 except for one time I told Mr. Cano that I guess I gave him phone notice that I will be
8 requesting the whole file on my case and that's about it.

9 THE COURT: Do you understand, sir, there's a lot of people in prison who
10 represented themselves?

11 THE DEFENDANT: It's a lot of people that -- that represent themselves in
12 prison. There's a lot of people who is represented by attorneys that's in prison too,
13 sir, because of a lot of mistakes that are made procedural mistakes or just the -- the
14 -- the ability to do things that the Public Defender's Office are not able to do; that
15 type of stuff. However, that -- like I had explained earlier I understand.
16 Unfortunately, that's how it is, you know, we're not here to change. We're just trying
17 here to get along and deal with what we have, sir.

18 THE COURT: Well, as you know, I think you're making an unwise decision.
19 You have two very fine attorneys who agreed to represent you, but that's your
20 decision, sir.

21 All right. Anything else?

22 MR. SCHIECK: Your Honor, and there are certain things that Mr. Malone
23 has requested that the jail will not allow him to have with regards to his case such as
24 DVD's and CD's. He has no ability to play those things any way and the jail won't
25 allow him to have those in his property, so if he's requesting us to provide things we

1 can't provide because the jail says you can't give them to him I don't know what --
2 how the Court wants to handle that situation with Mr. Malone.

3 THE COURT: Officer, if he was represented by an attorney and they wanted
4 to show him or allow him to listen to a CD or watch a DVD, you know, a videotape of
5 something how does an attorney go about doing that?

6 MR. SCHIECK: We take them in and can show it to him and we take them
7 back out.

8 THE DEFENDANT: Yeah.

9 MR. SCHIECK: Okay. That's has been done. We can't give him physical
10 copies --

11 THE COURT: Right.

12 MR. SCHIECK: -- of those DVD's or the ability to play those.

13 THE COURT: Okay. Yes, sir.

14 THE DEFENDANT: I understand that. You know, I understand that when I
15 request for the whole file, I was just encompassing the whole file. I understand that
16 certain -- certain discs that I can't have 'cause how it was played to me was played
17 on the computer, right. So I understand that I don't have a computer in the jail.
18 However, it's the rest of the file that's not [indecipherable] can't be transcribed to
19 paperwork that I can have. And these are the things in my file that I wanted. And --

20 THE COURT: Well, I understand that your attorneys had given you a copy
21 of the file.

22 THE DEFENDANT: I have given that. I have given that back to them, so I
23 don't have nothing.

24 THE COURT: Okay.

25 THE DEFENDANT: And they don't --

1 THE COURT: Mr. Schieck, Mr. Malone said he gave the copies back to
2 you?

3 MR. SCHIECK: My understanding is he's been provided with everything, but
4 some things he has given back to us that we are holding. We can make -- make --

5 THE COURT: All right.

6 MR. SCHIECK: -- arrangements to give those back to Mr. Malone.

7 THE COURT: Mr. Schieck and Mr. Cano is going to return those items to
8 you, sir.

9 THE DEFENDANT: Yeah. And there's some things that I asked for that was
10 not transcribed such as telephone --

11 THE COURT: Well, sir, that's -- that's the issue of representing yourself.
12 You need to file a motion. If there's a discovery issues, you need to file a motion
13 and you don't know how to do that.

14 THE DEFENDANT: No. I'm the one that do that. It was --

15 THE COURT: Okay. All right, so you have a copy of the file. You're
16 missing some documents that you returned to Mr. Schieck or Mr. Cano. They're
17 going to turn that back over to you in the next couple of days, okay. If there's other
18 issues, you need to file the appropriate motion.

19 THE DEFENDANT: Yes, sir.

20 THE COURT: Okay. And understand that if your motions are not proper
21 form, it's not properly prepared or it's not a legal basis for it, then more than like the
22 Court's going to deny it; do you understand that?

23 THE DEFENDANT: Yes, sir, because it'll show that --

24 THE COURT: All right.

25 THE DEFENDANT: -- I was incorrect. Yes, sir.

1 THE COURT: All right. And we have a tentative trial date on April --

2 THE CLERK: Yeah.

3 THE COURT: -- are you going to be ready to go to trial, sir, on April 5th?

4 THE DEFENDANT: No, sir. I'll probably announce not be ready to go to
5 trial.

6 THE COURT: Okay. When --

7 MR. LALLI: Well, we would object to that, Your Honor. We plan on being
8 ready to go to trial on that date.

9 THE COURT: When was -- when was our Calendar Call? Couple months
10 ago?

11 THE DEFENDANT: It was --

12 MR. LALLI: I believe the Calendar --

13 MR. DIGIACOMO: Yes, Judge. And that alone would be a basis for reject
14 his -- his late request to represent himself. If he's not going to be ready which is a
15 question I guess we should have asked, then obviously that's a basis of the Court
16 can consider. We've been ready for years now.

17 THE DEFENDANT: Sir --

18 THE COURT: I think there's a case was it called [indecipherable] --

19 THE DEFENDANT: -- I've been trying to go to trial.

20 THE COURT: -- or some other case -- sir, listen to me.

21 THE DEFENDANT: Okay, sir.

22 THE COURT: That we have a trial date that's been set for at least four
23 months I would think. I mean from April -- when was the trial date set?

24 MR. DIGIACOMO: October.

25 MR. CANO: October.

1 THE CLERK: October, yeah.

2 THE COURT: Okay. Sir, it's in October. Trial's April 5th, so that's 6 months.
3 And so we're going to go forward on that day; do you understand that? The fact that
4 now you're coming in and with 2 ½ or 3 months to go and now you're not going to be
5 ready, it's a basis for me to deny this motion.

6 THE DEFENDANT: Sir, as I explained to you at the top of the year when I
7 first met you. Every year that trial date got set for me, my attorneys and I have
8 always pushed for a trial. I have never waived my right to a trial that we was trying
9 to go, but each time that I thought I was getting a trial, they got to wait. Now, that I
10 need time to go over my case myself, now I'm -- now I'm hearing that now that we're
11 ready, we're going.

12 I have been most courteous to them for them to keep pushing year
13 after year after year after year. I'm quite sure I can too get some type of courtesy to
14 get time so I can properly be ready to represent myself, sir; that's all I'm asking.

15 THE COURT: Well, sir, at this point and that's one of the things you just
16 can't -- can't come in now after we've -- it's actually 3 months, 4 months since we
17 set this trial date and now say I was to represent myself, but I won't be ready; that's
18 the basis for me to deny your motion.

19 And as far as I'm concerned, we're going to trial on April 5th. I'm
20 assuming your attorneys would be ready to go to trial on April 5th and if you're not
21 because you're representing yourself, you got to start everything over --

22 THE DEFENDANT: Yes, sir.

23 THE COURT: -- that's to detriment, sir; do you understand that?

24 THE DEFENDANT: So it's like because I'm representing myself and I'm not
25 ready then I still have to go; that what you're saying, sir?

1 THE COURT: Untimely requesting of to represent yourself is a basis for this
2 Court to deny your motion.

3 THE DEFENDANT: Okay, sir. Like I said I was trying to get an attorney --

4 THE COURT: Okay. Well, sir, you're going to trial April 5th or you're
5 representing yourself or you're going to trial April 5th with 2 fine attorneys; which do
6 you want?

7 THE DEFENDANT: I guess, sir, I have to go to prison by myself then, sir.

8 THE COURT: All right. Well, we don't know if that's going to happen, but
9 we're set for April 5th.

10 MR. DIGIACOMO: Judge, one last issue pursuant to Rule 253. Last time
11 Defendant's lawyers who are now standby counsel announced ready. In fact, we
12 made the weekend and then it was a personal issue related to the Co-defendant's
13 lawyers that caused a continuance.

14 If the Court can just enter an Order that standby counsel be ready in
15 case Mr. Malone at some point close to trial elects to now have them take over as
16 counsel, so that they don't just not be prepared. Rule 253 says that they'd be
17 prepared to take over in the proceedings. I don't want this to be like something Mr.
18 Malone goes okay now I want to lawyer and then there'll be a continuance of our
19 trial date. Rule 253 contemplates that and so I just ask the Court to enter that
20 Order.

21 THE COURT: Mr. Schieck or Mr. Cano?

22 MR. SCHIECK: Well, Your Honor, it's sort of having your -- your cake and
23 eating it too here. We will -- we announced ready before and my understanding
24 from Mr. Cano and Mr. Pike is that they would announce ready if we were still on the
25 case on April 5th. We'll do what we can to -- to be ready in the posture of standby

1 counsel, but we can't control what -- what transpires or motions filed by Co-
2 defendants. Mr. Oram may file motions on behalf of his client that we would in
3 certain ways that Mr. Malone chooses to not respond to or agree to. And then at the
4 last minute we're thrust into the fray and they're supposed to say well we're stuck
5 with -- with what's happening. We don't have any chance to try and correct that
6 because it needs to be corrected. So we will do everything we can to say we will be
7 ready. We can't predict what's going to go on while Mr. Malone is counsel on the
8 case or while the State and Co-defendant's counsel are doing other things that
9 come up.

10 THE COURT: I understand that. As you had mentioned your office was
11 ready to go forward or is ready to go forward, but for the Defendant at this point;
12 correct?

13 MR. SCHIECK: Correct.

14 THE COURT: Do you understand that, sir?

15 THE DEFENDANT: Yes, sir. Like I said --

16 THE COURT: Yes. Do you understand that?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: All right. Any other question before we go today, sir?

19 THE DEFENDANT: I guess I'll have to be ready -- my understanding that in
20 the last Court hearing, DiGiacomo's was stating that they had some death penalty
21 case or something in the month of April. You say you will try to steal April, but
22 October most likely; right? That was my understanding in the last Court --

23 MR. DIGIACOMO: Well, the Court had another case, but it was with -- it was
24 my opinion that I felt that the case wouldn't go so I requested the April date and then
25 you also gave us an October date as a second setting so we don't have to wait

1 again.

2 THE COURT: Sir, I set probably 10 trials a week, okay. And this is one of
3 the trials that set for this particular week.

4 THE DEFENDANT: Okay.

5 THE COURT: We assume that some cases will be continued or some cases
6 will negotiate and then the other ones we try, so that's why we have that date; do
7 you understand that?

8 THE DEFENDANT: The October date?

9 MR. DIGIACOMO: No.

10 THE COURT: That's a standby, but right now we're schedule to go April 5th.

11 MR. DIGIACOMO: April 5th, Judge.

12 THE COURT: Okay?

13 THE DEFENDANT: Yes, sir. I guess that's what I have to do, sir.

14 THE COURT: All right. We'll see you back at Calendar Call or if there's any
15 motions filed, we'll see you back in Court.

16 MR. LALLI: Thank you, Your Honor.

17 THE COURT: Thank you.

18 [Proceeding concluded at 10:05 a.m.]

19 * * * * *

20
21 ATTEST: I hereby certify that I have truly and correctly transcribed the audio/video
22 proceedings in the above-entitled case to the best of my ability.

23
24 
Michelle Ramsey
25 Court Recorder/Transcriber

ORIGINAL

CERTIFIED

FILED

MAR 18 2010

CLERK OF COURT

1 MOT

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2 Nevada Bar No.: 003811

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4 (702) 385-9595

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8 Attorneys for Defendant Jason McCarty

9 DISTRICT COURT

10 CLARK COUNTY, NEVADA

11 THE STATE OF NEVADA,

12 Plaintiff,

Case No.: C 224572

Dept No.: XVII

13 vs.

14 JASON MCCARTY,
15 and DOMONIC MALONE

RENEWED MOTION TO SEVER

16 Defendant.

17
18
19 RENEWED MOTION TO SEVER

20 COMES NOW, Defendant, JASON MCCARTY, by and through his attorney, ANTHONY
21 P. SGRO, ESQ., and CHRIS ORAM, ESQ., and renews his previous motion to sever his trial from
22 that of his co-defendant DOMONIC MALONE. This motion is made pursuant to NRS 174.165, and
23 Article I, § 8 of the Nevada Constitution, U.S. Const. Amend. VI, § 14, relevant caselaw and a
24 hearing is requested.

25 ...

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CLERK OF THE COURT

MAR 18 2010

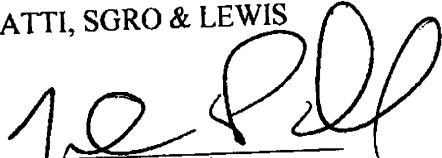
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1 This Motion is based upon the following Points and Authorities, the pleadings and papers
2 on file herein, and any oral argument before the court.

3 DATED this 18th day of March, 2010.

4 Respectfully Submitted by,

5 PATTI, SGRO & LEWIS

6 
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18 Attorneys for Defendant Jason McCarty
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NOTICE OF MOTION

TO: THE STATE OF NEVADA, Plaintiff

TO: MARC DiGIACOMO, Deputy District Attorney,

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the undersigned will bring the foregoing motion on for hearing before the above-entitled Court on the 30 day of March, 2010, at the hour of 8:15 am / pm, in Department 17, or as soon thereafter as counsel may be heard.

DATED this 18th day of March, 2010.

Respectfully submitted by,



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1 A. **WHILE DEFENDANT MALONE HAS ACKNOWLEDGED AND AGREED**
2 **TO PROCEED PRO-SE REGARDLESS OF THE DANGERS INHERENT IN**
3 **SELF-REPRESENTATION, DEFENDANT MCCARTY HAS MADE NO**
4 **SUCH AGREEMENT.**

5 The right to defend oneself from charges is one of the essential rights guaranteed by the
6 United States Constitution, as well as the Nevada Constitution. Attached to this right is also the right
7 to effective counsel. However, these two separate rights are distinct, and, if a person so chooses,
8 they are free to defend themselves and act as their own attorney, as long as they can pass certain
9 standards laid out by the United States Supreme Court in *Faretta*. *Faretta v. California*, 422 U.S.
10 806, 95 S.Ct. 2525 (1975). This right to self-representation is based upon "that respect for the
11 individual which is the lifeblood of the law." *Id.* at 834, *citing Illinois v. Allen*, 397 U.S. 337,
12 350-351, 90 S.Ct. 1057, 1064, 25 L.Ed.2d 353 (Brennan, J., concurring).

13 However, such an agreement to forgo counsel is not without attendant risks, risks that must
14 be recognized by the prospective pro-se litigant. This decision for self-representation must be
15 entered into "knowingly and intelligently" in order to forgo the relinquished benefits of
16 representation. *Id.* at 835, *citing Johnson v. Zerbst*, 304 U.S. 458, 464-465, 58 S.Ct., at 1023 (1938).
17 For it is the pro-se litigant who normally "suffers the consequences if the defense fails." *Johnson*
18 *v. State*, 117 Nev. 153, 17 P.3d 1008 (2001), *citing Faretta*, 422 U.S. at 819-20.

19 An individual must be permitted to "conduct his own defense" even if it is "ultimately to his
20 own detriment." *Faretta* 422 U.S. at 834. There is no "*Faretta* exception where a defendant's
21 assertion of the right to self-representation would be especially unwise," (*Godinez v. Moran*, 509
22 U.S. 389, 400, 113 S.Ct. 2680 (1993). Defendant MALONE has chosen self-representation and it
23 will be to his own detriment. However, if this matter were to proceed to a joint trial as currently
24 ordered, it is not only Defendant MALONE at risk. The State should not be permitted to enjoy the
25 same detrimental impact, as well as the inherent risks of self-representation, with regard to
26 Defendant MCCARTY. Defendant MALONE has had the opportunity to make his choice "with
27 eyes open." *Adams v. United States ex rel. McCann*, 317 U.S. 269, 63 S.Ct., at 242 (1942).
28 Defendant MCCARTY, on the other hand, has simply been forced to accept the risks the Supreme
 Court warns of, due to the unilateral decision made by MALONE.

1 The potential prejudice is markedly increased due to the fact that the instant case is not a
2 simple case. Indeed, the consequences could not be more severe as Defendants MALONE and
3 MCCARTY are charged with capital crimes and face the death penalty. From jury selection through
4 argument during a penalty phase hearing, everything changes when the case being litigated is a
5 capital case. As the United State Supreme Court has routinely indicated, "[t]he imposition of death
6 by public authority is ... profoundly different from all other penalties." Lockett v. Ohio, 438 U.S.
7 586, 605, 98 S.Ct. 2954 (1978). This is because "death is a different kind of punishment from any
8 other which may be imposed in this country." Gardner v. Florida, 430 U.S. 349, 357, 97 S.Ct. 1197,
9 1204, 51 L.Ed.2d 393 (1977). See also Zant v. Stephens, 462 U.S. 862, 884, 103 S.Ct. 2733, 2747,
10 77 L.Ed.2d 235 (1983), ([T]here is a qualitative difference between death and any other permissible
11 form of punishment"); Rummel v. Estelle, 445 U.S. 263, 272, 100 S.Ct. 1133, 1138, 63 L.Ed.2d 382
12 (1980), ("This theme, the unique nature of the death penalty for purposes of Eighth Amendment
13 analysis, has been repeated time and time again in our opinions.... [A] sentence of death differs in
14 kind from any sentence of imprisonment")(emphasis added); Lockett v. Ohio, 438 U.S. 586, 605,
15 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973 (1978) (BURGER, C.J.), ("[T]he imposition of death by public
16 authority is ... profoundly different from all other penalties").

17 Because of its finality, the scrutiny in capital cases is greater. California v. Ramos, 463 U.S.
18 992, 998-999, 103 S.Ct. 3446, 3452, 77 L.Ed.2d 1171 (1983). Such enhanced scrutiny is required
19 to ensure a fair trial and due process of law for individuals who are facing the strictest of penalties
20 a court can impose. This enhanced scrutiny leaves no choice but for this Honorable Court to sever
21 the trials of MCCARTY and MALONE.

22 While it is true that the right to self-representation being asserted is specifically MALONE'S
23 right to self-representation, it is undeniable that such a decision will have an impact on
24 MCCARTY'S right to a fair trial. The dangers warned of in the cases discussed *supra* are not
25 imaginary. In fact, they rise to the level that the Supreme Court requires that any person desiring to
26 take on these risks must be properly canvassed to determine their competency and understanding of
27 the associated risks. See generally Fareta.

28

1 The State has previously argued against severance of this matter. In their argument, they
2 relied upon the interconnectivity of the charges between the defendants and that the crimes were part
3 of the same transaction. It is this very same connection the State argued for in their previous motion,
4 that mandates that the instant severance motion be granted.

5 The State, in their prior motions, has argued that MALONE'S defense is not antagonistic to
6 any defense MCCARTY would present. See State's Opposition to Defendant McCarty's Motion to
7 Sever, October 20, 2006. If, arguendo, this were to be correct, the defenses of MALONE and
8 MCCARTY are either similar, or, at minimum, not contradictory. Due to the similar nature of their
9 defenses, MCCARTY will be unfairly prejudiced by MALONE'S presentation of his defense..

10 **B. THE PRIOR SEVERANCE ISSUES WILL BE EXACERBATED BY A JOINT**
11 **TRIAL AND MALONE PROCEEDING PRO-SE.**

12 In November of 2006, the Honorable Jackie Glass ruled on the previously filed Motion to
13 Sever. One of the issues that counsel for both defendants raised was the issue of potential Bruton
14 violation. At that time, the State indicated they would carefully ensure that no such potential
15 violation would occur through careful introduction of evidence.

16 However, now that Defendant MALONE is proceeding pro-se, the issue will certainly arise
17 again. While this Honorable Court will endeavor to hold MALONE to the standards that any
18 attorney would be held to, to expect MALONE to have the knowledge and wherewithal of a
19 seasoned, practiced capital litigant is unrealistic. One can only imagine all the doors opened by
20 Defendant MALONE'S "examination" of witnesses. And while this Honorable Court will assuredly
21 instruct MALONE regarding this issue, the fact remains that anything he says that is incriminating
22 to MCCARTY will either be inadmissible or the result of a mistrial. Any comment he makes or any
23 statement he makes could incriminate MCCARTY, and MCCARTY would be unable to cross-
24 examine him, which would be a violation of his Sixth Amendment rights.

25 In fact, any comment that MALONE makes that merely infers the guilt of MCCARTY is
26 inadmissible. The Nevada Supreme Court stated:

27 However, we conclude that this was error because Ducksworth's confessions referred
28 to another unnamed person, and it is likely that the jury deduced that this other
person was Martin. This conclusion is bolstered by the fact that Martin and
Ducksworth sat together at trial, and testimony had indicated that Martin and Joey

1 were friends and that Martin, Joey, and Ducksworth all drove from California
2 together.

3 Ducksworth v. State, 113 Nev. 780, 794-795, 942 P.2d 157 (1997). When the jury in Ducksworth
4 “inferred that Ducksworth's accomplice was Martin,” the presentation of that testimony violated
5 Ducksworth's rights “because Ducksworth did not testify, the introduction of his confession, which
6 probably inculpated Martin, violated Martin's right of cross examination secured by the
7 confrontation clause of the Sixth Amendment.” Id. at 795, 942 P.2d at 167. (Emphasis added). See
8 also, Stevens v. State, 97 Nev. 443, 634 P.2d 662 (1981).

9 The State will be alleging that MCCARTY and MALONE acted together to commit the
10 instant crimes. They will be going to great lengths at trial to attempt to establish that they were
11 friends, or at minimum “business” associates, and MCCARTY and MALONE will be seated
12 together at trial; similar to Ducksworth. The danger of unfair prejudice is exceedingly high in the
13 instant case if that was the only issue. But compounding that problem will be the fact that MALONE
14 will be giving his own opening statement and MALONE will be cross-examining the State's
15 witnesses and MALONE will be giving his own closing statement. He will most likely use first
16 person vernacular, which will lead to impermissible inferences of any personal knowledge that the
17 jury may infer he has. The risk of a Bruton or Ducksworth violation exists not only if MALONE
18 were to introduce one of his prior statements, but the risk is now enhanced by every action
19 MALONE takes at trial, which could lead the jury to improperly infer the guilt of MCCARTY. Any
20 improper inference that MALONE may give based upon his conduct during trial could incriminate
21 MCCARTY and MCCARTY would have no recourse for cross-examination, thereby denying him
22 his Constitutional right to confront his accuser.

23 ...

24 ...

25 ...

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28 ...

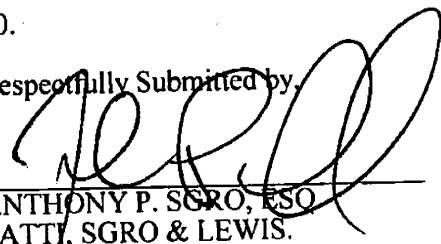
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CONCLUSION

WHEREFORE, for the foregoing reasons, JASON MCCARTY, based on the arguments presented above respectfully requests this Honorable Court to enter an order pursuant to N.R.S. 174.165, to sever him from the currently scheduled joint trial.

DATED this 18th day of March, 2010.

Respectfully Submitted by,


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CERTIFICATE OF MAILING

I hereby certify that I mailed a foregoing copy of the **MOTION TO SEVER**, on March 18th, 2010, by depositing a copy thereof, in the United States Mail, postage pre-paid, addressed to:

MARC DIGIACOMO, ESQ.
DEPUTY DISTRICT ATTORNEY
200 Lewis Avenue
Las Vegas, Nevada 89101

and that there is regular communication by mail between the place of mailing and the place so addressed.


An employee of PATTI, SGRO, and LEWIS

EXHIBIT “1”

FILED

2006 OCT -9 P 4: 57

[Handwritten signature]

MOT

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Attorneys for Defendant Jason McCarty

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Case No.: C 224572

Dept No.: V

Plaintiff,

vs.

JASON MCCARTY,
and DOMONIC MALONE

Defendant.

MOTION TO SEVER

COMES NOW, Defendant, JASON MCCARTY, by and through his attorney, ANTHONY P. SGRO, ESQ., and CHRIS ORAM, ESQ., and moves this Court for an order severing the criminal trial of Defendant JASON MCCARTY from that of his co-defendant DOMONIC MALONE. This motion is made pursuant to NRS 174.165, and Article I, § 8 of the Nevada Constitution, U.S. Const. Amend. VI, § 14, relevant caselaw and a hearing is requested.

...

...


...

1 This Motion is based upon the following Points and Authorities, the pleadings and papers
2 on file herein, and any oral argument before the court.

3 DATED this 9th day of October, 2006.

4
5 Respectfully Submitted by,

6 PATTI & SGRO, LTD.

7 

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20 Attorneys for Defendant Jason McCarty
21
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NOTICE OF MOTION

TO: THE STATE OF NEVADA, Plaintiff

TO: CHRIS OWENS, Deputy District Attorney,

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the undersigned will bring the foregoing motion on for hearing before the above-entitled Court on the 31st day of October, 2006, at the hour of 8:30 am/pm, in Department V, or as soon thereafter as counsel may be heard.

DATED this 9th day of October, 2006.

Respectfully submitted by,



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MEMORANDUM OF POINTS AND AUTHORITIES

I. **FACTS**

A. **ON MAY 20, 2006, TWO DEAD BODIES WERE FOUND NEAR PARADISE HILLS AND DAWSON STREET, IN HENDERSON, NEVADA**

On May 20, 2006, the Henderson Police Department ("HPD") received a 911 call regarding two dead bodies that had been found just west of Paradise Hills and Dawson Street in Henderson, Nevada. See July 24, 2006, transcript, Volume III, of the Preliminary Hearing proceedings, page 366, attached hereto as Exhibit 1. The two dead bodies were identified as Jane Dawson Doe One and Jane Dawson Doe Two. See Exhibit 1, p. 368. On or about May 21, 2006, a female named Melissa Estores, along with Ryan Noe made contact with the HPD and believed the two dead bodies to be Victoria Rachel Magee ("Victoria") and Charlotte Agnes Combado ("Christina"). See July 26, 2006, Preliminary Hearing transcript, p.74, attached hereto as Exhibit 2. The two dead bodies were eventually identified as Victoria Rachel Magee (hereinafter "MAGEE") and Charlotte Agnes Combado (hereinafter "COMBADO"). See Exhibit 1, p. 368. Detective Collins of the Henderson Police Department ("HPD") was assigned as the lead investigator in the investigation of the deaths of MAGEE and COMBADO. See Exhibit 1, p. 365. A crime scene was set up and secured. See Exhibit 1, p. 367.

To assist with the HPD's investigation, surveillance tapes were requested from the Hard Rock Hotel and Casino, the Sahara Hotel, and 7-Eleven stores near South Cove, a Shell or Texaco station near Conostoga and Nevada. See Exhibit 2, p. 81. Based in part on information obtained from Melissa Estores, the HPD obtained arrest warrants for MALONE, HERB, and MCCARTY. See Exhibit 2, p. 173-75.

B. **THE HPD's INVESTIGATION OF THE DEATHS OF COMBADO and MAGEE LED THE HPD TO THREE SUSPECTS: DONALD HERB, DOMONIC MALONE, and JASON MCCARTY**

On May 23, 2006, MALONE was questioned by Detective Collins. See Exhibit 2, p. 68. On May 23, 2006, MALONE denied any involvement in the incident that occurred with a female named Melissa Estores on the night that they were taken to the Hard Rock Cafe, but MALONE did admit about a month prior to beating Estores in the chest area at the Sportsman's complex. See Exhibit

1 1, p. 382. On May 23, 2006, MALONE was questioned, arrested, and transported to the Henderson
2 City Jail. See Exhibit 1, p. 378. MALONE was also questioned about being with MCCARTY on
3 Wednesday night at the Sportsman's Lounge. At the Preliminary Hearing, Detective Collins on
4 direct examination from Prosecutor Chris Owens, Esq., stated the following:

5 MR OWENS: What did he say to you about the night of the murder as to what he was doing that
6 Wednesday into the Thursday?

7 THE WITNESS: he did tell me on Wednesday night that he was down at the Sportsman's and that
8 he did run into Romeo.

9 BY MR. OWENS:

10 Q.: What happened?

11 A.: He said they stayed there for a little bit, and Romeo ended up taking him home between, I think
12 he said probably like about 12:30, a little bit after midnight, probably between midnight and 1:00
13 o'clock in the morning.

14 See Exhibit 2, p. 68, l. 14-19.

15 On or about, May 25, 2006, HERB, MCCARTY, and MALONE, were all booked with
16 charges including and related to the murders of COMBADO and MAGEE. See Exhibit 2, p. 79.
17 The two vehicles of Donald Herb, a green Alero and a white Honda were impounded and processed
18 by crime scene investigators. See Exhibit 2, p. 86.

19 **C. SEVERAL STATEMENTS WERE GIVEN BY SUSPECTS/DEFENDANTS**
20 **MALONE, HERB, and MCCARTY**

21 Defendant HERB gave two statements to the police on May 25, 2006.¹ MCCARTY gave
22 statements to the HPD on May 25, 2006, June 1, 2006, and three (3) statements on June 6, 2006.²
23 MALONE gave statements to the HPD on May 23, 2006 (2 statements), May 31, 2006, and June 1,
24 2006. Each of the statements by MALONE make specific reference to Defendant MCCARTY, and,
25 arguably, implicates him in the crimes that are the subject of the instant case. The statements of
26 MALONE require severance based on the Nevada Revised Statutes and relevant case-law.

27 ...

28 ¹Donald Herb has reached a plea agreement with the State of Nevada and has agreed to testify
against MALONE and MCCARTY.

²MCCARTY gave statements on May 25, 2006, June 1, 2006, and three (3) statements on
June 6, 2006, all of which were before Counsel had been retained or appointed to MCCARTY.

1 II. ARGUMENT

2 A. SEVERANCE IN THIS MATTER IS NECESSARY BECAUSE INTRODUCTION
3 OF THE CO-DEFENDANT MALONE'S CONFESSION/STATEMENTS WOULD
4 VIOLATE DEFENDANT MCCARTY'S SIXTH AMENDMENT RIGHT OF
5 CONFRONTATION AND CROSS-EXAMINATION.

6 N.R.S. 174.165(1) states:

7 If it appears that a defendant or the State of Nevada is prejudiced by a joinder of
8 offenses or of defendants in an indictment or information, or by such joinder for
9 trial together, the court may order an election or separate trials of counts, grant a
10 severance of defendants or provide whatever other relief justice requires.

11 In Amen v. State, 106 Nev. 749, 755, 801 P.2d 1354, 1358 (1990), the Nevada Supreme
12 Court held that: "N.R.S. 174.165 provides that the district court may sever a joint trial 'if it appears
13 that a defendant is prejudiced' by the joinder."

14 Previously, the Nevada Supreme Court reversed a conviction and remanded cases for new
15 trial based on the District Court's refusing to grant a severance for a defendant. See Duckworth v.
16 State, 113 Nev. 780, 942 P.2d 157. In Duckworth, Martin and Duckworth were co-defendants for
17 the murders of Joseph Smith and Vikki Smith. The evidence against Martin was largely
18 circumstantial. Testimony, including a confession by Duckworth, inferred that Duckworth had acted
19 with an accomplice. Id. at 794, 942 P.2d at 166. Motions to sever were denied by the District Court.
20 The Nevada Supreme Court stated:

21 However, we conclude that this was error because Duckworth's confessions referred
22 to another unnamed person, and it is likely that the jury deduced that this other
23 person was Martin. This conclusion is bolstered by the fact that Martin and
24 Duckworth sat together at trial, and testimony had indicated that Martin and Joey
25 were friends and that Martin, Joey, and Duckworth all drove from California
26 together.

27 Id. at 794-95, 942 P.2d at 166-67.

28 Furthermore, the Court concluded, "that because Duckworth did not testify, the introduction
of his confession, which probably inculpated Martin, violated Martin's right of cross examination
secured by the confrontation clause of the Sixth Amendment." Id. at 795, 942 P.2d at 167. See also,
Stevens v. State, 97 Nev. 443, 634 P.2d 662 (1981).

In Bruton, 391 U.S. 123 (1968), the United States Supreme Court held that an accused's right
of cross-examination secured by the confrontation clause of the Sixth Amendment is violated at his

1 joint trial with a Co-Defendant who does not testify by the admission of the Co-Defendant's
2 confession inculcating the accused, notwithstanding jury instructions that the Co-Defendant's
3 confession must be disregarded in determining the accused's guilt or innocence.

4 The Bruton court also found that if a co-defendant in a joint trial has made a confession
5 implicating another co-defendant and the prosecution seeks to use the confession, the non-confessing
6 defendant has a right to exclusion of the confession, severance, or redaction of the confession to
7 avoid mention or implication of him. The introduction of the co-defendant's confession violates the
8 non-confessing co-defendant's Sixth Amendment right of confirmation and cross-examination. The

9 Bruton Court continued:

10 Such a context is presented here, where the powerfully incriminating extra-judicial
11 statement of a co-defendant, who stands accused side by side with a defendant, are
12 deliberately spread before the jury in a joint trial. Not only are the incriminations
13 devastating to the defendant, but the credibility is inevitably suspect, a fact
14 recognized when accomplices do take the stand and the jury is instructed to weigh
15 the testimony carefully given the recognized motivation to shift blame onto others.
16 The unreliability of such evidence is intolerably compounded when the alleged
17 accomplice, as here, does not testify and cannot be tested by cross-examination.

18 Bruton, 391 U.S. 123, 135-36 (1968).

19 The Nevada Supreme Court in Stevens, 97 Nev. 443, 634 P.2d 662 (1981), recognized the
20 principle that not every situation may be cured by limiting instructions or any other cautionary
21 measures. Even though the State had excised all references to Stevens, the Nevada Supreme Court
22 reversed Defendant Stevens' conviction pursuant to the Bruton rule when a co-defendant's statement
23 was offered at trial, and Stevens had no opportunity to cross-examine that co-defendant. Id. at 444,
24 534 P.2d, 663. The Nevada Supreme Court held:

25 It appears likely that the jury read the appellant's [Stevens] name into the blanks in
26 each of [co-defendant] Oliver's statements introduced at the trial below. The
27 circumstantial links between Oliver and Stevens, referred to by the prosecutor, and
28 the fact that Oliver and appellant were being tried together made it not only natural,
but seemingly inevitable, that the jury would infer appellant to be the person referred
to in the blanks in Oliver's statement.

26 Id.

27 ...

28 ...

1 In Cruz, the United States Supreme Court held:

2 Where a non-testifying co-defendant's confession incriminating the defendant is not
3 directly admissible against the defendant, the Confrontation Clause bars its admission
4 at their joint trial, even if the jury is instructed not to consider it against the
5 defendant, and even if the defendant's own confession is admitted against him.

6 Cruz v. New York, 481 U.S. 186 (1987). According to the holding in Bruton it is necessary in order
7 to preserve MCCARTY's Sixth Amendment right to confrontation and cross-examination that the
8 trial be severed from co-defendant MALONE. It is likely that the State will attempt to introduce the
9 statements of MALONE, and without an opportunity to cross-examine MALONE regarding his
10 statements, his statement will inculcate MCCARTY and result in extreme prejudice to MCCARTY.
11 In the instant case, this Court is faced with the exact dilemma that the Nevada Supreme Court
12 considered in both Duckworth and Stevens, and that the U.S. Supreme Court addressed in Bruton.

13 At the preliminary hearing, HERB testified to his alleged involvement in the murders of
14 MAGEE and COMBADO. HERB testified that MCCARTY drove his green Alero in the months
15 of April and May and that MCCARTY is a friend of his. See July 27, 2006, transcript of Preliminary
16 Hearing, p. 6, attached hereto as Exhibit 3. HERB testified that MCCARTY had a cell phone with
17 the number (702) 237-3308. HERB testified that he was involved in drug transactions with
18 MCCARTY and MALONE. See Exhibit 3, p. 11. HERB testified that MALONE, MCCARTY, and
19 HERB were together with MAGEE, COMBADO, and ESTORES on the night that Estores was
20 allegedly battered by MALONE. See Exhibit 3, p. 12. HERB then testifies that he was taken home
21 and is not sure where MALONE, MCCARTY, MAGEE, COMBADO, and ESTORES went later
22 in the evening. See Exhibit 3, p. 13. HERB testified that on what is believed to be the early morning
23 of May 18, 2006, HERB received a call from MCCARTY. See Exhibit 3, p. 15. HERB testified that
24 MCCARTY and MALONE summoned him to the crime scene and needed help in relation to two
25 murders. See Exhibit 3, pp. 15-21. HERB also testified that MCCARTY was with MALONE on
26 the Tuesday night before the alleged murders of MAGEE and COMBADO. See Exhibit 3, p. 12.
27 Defendant MCCARTY believes the State will attempt to prove that he was present with MALONE
28 on the night (Tuesday) ESTORES was allegedly beaten by MALONE and also on the night of the
alleged murders of MAGEE and COMBADO.

1 Co-defendant MALONE has made statements, arguably, that explicitly inculcate Defendant
2 MCCARTY. Defendant MCCARTY believes the State will present a theory that MCCARTY and
3 MALONE were together on Wednesday night, May 17, 2006, into the early morning of Thursday,
4 May 18, 2006. The following statements by MALONE would be used by the State to place
5 MALONE and MCCARTY together on May 17, 2006, and also in the early morning of May
6 18, 2006.

7 MALONE is questioned as to whether MCCARTY took him home on Wednesday night.
8 The questioning is as follows:

9 Q.: Okay, How about were you with Romeo Wednesday night?
10 A.: Now, I remember - - if not mistaken, that Wednesday when I came down, I think Romeo took
11 me home, or was - - I'm not sure. I'm not really sure, but I know somebody took me home
12 Wednesday.

12 See May 31, 2006, MALONE statement, p. 55, l. 20-4, attached hereto as Exhibit 5.

13 MALONE is questioned about being in apartment 1585 on Wednesday night or early
14 Thursday morning, which is the night that the alleged murders of Christina and Victoria took place.

15 The questioning is as follows:

16 Q.: When you're with - - when you're with Romeo on Wednesday night and before he took you
17 home, did - - did you guys go up to the girls' apartment?

17 A.: 1585?

18 Q.: Yeah.

18 A.: Yeah.

19 Q.: Yeah. Were the girls there?

19 A.: To my knowledge, I think so.

20 See Exhibit 5, p. 59, l. 15-22.

21 MALONE is also questioned about getting a ride home from Jason on the Wednesday night
22 both were in apartment 1585. The questioning is as follows:

23 Q.: Okay. And you're saying - - you're saying that Romeo took you home.

24 A.: Yeah.

24 Q.: Do you know what time he took you home?

25 A.: I do not know.

26 See Exhibit 5, p. 60, l. 15-19.

27 Q.: Okay. All right. But you - - you can't remember what time you got home that - - what time that
28 Romeo dropped you off?

1 A.: No.
 Q.: But it was before he got beat?
 2 A.: Yeah. He was in his right state of mind then.
 Q.: Okay.
 3 A.: Yeah.
 Q.: All right. But you said - - you said when you got there and you were with Romeo at the
 4 Sportsman Wednesday night, it was dark?
 A.: Uh huh.
 5 Q.: Okay, But you're not sure exactly what time it was?
 A.: No sir.
 6 Q.: Okay. And you said you did go to the girls' apartment?
 A.: Yes.
 7 Q.: Okay. And let's say - - let's say if the girls say that you were there probably about like past
 midnight, would that be accurate before you got taken home.
 8 A.: It could be, yeah.
 9 See Exhibit 5, pp. 64-5, l. 20- 13.
 10 Q.: Then you got - - then- - and Donnie says that - - that you and Romeo went and got - - went and
 got the girls and took 'em out to the desert.
 11 A.: Like I say, you got to take that up with them.
 12 See Exhibit 5, p. 26, l. 21-4.
 13 MALONE is questioned about being with Donald Herb or MCCARTY in the early morning
 14 that the battery was committed on MCCARTY. MALONE answers as follows:
 15 Q.: Okay. "Cause Romeo says you were with Donnie that night, you know. Is that true?
 16 A.: Like I said, no.
 17 See Exhibit 5, p. 79, l. 2-4.
 18 Q.: Okay. All right. And - - now, Donnie says - - Donnie says you were with Romeo that night.
 A.: Uh-huh.
 19 Q.: Okay. Now, how would Donnie know that you were with Romeo that night?
 A.: I don't know. Like I say, I didn't see Donnie. I really didn't.
 20 See Exhibit 5, p. 81, l. 1-7.
 21 The following questioning goes into the beating received by MCCARTY on the early
 22 morning of May 18, 2006. MALONE is questioned as follows:
 23 Q.: Excuse me. When - - when Romeo got jumped.
 24 A.: No, I wasn't there.
 Q.: No. Were you at - - were you at the girls' house in 1585, you know, where Romeo's friends, the
 25 girlfriends, the two lesbians?
 A.: No, I wasn't there.
 26
 27 See Exhibit 5, p. 31, l. 5-9.
 28 Q.: When was - - when was the next time that you saw Romeo?

1 A.: Well he, - - well, he probably seen me the next day.

Q.: About what time?

2 A.: It was daytime because that was when - - 'cause we - - think we supposed to did something or whatever. I don't remember.

3 Q.: Right.

4 A.: But I was asking, you know, what's - - what's - - what's happening, whether he like - - he really couldn't talk.

Q.: Yeah.

5 A.: And I was like, "What's wrong?"

6 Q.: Cause he said - - he said when he got his ass kicked right there about 2:30 in the morning, he called you and you showed up back at the Sportsman?

7 A.: Nah. 'Cause if I did, there wouldn't be nothing to talk about. 'Cause like I say, I would never let that happen to you. I won't let that happen to nobody.

8 See Exhibit 5, pp. 61-2, l. 25-16.

9 MALONE is questioned further about getting a ride home from MCCARTY and MCCARTY being
10 beaten on the same night. The line of questioning is as follows:

11 Q.: Okay. And then what happened was that Romeo took you home.

A.: Uh-huh.

12 Q.: Okay. And then Romeo came back and got his ass kicked - -

A.: Yeah.

13

14 See Exhibit 5, p. 78, l. 13-7.

15 In the event co-defendants MCCARTY and MALONE proceed to a joint trial, it is almost
16 certain that the State will admit the statements of co-defendant MALONE. U.S. Const. Amend. VI,
17 § 14. MCCARTY will be precluded from cross-examining the statement of co-defendant MALONE
18 if he does not testify, and introduction of the co-defendant's confession would significantly prejudice
19 MCCARTY's ability to receive a fair trial afforded under the Sixth Amendment to the United States
20 Constitution. U.S. Const. Amend. VI, § 14. **The following, if admitted as evidence, and if**
21 **MCCARTY is not given an opportunity to cross-examine MALONE illustrate additional**
22 **problems which would result if a severance is not granted.**

23 Q.: Well, let me ask you something. Do you have a friend that you hang around with that's got like
a - something wrong with his arm and his hand?

24 A.: Yeah, I know the guy.

Q.: What's that - what's that guy's name?

25 A.: Jason

Q.: Jason. Jason what?

26 A.: I don't know his last name.

Q.: You don't know his last name. Is he white or black?

27 A.: He's a black dude.

Q.: He's a black dude. How do you know Jason?

28 A.: I know Jason from being over at the bar at the Sportsman's

1 See Exhibit 4, page 21-22, l. 17-4.

2 MALONE was questioned about selling dope to Tre and Jason. The questioning is as
3 follows:

4 Q.: You selling dope to - - like Tre and Jason?

5 A.: No.

6 See May 23, 2006, MALONE statement, p. 60. l. 24-5, attached hereto as Exhibit 4.

7 MALONE is questioned about last seeing MCCARTY. The line of questioning is as follows:

8 Q.: And what about Jason?

A.: Jason, he had me call once or twice and stuff like that.

9 Q.: When was the last time you saw him?

A.: Last time I saw Jason, about the other day.

10 Q.: The other day?

A.: The other day.

11 Q.: What day was that?

A.: About yesterday.

12 Q.: Yesterday?

A.: Yeah.

13

14 See Exhibit 4, p. 63, l. 22-6.

15 MALONE was questioned about the last time he saw Christina. The questioning is as
16 follows:

17 Q.: You said you took the - - he took you home.

A.: Yeah. And I said - - I think when I seen Christina, about the last time I probably seen Jason.

18 Q.: So you're telling me the night that you - - that you got a ride home from Jason - -

A.: Was probably the last - -

19 Q.: was the night that you saw - -

A.: I seen - -

20 Q.: Christina?

A.: About the same time I seen Christina, yeah.

21

22 See Exhibit 4, p. 75-6, l. 19-3.

23 MALONE is questioned about MCCARTY's physical description. The questioning is as follows:

24 Q.: Who's the guy with the left arm or whatever?

25 A.: That's Jason.

26 See Exhibit 4, p. 95, l. 6-8.

27 MALONE is questioned about the possibility of MCCARTY being Victoria's pimp.

28 Q.: How about - - how about - - how about Romeo, okay? Is Romeo - - is Romeo Victoria's pimp?

1 A: That I know of, uh-huh.
Q.: No?
2 A.: I don't - - I don't think that's - - well, it could be, but I doubt it.
3 See Exhibit 5, p. 91, l. 13-8.
4 In MALONE's June 1, 2006, statement, MCCARTY is mentioned as having been arrested
5 by the HPD. See MALONE June 1, 2006, statement, p. 7, l. 14, attached hereto as Exhibit 6.
6 MALONE is questioned about the green Alero, which is owned by Donald Herb.
7 MCCARTY believes the State will introduce a theory that one or both of the vehicles are
8 associated with the murders of MAGEE and COMBADO. The line of questioning and the
9 references to MCCARTY, which are numerous, are as follows:
10 Q.: Have you been inside the green Alero?
A.: Yes, I have.
11 Q.: You have.
A.: Yeah.
12 Q.: Yeah?
A.: Yeah.
13 Q.: Have you been inside the green Alero with other people?
A.: Yeah. Me, him, and Donnie.
14 Q.: You, him, and Donnie:
A.: Yes, Me, Donnie, and Jason.
15 Q.: Donnie and Jason?
A.: Yeah.
16 Q.: Okay. And who drives that car when you guys are in Donnie's car?
A.: Sometime Donnie drive. Sometimes Jason drive.
17 Q.: Really?
A.: Yeah.
18 Q.: Okay. Why does - why does Jason drive sometimes?
A.: I guess because he takes Donnie to work.
19
20 See Exhibit 4, pp. 25-26, l. 13-6.
21 Q. Okay. And when you were in the car with Donnie, who was in there with you?
A.: It was just me, him, and Jason. And then the last time I was in it, Jason took me home.
22 Q.: Jason took you home?
A.: Yes.
23 See Exhibit 4, p. 27, l. 10-15.
Q.: So the last time you were in - - the last time you were in Donnie's car - -
24 A.: Yeah.
Q.: - - Jessie, Sarah - -
25 A.: No. No.
Q.: Well - -
26 A.: Last time I was in Donnie's car - -
Q.: Yeah.
27 A.: - - Jason, and me, and Donnie was first, right, in the car together.
Q.: Right. Right.
28 A.: But the last, the same day - -

1 Q.: Yeah.
A.: It was me and Jason and he dropped me off.

2 See Exhibit 4, pp. 29-30, l. 14-2.

3 MALONE is further questioned about specifics about MCCARTY, including where he lives
and if he was driving on a certain night. The questioning is as follows:

4 Q.: Yeah. Do you know where - - do you know where Jason is staying?
A.: At this point in time. no. I don't.

5 Q.: No?
A.: I've never been- -

6 Q.: Where was he staying last?
A.: to his house.

7 ...

8 Q.: Okay. What's wrong with - - does Jason have something wrong with his arm?
A.: I guess. I don't really look at people like that.

9 Q.: Yeah.
A.: I just notice that his arm is like limp, but, you know. I don't be looking at people like that.

10 See Exhibit 4, pp. 33-4, l. 2-3.

11 Q.: Who was driving?
A.: Jason.

12 Q.: Jason was driving?
A.: Yes sir.

13

14 See Exhibit 4, p. 43, l. 13-6.

15 The HPD focused on three suspects in relation to the alleged murders of COMBADO and
16 MAGEE. Defendant MCCARTY was interrogated several times. Donald Herb was contacted
17 numerous times. In addition, MALONE is questioned about picking up the girls at the Sahara
18 Hotel, which is the night (Tuesday, May 16, 2006) when Estores was allegedly beaten by
19 MALONE. MCCARTY is mentioned and the questioning is as follows:

20 Q.: Well, apparently - - apparently, you - -
A.: Me:

21 Q.: Donnie and Jason - -
A.: Uh huh.

22 Q.: okay, picked up these girls at the Sahara Hotel.
A.: Uh- huh.

23 Q.: Okay? And then you left with them.
A.: Uh- huh.

24

25 See Exhibit 4, p. 54, l. 10-17.

26 Q. All right? Did you, Jason, Christina, Victoria, and Melissa drive out to Henderson last week?

27 A.: For what.

28 See Exhibit 4, p. 82, l. 4-6.

1 Q.: Okay. So what you are telling me is that you were never in the green car with Jason and the three
2 girls, and you never drove up to Henderson?

A.: That's right.

3 Q.: Okay. And that you never drove back and went to the Hard Rock?

A.: No sir.

4
5 See Exhibit 4, p. 89, l. 9-18.

6 Q.: right, and we talked about Red getting beat?

A.: Uh-huh.

7 Q.: Okay. And I asked if you were with - - if you were with Romeo - -

A.: Uh-huh.

8
9 See Exhibit 5, p. 8, l. 19-23.

10 MALONE is questioned about going to the Hard Rock with MCCARTY to drop off
11 COMBADO, MAGEE, and ESTORES. MCCARTY believes the State will present a theory that
12 COMBADO, MAGEE, and ESTORES were dropped off at the Hard Rock on the night that
13 ESTORES was beaten by MALONE. The questioning is as follows:

14 Q.: Are you saying that you were not with Donnie, Romeo, Christina, Red, and Victoria on Tuesday
night at the Sahara? You didn't go down there and pick them up - - pick up Red and Romeo?

15 A.: Why I - - why I need to go down there and pick them up?

16 Q.: I'm just asking. Were you there or not?

A.: No.

17 See Exhibit 5, p. 54, l. 4-9.

18 MALONE was further questioned about being with MCCARTY on the night Estores was
beaten. The line of questioning is as follows:

19 Q.: Tuesday night when Red said you beat her - -

A.: Uh-huh.

20 Q.: - - when you had the girls in the car and it was you and Romeo.

A.: Uh-huh.

21 Q.: Okay. And she said - - she said you guys took her out to this remote area - -

A.: Uh-huh.

22
23 See Exhibit 5, p. 74, l. 18-25.

24 Q.: Okay. All right. Because I mean Romeo says that you were in the cars on Tuesday night and that
you did beat Red.

25 A.: Nah.

26 Q.: He's lying?

A.: Yeah, he have to be if that's what he told you.

27 See Exhibit 5, pp. 76-7, l. 23-2.

28 ...

1 B. SEVERANCE IN THIS MATTER IS NECESSARY BECAUSE ONLY MALONE IS
2 CHARGED WITH TWO ADDITIONAL COUNTS WHICH RELATE TO AN
3 EARLIER BATTERY OF ESTORES.

4 The Nevada Supreme Court held in Tabish v. State, 119 Nev. 293, 72 P.3d 584 (2003), that
5 defendants were entitled to severance because one defendant was charged and convicted of offenses
6 in the same trial where the other defendant was not charged with the offenses, but was convicted on
7 other charges. In Tabish, both Tabish and Murphy were charged by the State by information with
8 numerous crimes relating to three separate incidents. Id. at 296, 72 P.3d 584 at 586. Tabish and
9 Murphy were charged with three separate incidents including: (1) the alleged robbery and murder
10 by suffocation and/or poisoning of Lonnie Theodore "Ted" Binion at Binion's home on September
11 17, 1998 ("Binion counts"); (2) the removal of a large quantity of silver belonging to Binion from
12 an underground vault located in a desert near Pahrump, Nevada ("Silver counts"); and (3) financial
13 interests in a sand and gravel pit in Jean, NV ("Casey counts"). Id. Murphy was not convicted of
14 the Casey counts, however, Tabish was convicted on the Casey counts. The Supreme Court
15 concluded "that the district court's refusal to sever the Casey counts from the remaining charges in
16 the case and to give a crucial limiting instruction warrant reversal." Id. at 297, 72 P.3d 584 at 586.
17 Attorneys for Murphy and Tabish argued that the Casey counts were not based upon a "common
18 scheme or plan." Id. at 301, 72 P.3d at 589.

19 The Court held, even certain similar counts could not be joined because their connection in
20 time was too remote. Id. at 303, 72 P.3d 584 at 591. In Mitchell v. State, 105 Nev. 735, 782 P.2d
21 1340, (1989) the Nevada Supreme Court held that two separate incidents which were forty-five days
22 apart involving social drinks at a particular bar, which were followed by alleged sexual assaults were
23 not to be considered part of a common scheme or plan. In Tabish, the Court determined, "the joined
24 incidents were dissimilar, and fifty days separated the Casey incident from the alleged murder and
25 theft of the silver." Tabish, 119 Nev. 293, 303-04, 72 P.3d 584, 591, (2003). In Tabish, the Court
26 stated that even though a limiting instruction was given to the counts against Murphy, Murphy was
27 prejudiced by the joinder of the Casey counts. Id. at 304, 72 P.3d at 591.

28 In the instant case, MALONE is charged with two counts relating to a battery against
ESTORES which is alleged to have happened in or about April of 2006. See Information, attached

1 hereto as Exhibit 7. MALONE is charged in Count 1 of the Information with First Degree
2 Kidnapping and Battery with Substantial Bodily Harm. See Exhibit 7. MCCARTY is not charged
3 in either of these two counts, which involve only ESTORES and MALONE. There is no specific
4 date that the State alleges that the incidents against ESTORES took place. It is possible that these
5 alleged incidents took place as early as April 1, 2006, which would be over forty-five days prior to
6 the alleged incidents which took place in the remainder of the Counts, in which both MALONE and
7 MCCARTY are charged. The state alleges that MALONE and MCCARTY committed the
8 remainder of these crimes from May 16, 2006, until May 19, 2006. Based on the Nevada Supreme
9 Court decisions in both Tabish and Mitchell, the joint trials of MCCARTY and MALONE must be
10 severed.

11 CONCLUSION

12 WHEREFORE, for the foregoing reasons, JASON MCCARTY, based on the arguments
13 presented above respectfully requests this Honorable Court to enter an order pursuant to N.R.S.
14 174.165, to sever him from the currently scheduled joint trial.

15 DATED this 9th day of October, 2006.

16 Respectfully Submitted by,

17 

18 ANTHONY P. SGRO, ESQ.
19 PATTI & SGRO, LTD.
20 Nevada Bar No. 003811
21 720 S. 7th Street, 3rd Floor
22 Las Vegas, Nevada 89101
23 (702)385-9595

24 CHRIS ORAM, ESQ.
25 Nevada Bar No.: 4349
26 520 S. 4th St., 2nd Floor
27 Las Vegas, NV 89101
28 (702) 384-5563

Attorneys for Defendant Jason McCarty

EXHIBITS NOT INCLUDED

OMITTED

FILED

FEB 01 2010

John J. Blum
CLERK OF COURT

1. Domonic Malone #1670891
2. Clark County Detention Center
3. 330 S. Casino Center Blvd.
4. Las Vegas, NV 89101
5. In Properia Persona

6
7. Eighth Judicial District Court
8. Clark County, Nevada
9

2/16/10

10. State of Nevada,
11. Plaintiff,
12. vs.
13. Domonic Malone et al,
14. Defendant.

Case No: C274572
Dept No: XII

15. RECEIVED

FEB 01 2010

Motion To Preserve And Produce Evidence
Including Potentially Exculpatory Evidence

145

CM

16. comes now the Defendant, Domonic Malone, in
17. propria persona, and hereby moves this Honorable Court to
18. Order the state to produce certain discovery, including potentially
19. exculpatory evidence, as set forth more specifically in the
20. following Points and Authorities. To the extent any evidence is not
21. produced, the undersigned request an order that it be
22. preserved.

23. This Motion is based upon the pleadings and papers on file herein,
24.
25.



THIS PAGE ADDED BY IMAGING SERVICES

SOME PAGES IN THIS DOCUMENT ARE LIGHT OR UNREADABLE
IN ORIGINAL FORM AND HAVE BEEN DARKENED AS MUCH AS POSSIBLE.

THE IMAGES THAT FOLLOW ARE THE BEST POSSIBLE

1 The following facts and authorities, all as incorporated herein.
2 DATED this _____ day of January, 2010
3
4

5 By: Dominic R. Moore
6 Dominic R. Moore
7 Public Defender
8 330 S. Casino Center Bldg.
9 Las Vegas, Nevada 89101

11 Points And Authorities

12 Factual Background

13
14 Dominic R. Moore, in propria persona. Is charged by way of
15 information with 4 counts First Degree Kidnapping, 2 counts
16 of First Degree Murder, 1 count of Conspiracy to Commit Murder,
17 1 count of Conspiracy to Commit Kidnapping, 1 count of
18 Robbery, 2 counts of Robbery with use of a Deadly Weapon, 1
19 count of Conspiracy to Commit Murder, 1 count of Conspiracy
20 to Commit Burglary, 1 count of Burglary, and 2 counts
21 of Murder with use of a Deadly Weapon.

22 The State filed its Notice of Intent to Seek Death Penalty
23 on August 11, 2009. That is set for April 2010.

24 Donald Lee Fere Laika "Denny", "D-Boy" and Denny") was charged
25 with the criminal offenses in the case. Prior to the preliminary
26 hearing, the State filed its information charging the defendant
27 with the criminal offenses in the case. The information charging the defendant
28 with the criminal offenses in the case.

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28

2 The subject of the alleged murder in this case is
3 "Charlotte" (Mrs. Charlotte) who testified or were
4 alleged to have been involved in the case.
5 The names of the persons who testified or were
6 mentioned in the case concerning the death of Mrs. Charlotte
7 Lombardi, or Mrs. Charlotte, are: These persons include Meliss
8 Estorres, Herman, Ray, John, and others, who testified or were
9 mentioned in the case. The two other persons who
10 testified or were mentioned in the case are: Meliss
11 Estorres, Herman, Ray, John, and others, who testified or were
12 mentioned in the case. The two other persons who
13 testified or were mentioned in the case are: Meliss
14 Estorres, Herman, Ray, John, and others, who testified or were
15 mentioned in the case. The two other persons who
16 testified or were mentioned in the case are: Meliss
17 Estorres, Herman, Ray, John, and others, who testified or were
18 mentioned in the case. The two other persons who
19 testified or were mentioned in the case are: Meliss
20 Estorres, Herman, Ray, John, and others, who testified or were
21 mentioned in the case. The two other persons who
22 testified or were mentioned in the case are: Meliss
23 Estorres, Herman, Ray, John, and others, who testified or were
24 mentioned in the case. The two other persons who
25 testified or were mentioned in the case are: Meliss
26 Estorres, Herman, Ray, John, and others, who testified or were
27 mentioned in the case. The two other persons who
28 testified or were mentioned in the case are: Meliss

29 This delay in charging the charged obviously makes it more
30 difficult in some circumstances to obtain discovery.

Section 174.233

1 NRS 174.233 provides in relevant part that:
2
3 1. Except as otherwise provided in NRS 174.233 to 174.245, inclusive,
4 at the request of a defendant, the prosecuting attorney, state or county
5 the district is responsible for providing the following:

6 (a) Written or recorded and certified copies of all reports
7 the defendant, or any written or recorded statements made by the defendant
8 the prosecuting attorney, or any other person, or any other person, or any other person,
9 the copies thereof, within the proceeding, and to be certified
10 the prosecuting attorney, or any other person, or any other person, or any other person,
11 the prosecuting attorney, or any other person, or any other person, or any other person;

12 (b) Written or recorded and certified copies of all reports
13 the defendant, or any written or recorded statements made by the defendant
14 the prosecuting attorney, or any other person, or any other person, or any other person,
15 the copies thereof, within the proceeding, and to be certified
16 the prosecuting attorney, or any other person, or any other person, or any other person,
17 the prosecuting attorney, or any other person, or any other person, or any other person;

18 (c) Written or recorded and certified copies of all reports
19 the defendant, or any written or recorded statements made by the defendant
20 the prosecuting attorney, or any other person, or any other person, or any other person,
21 the copies thereof, within the proceeding, and to be certified
22 the prosecuting attorney, or any other person, or any other person, or any other person,
23 the prosecuting attorney, or any other person, or any other person, or any other person;

24
25
26 2. The prosecuting attorney, or any other person, or any other person, or any other person,
27 the prosecuting attorney, or any other person, or any other person, or any other person,
28 the prosecuting attorney, or any other person, or any other person, or any other person,
29 the prosecuting attorney, or any other person, or any other person, or any other person,
30 the prosecuting attorney, or any other person, or any other person, or any other person;

- (a) An internal report, document or memorandum that is prepared by or on behalf of the prosecuting attorney in connection with the investigation or prosecution of the case.

" (b) P did not inspect, paper, document, tangible or other type of item or information that is privileged or protected from disclosure or inspection pursuant to the constitution or laws of the state or the constitution of a foreign state.

3. The members of the section are not intended to affect any obligation already incurred, whether by the person or the company, in this state, or in any jurisdiction, with respect to the liability of the person or company for any conduct or the performance of any duty (including a duty to the company).

1. While 1935 RUCS made no attempt to define "land", the 1936 RUCS, in providing for the payment of a land tax, did not define "land".
2. The definition of "land" in the 1936 RUCS is not identical to the definition of "land" in the 1935 RUCS.
3. The definition of "land" in the 1936 RUCS is not identical to the definition of "land" in the 1935 RUCS.
4. The definition of "land" in the 1936 RUCS is not identical to the definition of "land" in the 1935 RUCS.
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8. The definition of "land" in the 1936 RUCS is not identical to the definition of "land" in the 1935 RUCS.
9. The definition of "land" in the 1936 RUCS is not identical to the definition of "land" in the 1935 RUCS.
10. The definition of "land" in the 1936 RUCS is not identical to the definition of "land" in the 1935 RUCS.

1 expired by the fact that NPS 174235 was enacted in 1961, and NPS

2 174235, not until 1977. It is therefore I, (Mr. Malone's)

3 position that if witnesses interviewed told the officers anything

4 about this incident, whether their statements were relevant

5 or not, or if they were not, their statements should

6 be preserved and made available to the defense, if any of this

7 information goes to the defense, it is the duty of the witness, if

8 a witness, to provide evidence which must be provided to the prosecution

9 is aware of it as a witness.

10 The defense will also be required to provide

11 of any testimony or information concerning physical evidence,

12 including any rough notes related to the same.

13 The same obligation applies to the defense as applies to the

14 of any witness testimony.

15

16 (a) Malone's

17

18 When the defense seeks a subpoena to produce material and

19 the state does not comply with material, the Nevada Supreme Court

20 has held that there are circumstances where a subpoena can be

21 granted if it is shown that the material would be

22 material to the defense. See *Robertson v. State*, 112 Nev. 212, 911 P.2d 1121.

23 See also *State v. Smith*, 112 Nev. 212, 911 P.2d 1121, 112 Nev. 212, 911 P.2d 1121.

24 See also *State v. Smith*, 112 Nev. 212, 911 P.2d 1121, 112 Nev. 212, 911 P.2d 1121.

25 (b) Malone's

26 Even if the defense has not been made, the state is still

27

28

(c)

0963

1 warranted "if there exists a reasonable probability that, had the
2 evidence been disclosed, the result of the proceeding would have
3 been different." Brady, 430 U.S. 619, 625; Kyles, 514 U.S. 413, 427.

4 But see, 480 U.S. 339, 357 (1987). A "reasonable probability" is a probability
5 sufficient to undermine confidence in the verdict. Brady, 430 U.S. at
6 624, 625; Kyles, 514 U.S. at 427. Kyles, 514 U.S. at 427.

7 Therefore, although the State requested the trial judge to

8 withhold the evidence, it did not withhold the evidence.

9 The State of the evidence was not withheld from the jury.

10 Where a defendant is charged with a crime, anything

11 that tends to establish or disprove the defendant's guilt

12 is relevant to the defendant's guilt and is material.

13

14 (b) Federal or State or Defendant

15 Brady material applies not only to evidence which might
16 reflect on a defendant's guilt, but also includes evidence which
17 reflects on a defendant's character or conduct if it is material.

18 An example of this kind of evidence might be where the victim of a robbery
19 who identified the accused as one of two people who robbed him, also indicated
20 the the accused tried to keep the co-defendant from injuring him.

21 Although the identification would actually go to establishing the accused's
22 guilt, it would also be Brady material because it might serve to mitigate
23 the defendant's sentence because of his effort to aid the victim. Essentially,

24 anything which could cause the court to impose something less than a
25 maximum sentence, or rebut alleged aggravating circumstances would be
26 relevant to punishment. Obviously, where the State is seeking to impose

27

1 the ultimate sanction of death against an accused, the breadth of this kind
2 of evidence is expanded and its reliability becomes even more crucial.

3 4 (2) Favorability to the Accused

5 The Nevada Supreme Court has spoken directly to what is considered
6 "favorable" evidence and has set proper Brady material. In *Mazzan v.*
7 *Warden, Mc Nev. 119, 67, 993 P.2d 25, 37 (2000)* the court stated:

8 Due process does not require early disclosure of exculpatory evidence.
9 Evidence also must be disclosed if it provides grounds for the defense
10 to object to the admission of evidence, to impeach the police investigation,
11 to impeach the credibility of the state's witnesses, or to prepare the defense
12 case against the prosecution. Moreover, "discovery in a criminal
13 case is not limited to investigative leads or reports that are admissible in
14 court or that would not have been independently admissible in
15 have been excluded, it has omitted)

16 Therefore, Brady material under this standard would include, but
17 not be limited to, the following examples: material which was
18 relevant but not used, or which was omitted but did not impeach the
19 prosecution's criminal case; material which was relevant to the
20 witnesses which might show their bias, prejudice, interest, or
21 other factors affecting their credibility; evidence that the alleged victim
22 was from the victim's family or a close personal contact;
23 investigation leads or a directly responsive investigation which were
24 not followed-up on or controlled by law enforcement; and, of course,
25 anything which is material to the case or present
26 testimony of a state witness, including the failure to previously

- 1 make a statement which is later made or testified to. Of course,
- 2 traditionally exculpatory evidence such as that which could
- 3 show that someone else committed the charged crime or that no crime
- 4 occurred, could also be included as Brady material.

5

6 (d) Withholding Material on Joint Active Possession of Weapons

7 Arking on Brady v. Maryland

8 Based on my prior experience, it is anticipated that the prosecution
9 may assert that it has an "exclusion" policy and that a requested
10 material is not available to its file, especially because this material
11 speaks to material in the possession or custody of the
12 prosecution. However, this argument is in direct conflict with Strickler
13 v. Green, 527 U.S. 26, 120 S.Ct. 1361, 144 L.Ed.2d 346 (2000), where the United States
14 Supreme Court explicitly held that a prosecutor's own file policy
15 does not constitute a substitute for or discharge the State's obligation
16 to turn over Brady material. The Strickler Court stated that it is in violation
17 of the due process clause of the Constitution to withhold exculpatory
18 evidence, and his motive for doing so is immaterial. Jimenez v.
19 State, 112 Cal. 2d 112, 118, 915 P.2d 387, 1996 (1996). Furthermore, even if
20 the defense withheld the material without the prosecutor's
21 knowledge, the State attorney is charged with constructive knowledge
22 and possession of evidence withheld by other state agents, including
23 law enforcement officers. Id., 112 Cal. 2d 1320 (citation omitted). If (Mr. Malone)
24 would submit that other state agents such as prosecutor and police
25 officers, who are not independent, and serve as agents of the State
26 are also included in the Brady material, the prosecution would lose

27

28

1 out Brady material.

2 In *Kyles v. Whitley*, supra, the United States Supreme Court
3 made it clear that the prosecutor has an affirmative obligation to
4 obtain Brady material and provide it to the defense, even if the
5 prosecutor is initially unaware of its existence. In so finding, the
6 Supreme Court noted that "the prosecution's affirmative duty to
7 disclose evidence favorable to a defendant can trace its origins to
8 early 20th century strictures against misrepresentation and is
9 of course most prominently associated with the Court's
10 decision in *Brady v. Maryland*, 357 U.S. at 432. The *Kyles*
11 Court also made it clear that the duty to disclose exists even where
12 the defense does not ask for the evidence in a timely manner."

13 There can be little doubt that the duty to disclose is open to
14 anyone who is a party to the proceedings and who is entitled to
15 a fair trial. The duty to disclose is not limited to the defense
16 and is not limited to the prosecution. It is a duty that applies to
17 all parties to the proceedings, whether or not they are the
18

19 3. The duty to disclose is not limited to the prosecution.

20 In the instant case, the defense requested the disclosure of

21 the requested discovery material.

22 The defense requested the disclosure of the requested material

23 on the grounds that the material was relevant to the case.

24 The defense requested the disclosure of the requested material

25 on the grounds that the material was relevant to the case.

26 The defense requested the disclosure of the requested material

27 on the grounds that the material was relevant to the case.

28 The defense requested the disclosure of the requested material

1. A national reaction to the...
 2. ...
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2. All written or recorded statements, memoranda, and documents
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1 interview, or investigative work centers.

2 3. In a report in the case of the above named candidate,

3 the following information was obtained from the individual in the

4 report of the State. To the extent that the State advised that criminal

5 history was not a consideration in the absence of a court order,

6 I should request that the individual be ordered to have no

7 independent access to the individual's record for the purpose of

8 making the alleged violation, the confidentiality, and that the

9 information in this case.

10 4. Any person, State, and a candidate in the

11 State, or any other person, who is a candidate in the

12 State, or any other person, who is a candidate in the

13 State, or any other person, who is a candidate in the

14 State, or any other person, who is a candidate in the

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26 State, or any other person, who is a candidate in the

27 State, or any other person, who is a candidate in the

28 State, or any other person, who is a candidate in the

1. The undersigned is representing the fact that Mr. Charles Lombardi,
 2. Mr. Lombardi's wife, has been a witness to the nature and thoroughness
 3. of the police investigation of the case, and that the police have been
 4. diligent in their efforts to locate and identify the person who
 5. committed the crime, and that the police have been diligent in their
 6. efforts to locate and identify the person who committed the crime.
 7. The undersigned is representing the fact that the police have been

1. diligent in their efforts to locate and identify the person who
 2. committed the crime, and that the police have been diligent in their
 3. efforts to locate and identify the person who committed the crime.
 4. The undersigned is representing the fact that the police have been
 5. diligent in their efforts to locate and identify the person who
 6. committed the crime, and that the police have been diligent in their
 7. efforts to locate and identify the person who committed the crime.

1. The undersigned is representing the fact that the police have been
 2. diligent in their efforts to locate and identify the person who
 3. committed the crime, and that the police have been diligent in their
 4. efforts to locate and identify the person who committed the crime.
 5. The undersigned is representing the fact that the police have been
 6. diligent in their efforts to locate and identify the person who
 7. committed the crime, and that the police have been diligent in their

1. efforts to locate and identify the person who committed the crime.
 2. The undersigned is representing the fact that the police have been
 3. diligent in their efforts to locate and identify the person who
 4. committed the crime, and that the police have been diligent in their
 5. efforts to locate and identify the person who committed the crime.
 6. The undersigned is representing the fact that the police have been
 7. diligent in their efforts to locate and identify the person who

involved be produced whether the State intends to use them at all
or not. The only way of doing this would be to have a list of
documents that have already been fully listed and are now available
for reference or destruction. This is a very important question.

[illegible][illegible]

1. What is the purpose of the study?
 2. What are the research questions?
 3. What are the hypotheses?
 4. What are the variables?
 5. What are the methods?
 6. What are the results?
 7. What are the conclusions?
 8. What are the implications?
 9. What are the limitations?
 10. What are the future directions?

1. The first part of the document is a list of names and their corresponding dates. The names are: "John Doe", "Jane Smith", "Bob Johnson", "Alice Brown", "Charlie White", "David Green", "Eve Black", "Frank Gray", "Grace Pink", "Henry Blue", "Ivy Yellow", "Jack Purple", "Karen Red", "Leo Orange", "Mia Silver", "Noah Gold", "Olivia Bronze", "Peter Copper", "Quinn Iron", "Rachel Steel", "Sam Tin", "Tina Lead", "Uma Zinc", "Victor Nickel", "Wendy Platinum", "Xavier Silver", "Yara Gold", "Zoe Bronze". The dates are: "1990-01-01", "1990-02-01", "1990-03-01", "1990-04-01", "1990-05-01", "1990-06-01", "1990-07-01", "1990-08-01", "1990-09-01", "1990-10-01", "1990-11-01", "1990-12-01", "1991-01-01", "1991-02-01", "1991-03-01", "1991-04-01", "1991-05-01", "1991-06-01", "1991-07-01", "1991-08-01", "1991-09-01", "1991-10-01", "1991-11-01", "1991-12-01", "1992-01-01", "1992-02-01", "1992-03-01", "1992-04-01", "1992-05-01", "1992-06-01", "1992-07-01", "1992-08-01", "1992-09-01", "1992-10-01", "1992-11-01", "1992-12-01".

g. Information as to whether there has been any surveillance of Mr. Malen during the period of the investigation in the U.S. etc. - surveillance of any contact with the

was a party. This request includes any monitoring of calls or contacts involving the accused or his co-defendants at the Clark County Detention Center & Henderson Detention Center. It is my Mr. Malone understanding that there is a CD with approximately 3,000 minutes of phone calls on it.

1. and that information is included in this request. If such electronic surveillance exists, provide a copy of any such tape/cr and any transcripts which exist. If such evidence has been lost or destroyed, please state how, when and why this loss or destruction occurred.

2. Any information and documentation as to whether Mr. Malone, in either this case or that related to the death of Charlotte Cambodge or Victoria Huggins, appeared in a line-up or show-up, whether formal or informal;

3. been made to speak for identification to witnesses to said offense;

4. been printed (fingerprinted, palm-printed, foot printed, shoe printed, etc.);

5. been photographed;

6. had samples of blood, hair, breath or other materials of his/her body taken;

7. provided a specimen of handwriting;

8. submitted to physical or medical inspection of his body;

9. had his photograph shown to any witness to the alleged crime, and, if so, copies of any such photographs.

10. Information as to whether any and all items used or attempted to be used in connection with the investigation of the crimes charged against the accused.

11. Any and all information, whether in writing or otherwise, which

could in any way be considered favorable to the defense, whether disclosed by the State or not. Such information includes, but is not limited to,

information furnished by the informant during the investigation, the

results of any searches performed, any leads which were generated by the

enforcement, whether such leads were followed-up on or not, and any forensic

evidence. Requests pursuant to this item are relevant if they can be used in

either the trial or in the phase of these proceedings.

u. Evidence of gang affiliation is admissible to any witness the state intends to call in order to impeach the credibility of him. Such evidence includes, but is not limited to gang, field cards, and other gang data compiled and maintained by LMPD and or any other law enforcement agency.

Conclusion

Wherefore, The accused, DOMONIC MALONE, respectfully requests this Honorable Court to grant his Motion to Preserve and Produce Evidence, and order the State to preserve and produce the items enumerated herein. Alternatively, he requests the Court to hold a hearing concerning the matters set forth herein.

Dated this 28th day of January 2010

By: Dominic Malone

Signature #11670991

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Casa 2000

Las Vegas, Nevada 89101

Las Vegas, Nevada 89101



FROM ZIP CODE 89400

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FILED

FEB 01 2010

CLERK OF COURT

- 1 Dominic Malone #1670891
- 2 Clark County Detention Center
- 3 330 S. Casino Center Blvd.
- 4 Las Vegas, NV 89101
- 5 In Properia Persona

6
7 Eighth Judicial District Court
8 Clark County, Nevada
9

2/16/10

State of Nevada, }
Plaintiff, }

Case No: C224572

Det. No: XIII

vs.

Dominic Malone et al. }
Defendant }

3W

RECEIVED

FEB 01 2010

CLERK OF THE COURT

Ex Parte Motion For Expenses
For Private Investigators

144

Comes now the Defendant, Dominic Malone, in
 propria persona, and pursuant to N.R.S. 7.135, respectfully
 requests this Honorable Court to authorize the ex-
 penditure of funds not to exceed a sum certain
 duly authorized by this Court, to enable the
 Defendant to obtain the services of
 and private investigators, for
 a defense investigation of the facts surrounding

1 this case. and each
2 receive \$45.00/hour for their respective services.

3 As grounds therefore, the Defendant states that
4 he is indigent and unable to pay for an expert's
5 services, and that the requested funds are
6 reasonably necessary to prevent him from
7 being subjected to disadvantage in preparation or
8 presenting his case adequately; in comparison to
9 one who could afford to pay.

10 Wherefore, this Court is respectfully urged to
11 authorize the expenditure of funds to pay for
12 the reasonable services of a private investigator,
13 and for such other and further relief as
14 to this Court may seem just and proper.

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16 Dated this 28th day of January, 2013

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4 DISTRICT COURT

5 CLARK COUNTY, NEVADA

Ann H. Sullivan
CLERK OF DISTRICT COURT

6
7 THE STATE OF NEVADA,

8 Plaintiff,

9 vs.

10 DOMONIC RONALDO MALONE,

11
12 Defendant.

CASE NO. C224572

DEPT. XVII

13
14 BEFORE THE HONORABLE MICHAEL P. VILLANI, DISTRICT COURT JUDGE

15 TUESDAY, FEBRUARY 16, 2010

16 **RECORDER'S TRANSCRIPT OF HEARING RE:**
17 **ALL PENDING MOTIONS**

18 APPEARANCES:

19 For the State:

MARC DIGIACOMO, ESQ.
CHRISTOPHER LALLI, ESQ.
Deputy District Attorneys

21 For the Defendant:

22 RANDALL H. PIKE, ESQ.
23 CHARLES A. CANO, ESQ.
Special Public Defenders
24 (Stand-by Counsel)

25 RECORDED BY: MICHELLE L. RAMSEY, COURT RECORDER

1 LAS VEGAS, NEVADA; TUESDAY, FEBRUARY 16, 2010

2 [Proceeding commenced at 8:33 a.m.]

3
4 THE COURT: 224572, Domonic Malone who's present in custody. Mr.
5 Cano, Mr. DiGiacomo for the State. This is Defendant's Pro Per Motion to Preserve
6 and Produce Evidence Including Potentially Exculpatory Evidence and Defendant's
7 Pro Per Motion for Expenses for Private Investigator. And you are representing
8 yourself; correct, sir?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: All right.

11 THE COURT RECORDER: You need to speak up.

12 THE DEFENDANT: Yes, sir.

13 THE COURT: Actually, sir, there was perhaps 20 pages of your motion and
14 because of they were such poor quality as far as the penmanship and as far as the
15 copy machine you would have utilized in the jail, the Court could not pull up your
16 motion because it was just marks on the page.

17 THE DEFENDANT: Yeah, I noticed that too. I had wrote in pencil; that's all I
18 had was a pencil.

19 THE COURT: I'm sorry.

20 THE DEFENDANT: I said I wrote in pencil 'cause that's all I had at the time,
21 sir.

22 THE COURT: Is the State able to get a better copy?

23 THE DEFENDANT: No.

24 THE COURT: Mr. DiGiacomo, Mr. Lalli?

25 MR. DIGIACOMO: Judge, I was able to catch every couple of words. I - I

1 could tell that he was requesting some sort of criminal history, but I couldn't what
2 else he possibly was requesting in his motion to produce and preserve evidence. I
3 obviously don't take a position on the investigator ex parte motion.

4 THE COURT: And also just for the record we have Mr. Cano and Mr. Pike
5 were stand-by counsel; correct?

6 MR. PIKE: Correct.

7 MR. CANO: Yes, Your Honor.

8 THE COURT: Sir, do you have the original, the motion 'cause no one could
9 read your motion?

10 THE DEFENDANT: No. No. I sent it to the Court, sir. I don't have the
11 original with me, sir.

12 THE CLERK: It might be in the file.

13 THE COURT: It's not in the file.

14 Mr. Cano or Mr. Pike, did you have opportunity to read his motion so
15 I know what's in it 'cause we couldn't read it?

16 THE DEFENDANT: Your Honor, it's kind of going to get lost 'cause when I
17 had got the copy back myself, I saw that it was a lot missing, so I kind of figured that
18 it'd be hard for everybody to see it. The only thing I was only asking for is the
19 discovery from the State to determine the discovery [indecipherable]; that's all I was
20 really requesting.

21 THE COURT: Well, you should have received that. Has that been turned
22 over, Mr. Cano or Mr. Pike?

23 MR. CANO: Yes, it has, Your Honor.

24 THE COURT: Did your attorneys give you a big packet of police reports?

25 THE DEFENDANT: I think they gave me what I had asked for, sir, but I had

1 wanted to check it with what they had already given me with Mr. DiGiacomo here,
2 sir.

3 MR. DIGIACOMO: Judge, both Mr. Cano and Mr. Pike had been to my
4 office, gone through my file, checked their file versus my file. I don't know if you
5 wanted to request them to do it again because I don't know how else --

6 THE COURT: Right.

7 MR. DIGIACOMO: -- we're going to be able to accomplish that.

8 THE COURT: I'm assuming, Mr. Cano and Mr. Pike, you've found anything
9 different in your file Mr. DiGiacomo or Mr. Lalli would have made a copy for you.

10 MR. PIKE: That's correct, Your Honor. We've made an inventory and we've
11 provided that sheet to Mr. Malone. I'm not aware if there's been any additional
12 reports or anything generated.

13 MR. DIGIACOMO: The last thing we got was right around the trial date
14 which was a video of Mr. Herb which I turned over to them. I don't know if they're
15 able -- if Mr. Malone's been able to view that in the jail in any manner; it's a DVD.

16 THE DEFENDANT: Your Honor, I was able to view that.

17 THE COURT: Okay. So, sir, you sound like you have all the discovery. If
18 you think you're missing something, set forth specifically what you're requesting
19 instead of just the general request. It sounds like your attorneys, your former
20 attorneys, and your present stand-by counsel have provided you with everything
21 they have which appears to be everything the D.A. has.

22 On your motion for an investigator, that motion's granted. You'll
23 need to prepare the appropriate order on that.

24 THE DEFENDANT: Okay.

25 THE COURT: Yes.

1 THE DEFENDANT: I didn't hear what you said, sir.

2 THE COURT: Your motion for an investigator --

3 THE DEFENDANT: Uh-huh.

4 THE COURT: -- is granted.

5 THE DEFENDANT: Okay.

6 THE COURT: All right. You'll need to prepare an order and identify the
7 investigator you're going to utilize.

8 THE DEFENDANT: Okay, so I have to file.

9 THE COURT: All right.

10 THE DEFENDANT: Okay.

11 THE COURT: Anything else by --

12 MR. DIGIACOMO: Judge, is there any way we can get somebody to give
13 him a black felt tip pen for any --

14 THE COURT: All right.

15 MR. DIGIACOMO: -- future motions so that we all have the ability to read
16 them?

17 MR. PIKE: We'll deliver some over to him.

18 THE COURT: Okay. Thank you, Mr. Pike.

19 MR. CANO: Well, Your Honor, I think the situation is I thought we can't get
20 him this like pens or things of that nature. It's just going to be with the jail because
21 the jail has certain, you know, things that they consider contraband. I was speaking
22 to Mr. Malone about that. Like, you know, we turned everything over in a huge box.
23 He probably won't be able to keep the box to keep his files even organized. Even if
24 he put colored paper in between --

25 THE COURT: Right.

1 MR. CANO: -- there's things of that nature they don't even allow to have
2 those kinds of things.

3 THE COURT: All right.

4 MR. CANO: I was informed by the jail.

5 THE COURT: Officer, what kind of pen can we give him?

6 CORRECTION'S OFFICER: Your Honor, if it's in the Court Minutes and you
7 have a copy of that when you come to the jail, they will deliver the felt tip black pens
8 to the inmate, but if it's in the Court Minutes documented that you're authorizing it for
9 legal use pro se.

10 THE COURT: It's in the Court Minutes right now. Okay.

11 MR. CANO: Okay.

12 THE COURT: Anything else, Mr. Malone?

13 THE DEFENDANT: I need help like with order. Yeah, like with the box
14 they'll --

15 THE COURT: Okay, sir, what do you need me to -- what do you need?

16 THE DEFENDANT: Well, I need help with organization I guess with the if I
17 can separate the stuff in case they take the box from me 'cause it's a lot of stuff
18 right.

19 THE COURT: Well, sir, I can't help you with that. Your stand-by counsel, I
20 don't think they can sit there and just organize. It's your job.

21 THE DEFENDANT: No. No. It's organized correctly. It's already
22 organized, but sooner or later the jail going to take the box from me [indecipherable]
23 some have a lot of paper all over the room.

24 MR. CANO: I think what he's asking for is like the supplies in order to keep
25 his files organized. Like file folders, things of that nature in order to keep his files

1 organized.

2 THE COURT: Can you give him blank -- can someone send him blank file
3 folders in rubber band I guess?

4 CORRECTION'S OFFICER: Yes, Your Honor, it's the same thing. As long
5 as it's in the Court Minutes since he is pro se to use for legal purposes only. As long
6 as there's no metal or sharp objects attached to any staples.

7 THE COURT: All right. We'll put that in the minutes as well that -- can you
8 handle that, Mr. Cano or Mr. Pike?

9 MR. CANO: Yeah, we can get him -- like I said we can give him the supplies
10 --

11 THE COURT: Right.

12 MR. CANO: -- but the only problem is with the jail.

13 THE COURT: Okay, the minutes will [indecipherable] rubber bands to keep
14 everything together. All right. Anything else, Mr. Malone?

15 THE DEFENDANT: Yes, sir. I believe the private investigator -- how am I
16 supposed to be able to contact the private investigator, sir?

17 THE COURT: They will -- I mean, that should be in the order they can have
18 -- they can have physical contact with you. They going to meet you in one of the
19 meeting rooms and talk to you.

20 THE DEFENDANT: Yes, sir.

21 THE COURT: Okay. That'll be in the order.

22 THE DEFENDANT: All right.

23 THE COURT: You need to prepare the order.

24 THE DEFENDANT: I will.

25 THE COURT: You can seek some assistance from someone else; you

1 understand that?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: Anything else?

4 THE DEFENDANT: No. That should be it so for right now, sir.

5 MR. CANO: Or actually -- he actually -- I had spoke to him over the
6 weekend. He actually wanted to come over our office and view our file as well
7 because what we've given over to him so far is all the trial phase of the case. We
8 also have some mitigation that we have at our office that he would like us to hold on
9 to and wanted to view it in our office, so he probably wants to submit an order to the
10 Court like an order transport so he can come to our office and do that. We have no
11 problems with that.

12 THE COURT: Well, I think on something like that we need a formal motion
13 so the State can respond appropriately. Or you might need to serve also the
14 attorney for the jail because they're going to have to make the arrangements.

15 THE DEFENDANT: I do not know the attorney in the jail, sir.

16 THE COURT: Pardon?

17 THE DEFENDANT: I said I'm not aware of the attorney in the jail, sir.

18 THE COURT: Sir, that's the problem you representing yourself. You can
19 talk to stand-by counsel, but everyone tried to talk you out of this, but you're bound
20 and determined so your request has been granted and so now --

21 THE DEFENDANT: Okay.

22 THE COURT: All right.

23 THE DEFENDANT: Thank you.

24 THE COURT: All right. Anything else by the State?

25 MR. DIGIACOMO: No, Judge.

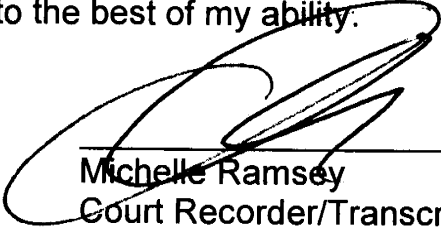
1 THE COURT: All right.

2 MR. DIGIACOMO: Thank you.

3 [Proceeding concluded at 8:41 a.m.]

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21 ATTEST: I hereby certify that I have truly and correctly transcribed the audio/video
22 proceedings in the above-entitled case to the best of my ability.

23
24 
25 _____
Michelle Ramsey
Court Recorder/Transcriber

ORIGINAL

FEB 26 11 12 AM '10

[Signature]
CLERK OF COURT

1 ORDER

2 DOMONIC MALONE

3 INMATE NO. 1670891

4 330 S. Casino Center Blvd.

5 Las Vegas, NV. 89155

6 Attorney in Proper Person

7 DISTRICT COURT
8 CLARK COUNTY, NEVADA

9
10 THE STATE OF NEVADA
11 Plaintiff,

CASE NO. C224572

DEPT. NO. XVII

12 vs.

13 DOMONIC MALONE #1670891

14 Defendant.

15 RECEIVED

ORDER GRANTING DEFENDANT'S MOTION

16 FEB 26 2010

DATE OF HEARING:

17 CLERK OF THE COURT

TIME OF HEARING:

18
19 The above entitled matter having come before the Court on Defendant's Pro
20 Per Motion to Preserve and Produce Evidence Including Potentially Exculpatory
21 Evidence and Motion for Expenses for Private Investigators on February 16, 2010,
22 the Defendant being represented by himself. Stand by counsel, attorneys DAVID M.
23 SCHIECK, Special Public Defender, Charles A. CANO, Deputy Special Public Defender
24 and RANDALL H. PIKE, Assistant Special Public Defender also being present, and a
representative of the Clark County District Attorney's Office appearing on behalf
25 of the State of Nevada, the State having no opposition to the Court granting
26 motions to the Defendant, and the Court being fully advised in the premises,
27

0988

and good cause appearing,


IT IS HEREBY ORDERED that the Defendant's Pro Per Motion to Preserve and Produce Evidence Including Potentially Exculpatory Evidence is granted.

IT IS FURTHER ORDERED that the Defendant's Motion for Expenses to Hire a Private Investigator is granted. * TOM DILLARD
LVMPD Ret. NV Lic.: 657 Professional Investigators Inc 123 N. 9th Street,
Las Vegas, NV. 89101 (702) 383-4005

* and that Mr. Dillard is allowed to have contact visits with the Defendant,

IT IS FURTHER ORDERED that the Clark County Detention Center allow Defendant who is proceeding in Pro Per Person to have in his possession ink pens and or ink markers, legal pads, file folders, post-it notes, rubber bands and a container to house files for the purposes of trial preparation.

DATED this 24 day of February 2010


DISTRICT COURT JUDGE EP

SUBMITTED BY:

Domonic Malone

DOMONIC MALONE

Attorney in Pro Per Person

CCPC 330 S. Casino Center Blvd

Las Vegas, NV. 89101

0001
DAVID M. SCHIECK
SPECIAL PUBLIC DEFENDER
Nevada Bar #0824
CHARLES A. CANO
Deputy Special Public Defender
Nevada Bar #5901
RANDALL H. PIKE
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Attorneys for Domonic Ronaldo Malone

FILED
MAR - 2 2010
John L. Sullivan
CLERK OF COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff

vs.

DOMONIC RONALDO MALONE, ID
1670891,
Defendant.

CASE NO. C224572
DEPT. NO. 17

**MOTION FOR JUDICIAL DETERMINATION OF
STANDBY COUNSELS OBLIGATIONS PURSUANT TO
HOLLAWAY V. STATE.**

DATE: 3/16/2010

TIME: 8:15 AM

COMES NOW, DOMONIC RONALDO MALONE, by and through his attorneys
DAVID M. SCHIECK, Special Public Defender and CHARLES A. CANO, Deputy Special
Public Defender, and RANDALL H. PIKE, Deputy Special Public Defender, and moves this
Court to Issue an Order regarding the duties of Standby Counsel in the event of a Penalty
Hearing in the instant matter.

This Motion is made and based on the pleadings of file herein, the Affidavit attached
hereto, and any argument of counsel at the time of hearing of the motion.

NOTICE OF MOTION

TO: THE STATE OF NEVADA, Plaintiff; and

1 TO: DISTRICT ATTORNEY'S OFFICE, Plaintiff's attorneys:

2 YOU WILL PLEASE TAKE NOTICE that the undersigned will bring the foregoing
3 Motion on for hearing before the above-entitled Court on the _____th day of March, 2010, at
4 the hour of 7:45AM

5 **POINTS AND AUTHORITIES**

6 **STATEMENT OF FACTS**

7 DOMONIC MALONE is facing a laundry list of offenses, the conviction of which may
8 require that he spend the rest of his natural life in jail. In addition to the above, the State has
9 filed a Notice of intent to seek the death penalty.

10 The Defendant has received permission of the Court to proceed in proper person and has
11 appointed the Special Public Defender as Standby Counsel. The Special Public Defenders
12 Office interprets the Court's Order as those indicated in the concurring opinion of Justice Rose
13 in the Case of Hollaway v. State (attached hereto), specifically requiring that the SPD **shall**
14 present a mitigation defense regardless of the Defendant's wishes unless the Court precludes
15 such a presentation. Due to the expense and time involved in the preparation and presentation
16 of the mitigation in this case, the SPD requires a pre-trial ruling from the Court regarding its
17 admission or preclusion of such a presentation.

18 POINTS AND AUTHORITIES

19 In the case of Hollaway v. State, 116 Nev. 732; 6 P.3d 987;(2000) Justice Rose, in a
20 concurring opinion determined that regardless of a capital defendant's desire to represent
21 himself and to control his own defense and self representation at the penalty phase that there
22 existed a concurrent interest of the State that "separate counsel be appointed to represent the
23 **State's** interest in ensuring a reliable penalty determination". See New Jersey v. Koedatich, 112
24 N.J. 225, 548 A.2d 939 (N.J. 1988). In determining that Nevada's statutory scheme includes
25 numerous safeguards to ensure that the death penalty determination is reliable and not given
26 randomly or disproportionately. Justice Rose felt that the mandate of NRS 175.554(3) prohibits
27 a jury from imposing a death sentence in matters where the mitigating circumstances
28

1 outweigh the aggravating ones and that the State, not the Defendant had an obligation to ensure
2 that these were presented. Justice Rose felt that the United States Supreme Court requires a
3 jury to be able to consider and give effect to any relevant mitigating evidence regardless of the
4 self-representation by a Defendant. Citing, Penry v. Lynaugh, 492 U.S. 302, 328, 106 L. Ed. 2d
5 256, 109 S. Ct. 2934 (1989). "I do not see how a jury could fulfill its legal, and perhaps moral,
6 duty of considering the mitigating circumstances when no such evidence is presented."

7 Further, NRS 177.055(2)(d) Justice Rose noted, compels this court to consider "whether
8 the sentence of death is excessive, *considering both the crime and the defendant.*" (emphasis
9 added). This provision not only permits, but requires, this court to consider any mitigating
10 evidence when determining whether a death sentence is excessive. This statutory mandate,
11 however, is thwarted in circumstances where compelling mitigating evidence is neither
12 investigated nor presented at the sentencing phase.

13 Justice Rose went so far as to intimate that Standby counsel should be prepared to act, at
14 the time of a sentencing hearing, as a "representative . . . for sentencing to prevent such
15 arbitrary imposition of the death penalty. This representative would act as an amicus curiae and
16 investigate and present mitigating factors, thus fulfilling the aforementioned statutory directives
17 that safeguard against random and arbitrary death sentences."

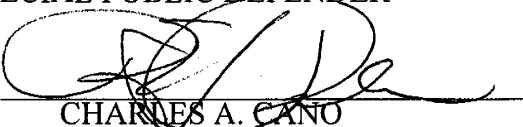
18 CONCLUSION

19 Standby Counsel intends upon presenting this mitigation regardless of the Defendant's
20 desires unless the Court specifically determines that no such obligation exists and that the Court
21 will not allow such evidence over the objection of the self representing defendant herein.

22 DATED this 2nd of March, 2010.

23 DAVID M. SCHIECK
24 SPECIAL PUBLIC DEFENDER

25 By


26 CHARLES A. CANO
27 Deputy Special Public Defender
28 Nevada Bar #5901
330 So. Third Street, Suite #800
Las Vegas, Nevada 89155
(702) 455-6265

1 **ROC**
2 DAVID M. SCHIECK
3 SPECIAL PUBLIC DEFENDER
4 Nevada Bar No. 0824
5 CHARLES A. CANO
6 Deputy Special Public Defender
7 Nevada Bar No. 5901
8 RANDALL H. PIKE
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13 (702) 455-6265
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15 canoca@co.clark.nv.us
16 rpike@co.clark.nv.us
17 Attorneys for MALONE

FILED

MAR 3 10 35 AM '10

[Signature]
CLERK COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

13 THE STATE OF NEVADA,
14 Plaintiff,

CASE NO. C 224572

DEPT. NO. XVII

15 vs.

16 DOMONIC MALONE #1670891,
17 Defendant.
18

RECEIPT OF COPY

DATE OF HEARING: 3/16/10
TIME OF HEARING: 8:15 a.m.

RECEIPT of a copy of Motion for Judicial Determination of Standby Counsels
Obligations Pursuant to Hollaway v. State is hereby acknowledged.

Dated: 3/3/10

DISTRICT ATTORNEY OFFICE

[Signature]
200 Lewis Ave. 3rd Floor
Las Vegas, NV 89155

1 CERT
2 DAVID M. SCHIECK
3 SPECIAL PUBLIC DEFENDER
4 Nevada Bar No. 0824
5 CHARLES A. CANO
6 Deputy Special Public Defender
7 Nevada Bar No. 5901
8 RANDALL H. PIKE
9 Assistant Special Public Defender
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13 (702) 455-6265
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17 Attorneys for MALONE

FILED
MAR 3 1 54 PM '10
CLERK COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

14 THE STATE OF NEVADA,)
15)
16 Plaintiff,)
17 vs.)
18 DOMONIC MALONE #1670891,)
19 Defendant,)

CASE NO: C 224572
DEPT NO: XVII

CERTIFICATE OF FACSIMILE

21 I HEREBY CERTIFY that on the 3rd day of March, 2010, I sent via facsimile a
22 true and correct copy of the foregoing Motion for Judicial Determination of Standby
23 Counsels Obligations Pursuant to Holloway v. State to the following:

24 Benjamin Durham, Esq. Anthony Sgro, Esq.
25 720 S. Fourth St. #100 726 S. 7th St. #300
26 Las Vegas, NV 89101 Las Vegas, NV 89101
27 Fax: (702) 202-1686-
28 946-1396 Fax: (702) 386-2737

Veronica Ayala
Legal Secretary of the Special Public
Defender's Office

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Mar. 03 2010 11:10AM

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Family Defense Division: (702) 455-6266
Family Defense Division Fax: (702) 380-6948

FAX TRANSMISSION

Date: 3/23/10
To: Eric Fax No. 671-4468
From: Rory
Subject: Milone

COMMENTS:

Per your request - Mtn Judicial Determination

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Rory

Pages: 34, including cover sheet

TRAN

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APR 12 2 21 PM '10

DISTRICT COURT
CLARK COUNTY, NEVADA

Ann D. Linn
CLERK OF THE COURT

THE STATE OF NEVADA,

Plaintiff,

vs.

DOMONIC RONALDO MALONE,

Defendant.

CASE NO. C224572

DEPT. XVII

BEFORE THE HONORABLE MICHAEL P. VILLANI, DISTRICT COURT JUDGE

THURSDAY, MARCH 18, 2010

**RECORDER'S TRANSCRIPT OF HEARING RE:
MOTION FOR JUDICIAL DETERMINATION**

APPEARANCES:

For the State:

MARC DIGIACOMO, ESQ.,
Deputy District Attorney

For the Defendant:

RANDALL H. PIKE, ESQ.,
DAVID M. SCHIECK, ESQ.,
Special Public Defenders
(Standby Counsel)

RECORDED BY: MICHELLE L. RAMSEY, COURT RECORDER

1 LAS VEGAS, NEVADA; THURSDAY, MARCH 18, 2010

2 [Proceeding commenced at 8:24 a.m.]

3
4 THE COURT: Which page?

5 THE MARSHAL: Page 15.

6 MR. DIGIACOMO: Yours might say Mr. Herb still, but it's the motion for Mr.
7 Malone.

8 THE COURT: You're right, but we do have Mr. Malone present in custody
9 and this is 224572. We have Mr. Schieck, Mr. Pike, Mr. DiGiacomo. This Motion for
10 Judicial Determination; it was on calendar last Tuesday. However, Mr. Malone
11 wasn't brought down because the calendar was in error. Any objection by the
12 State?

13 MR. DIGIACOMO: Judge, we're obviously not taking a position. We're
14 really here to make sure the records clear, but other than, it's between Mr. Malone
15 and his lawyers.

16 THE COURT: Okay. Mr. Malone, do you have a copy of the motion that
17 your standby counsel filed?

18 THE DEFENDANT: No.

19 THE COURT: Pardon?

20 THE DEFENDANT: No [indecipherable].

21 THE COURT RECORDER: You have to speak up.

22 THE DEFENDANT: No. No, sir.

23 MR. PIKE: Your Honor, we sent that to him and also Mr. Cano and myself
24 went over and discussed the contents of the motion and advised him that we're
25 seeking the Court's ruling on our duties as standby counsel based upon what we

1 perceive is a split of authority because of the concurring opinion in Holloway
2 whether we should be considered. Regardless of Mr. Malone's choices that we
3 should if he decides not to put on a mitigation defense that we then have an ethical
4 obligation to put that on regardless of his wishes and that we more or less assume
5 an amicus position with the Court's which is an unusual position, but it was
6 proposed by Justice Rose in the -- in his decision on that case and given the nature
7 of death penalty cases and the expense that we have to incur in this case
8 specifically flying in out-of-state witnesses and bringing in the experts that if -- if the
9 Court's going adopt one position over the other, we want to make sure that we're
10 ready to assume our -- our correct role and determine what Your Honor believes is
11 our correct role in this -- in cases like this.

12 THE COURT: Mr. Malone, sounds like from Mr. Pike that he and, is it, Mr.
13 Cano came over and spoke with you at the jail?

14 THE DEFENDANT: Yeah, I spoke to them. Yes.

15 THE COURT: And they talked to you about what they're -- what they're
16 trying to do here is to help you if in fact you are found guilty that they would be
17 presenting or assisting you in presenting mitigation evidence which would have an
18 impact on your ultimate sentence, that's if you are found guilty; do you understand
19 that, sir?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: You want them to help you with that?

22 THE DEFENDANT: After I told them that I was objecting to that. Yes, sir, on
23 the mitigation part.

24 THE COURT: Why is that, sir?

25 THE DEFENDANT: Because I feel that they -- if I'm going to be wrongfully

1 convicted, I just might as well just go ahead and do the whole thing and just
2 [indecipherable] go through a mitigation.

3 THE COURT: Well, the whole thing --

4 THE DEFENDANT: [indecipherable]

5 THE COURT: -- State seeking the death penalty; correct?

6 THE DEFENDANT: Yes. That's what the State is seeking.

7 THE COURT: Okay. Well, sir, so you want to go along with the whole thing;
8 whole thing meaning the death penalty?

9 THE DEFENDANT: Yes, the death penalty, sir, if I was to be wrongfully
10 convicted. Yes, sir.

11 THE COURT: You have any questions about their motion --

12 THE DEFENDANT: I have --

13 THE COURT: -- I think they went over and spoke with you about it. Do you
14 have any questions whatsoever about the motion they've filed to assist you?

15 THE DEFENDANT: I haven't seen it, but they came and spoke with me, so
16 my understanding was that I've told them that I was going to make an objection to it
17 and want to leave it up to you.

18 THE COURT: Well, let's make -- let's pass this -- make sure he has a copy
19 of it. I want to have the record as clean as possible that he has a copy of the
20 motion. What's better Tuesday or Thursday of next week? Which would be better?

21 MR. PIKE: Thursday please.

22 MR. DIGIACOMO: Tuesday's fine for the State.

23 THE COURT: All right. All right, Thursday and, sir, we have a trial date
24 coming up; you understand that?

25 THE DEFENDANT: Yes, sir. That is a question I have for you today. I've

1 been trying to get the Order to Transport signed so I can go over there and view all
2 the files and stuff and listen to the recordings and see the video, but I have been
3 having a hard time with that. I had sent Mr. Cano to see would he be able to get you
4 to sign it for [indecipherable] need to in the jail, but the jail people inside would be
5 giving me the run around. They're not telling me who I supposed to give it too, so I
6 was wondering how we're going to go about that.

7 THE COURT: So you want to go where to review?

8 THE DEFENDANT: I wanted to go to the Special Public Defender's Office,
9 sir.

10 THE COURT: Well, they can -- I understand that they've turned over all the
11 documents; is that correct? All the discovery in this case that you have?

12 MR. PIKE: We've given a copy of the discovery to Mr. Malone. We also
13 have coordinated with his appointed investigator, Mr. Dillard [phonetic], to come into
14 the office. He's had complete access to all of our files, so that he could take any
15 files or any videos or any audio tapes -- excuse me, CD's and take them into the --
16 the Clark County Detention Center so that Mr. Malone can review them there.

17 We -- the nature of the Order I guess that was submitted was that on
18 the transportation Order it's four officers security and for -- for safety the inmate is
19 not supposed to know when he's going to be transported out of the -- the detention
20 center except for Court hearings that are necessarily part of that. So I believe that's
21 the problem that he's having, so we've made the accommodation with his
22 investigator who's been appointed and who's been appearing and working with us. I
23 don't --

24 THE COURT: Without divulging --

25 MR. SCHIECK: Your Honor --

1 THE COURT: -- the specific day is this in the works?

2 MR. SCHIECK: -- if I might, Your Honor. From an administrative standpoint,
3 Mr. Malone is asking basically that he be allowed to utilize our office to prepare his
4 case for trial and to, in essence, work out of our office on his case and it creates not
5 only a security problem for the jail, but problems for inside of our office also of
6 having transport officers present for hours at a time while we're trying to conduct
7 other business within our office.

8 And I think part of the Faretta Canvass on an inmate who is in
9 custody includes that they understand that they're going to be preparing and trying
10 their case from -- from being in custody.

11 THE COURT: I don't recall signing such an Order. I may have. I mean, I
12 sign 50 orders a day.

13 MR. SCHIECK: I don't believe you signed a transport order.

14 THE DEFENDANT: Your Honor, I object.

15 THE COURT: Sir, Mr. Dillard -- you have all the discovery. Mr. Dillard can
16 make arrangements for you if you need to view a DVD or something. I'm sure you
17 can make arrangements with the Correction Officers to have that viewed. I'm not
18 going to sign an Order at this point to hold up, you know, five -- four or five
19 Correction Officers and then got to -- we may have security issues.

20 THE DEFENDANT: In regards to Mr. Dillard, due to the fact that he had
21 needed more time to work on my case and I had told him that I wanted to go to trial
22 now --

23 THE COURT: Okay.

24 THE DEFENDANT: -- that he would not be able to help me. So as of right
25 now, I'm not sure if Mr. Dillard is still even on my case 'cause he had came to see

1 me before Mr. Cano and Mr. Pike had came to see me.

2 THE COURT: Okay. We're going to pass this 'til next Thursday. Mr.
3 Schieck or Mr. Pike, if you can just perhaps have Mr. Dillard appear. I mean, if you
4 have a phone number for him. Contact him.

5 MR. SCHIECK: We have.

6 MR. PIKE: We'll contact him.

7 THE COURT: Okay.

8 MR. PIKE: He's willing to do whatever Mr. Malone has requested --

9 THE COURT: All right.

10 MR. PIKE: -- any appropriate requests and he came into our office.

11 THE COURT: Sir, Mr. Dillard's a very experienced investigator and I'm sure
12 if you give him appropriate investigation form he'll conduct it and so we'll have him
13 here next Thursday and we'll make sure that a copy of the motion's been filed. Will
14 be provided to you in the next day or two and we'll see you back next Thursday.

15 Sir, Mr. Schieck is absolutely right and Mr. DiGiacomo, Mr. Pike; this
16 is one of the short comings of representing yourself on a capital case. I think
17 everyone told you it's a bad decision. You're held back in going forward
18 representing yourself on a death penalty case and so we're going to grant your wish.
19 All right. We'll see how it turns out for you.

20 THE DEFENDANT: Okay.

21 MR. PIKE: Thank you, Your Honor.

22 THE COURT: All right.

23 MR. DIGIACOMO: Thank you, Judge.

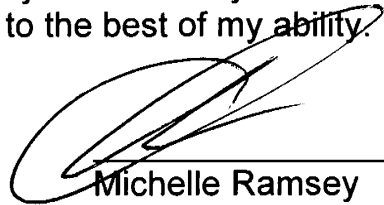
24 THE CLERK: March 25th at 8:15.

25 [Proceeding concluded at 8:32 a.m.]

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ATTEST: I hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.



Michelle Ramsey
Court Recorder/Transcriber

TRAN

COPY

DISTRICT COURT
CLARK COUNTY, NEVADA

FILED

APR 12 2 22 PM '10

Ann L. Quinn
CLERK OF THE COURT

THE STATE OF NEVADA,

Plaintiff,

vs.

DOMONIC RONALDO MALONE,

Defendant.

CASE NO. C224572

DEPT. XVII

BEFORE THE HONORABLE MICHAEL P. VILLANI, DISTRICT COURT JUDGE

THURSDAY, MARCH 25, 2010

**RECORDER'S TRANSCRIPT OF HEARING RE:
ALL PENDING MOTIONS**

APPEARANCES:

For the State:

MARC DiGIACOMO, ESQ.,
CHRISTOPHER LALLI, ESQ.,
Deputy District Attorneys

For the Defendant, Malone:

RANDALL H. PIKE, ESQ.,
DAVID M. SCHIECK, ESQ.,
Special Public Defenders
(Standby Counsel)

For the Defendant, McCarty:

CHRISTOPHER R. ORAM, ESQ.,
ANTHONY P. SGRO, ESQ.

RECORDED BY: MICHELLE L. RAMSEY, COURT RECORDER

1 LAS VEGAS, NEVADA; THURSDAY, MARCH 25, 2010

2 [Proceeding commenced at 8:21 a.m.]

3
4 MR. ORAM: Your Honor, Mr. Sgro said he was on his way. He's going to
5 be a couple of minutes. Do you want to call it now or do you --

6 THE COURT: Well, this is just for a motion for judicial determination relating
7 to Mr. Malone, not to your client. You guys have a motion on Tuesday I believe to
8 sever; don't you?

9 MR. ORAM: I also believe that they were going to address a motion to
10 continue.

11 THE COURT: That's not on the calendar right now, but if you want to bring it
12 up.

13 MR. PIKE: Yes, Your Honor, we will.

14 MR. LALLI: Are we waiting for Mr. Sgro?

15 THE COURT: Are we able to go, Mr. Oram, because this is just a
16 procedural matter, just calendaring?

17 MR. ORAM: I think we should probably wait for Tony, but I think they're
18 going to ask for a continuance I think.

19 MR. PIKE: That's correct. We come into Chambers before. An issue
20 came up.

21 THE COURT: Okay. Let's wait 'til Mr. Sgro.

22 [Matter trailed]

23 [Matter recalled at 8:48 a.m.]

24 THE COURT: State versus Malone. Mr. Malone is present in custody. We
25 have Mr. Pike, Mr. Schieck, Mr. Oram, Mr. Sgro, Mr. Lalli, Mr. DiGiacomo; and this

1 is -- there is -- couple of things, we have a motion for judicial determination filed by
2 Mr. Pike, Mr. Cano on this case.

3 MR. PIKE: That's correct, Your Honor. It's our position that the Holloway
4 case indicates that we have to take that position which maybe contrary to the pro
5 per Defendant's position as far as whether or not mitigation should be presented
6 and so with -- with that opinion not being really clear, we decided it was appropriate
7 to ask the Court for guidance on that issue.

8 THE COURT: We were here last week and Mr. Malone had stated he had
9 not received the motion although counsel had spoke to him about it, so I continued it
10 for a week for him to get a copy of the motion.

11 MR. PIKE: Right. Mr. Cano delivered that to him and discussed it with him.
12 It maybe moot now because Mr. Malone indicated that Mr. Cano that he desires us
13 to assume the case at this time.

14 THE DEFENDANT: Still working on that part. I was --

15 THE COURT: Okay, what's your -- sir, we're here on the motion.

16 THE DEFENDANT: Yeah, well my --

17 THE COURT: What is your -- do you object to the motion?

18 THE DEFENDANT: Yeah, my objection is still the same. I still object to it,
19 Your Honor.

20 THE COURT: Okay.

21 THE DEFENDANT: I had read it.

22 THE COURT: Okay. All right. You have not filed a written opposition;
23 correct?

24 THE DEFENDANT: No, sir.

25 THE COURT: All right. Well, the Court reads NRS 175.554 as if the juries

1 going to consider the death penalty in any case they are to consider aggravating
2 circumstances and mitigating circumstances. And my understanding from you last
3 week, sir, is that you do not wish to present any mitigating circumstances --

4 THE DEFENDANT: Yes.

5 THE COURT: -- is that correct?

6 THE DEFENDANT: Yes, sir, that is correct.

7 THE COURT: Okay. I'm going to allow -- I'm going to grant the Special
8 Public Defender's motion to present mitigating circumstances if this case gets to that
9 position.

10 MR. PIKE: Thank you, Your Honor.

11 THE DEFENDANT: Your Honor, I would like to file these two motions here
12 in open Court if that's okay with you?

13 THE COURT: Okay. I won't hear them today.

14 THE DEFENDANT: I know.

15 THE COURT: We'll have to do a notice of motion.

16 THE DEFENDANT: I know that you won't hear them today. I wanted to
17 know is it okay to file it with you today?

18 THE COURT: What are the motions, sir?

19 THE DEFENDANT: Motion for Reconsideration of Writ of Habeas Corpus
20 and this Motion Limited Prohibit Introduction of Hearsay Statements made by Co-
21 defendant, sir.

22 THE COURT: Okay, sir, I can tell you that if a statement is not allowed
23 under the rules, it will not come in.

24 THE DEFENDANT: Okay.

25 THE COURT: So I'm granting your motion to that extent. No improper

1 hearsay statements will be allowed.

2 THE DEFENDANT: Okay, sir. And I would like to have an oral motion on a
3 Motion to Reconsideration.

4 THE COURT: Well, that you're going to need to file, sir.

5 THE DEFENDANT: Yes. I have it here.

6 THE COURT: How do they file when they're in jail?

7 MR. PIKE: They send them to the Clerk's Office.

8 THE MARSHAL: Can she still file?

9 THE COURT: Well, we --

10 THE CLERK: I can file criminal.

11 THE COURT: -- okay. We'll take -- we'll take that motion, sir.

12 THE DEFENDANT: I greatly appreciate it, sir.

13 THE COURT: You have copies for the other counsel here, sir?

14 THE DEFENDANT: No, sir.

15 THE COURT: It probably would have been a good idea to have an attorney
16 wouldn't it.

17 THE DEFENDANT: I wouldn't have been able to --

18 THE COURT: Didn't you hear what I just said?

19 THE DEFENDANT: Yes, sir. Oh, yes. Yes, sir.

20 THE COURT: All right.

21 THE DEFENDANT: It is. I do want --

22 THE COURT: My Clerk will file it. My Clerk will make sure that all counsel
23 here have a copy of your motion. We'll put that on -- actually, we'll put that on for
24 two weeks for argument. Will that be enough time for the State to respond?

25 MR. LALLI: I'm sure we can respond orally depending on what it is.

1 THE COURT: Okay.

2 MR. DIGIACOMO: To reconsider the Writ obviously is jurisdictionally barred.

3 THE COURT: Right.

4 MR. DIGIACOMO: But two weeks would put us in the middle of trial, Judge.

5 THE COURT: That's true.

6 THE DEFENDANT: Yeah.

7 THE COURT: Okay, we'll do this on next Thursday.

8 MR. DIGIACOMO: Calendar Call will be fine, Judge.

9 THE DEFENDANT: Yeah.

10 MR. PIKE: And --

11 THE COURT: Calendar Call on Tuesday; is that going to give you enough

12 time?

13 THE DEFENDANT: It's very short.

14 MR. DIGIACOMO: As to the -- to the motion, yeah.

15 THE COURT: Okay.

16 MR. DIGIACOMO: To reconsidering the Writ, I think we can probably have a

17 response in tomorrow, so --

18 THE COURT: All right.

19 MR. DIGIACOMO: -- it'll be plenty of time to file a response.

20 THE COURT: Yes, sir?

21 THE DEFENDANT: I did would like to have my counsel back. However,

22 that I do not agree with pushing this case off any further than what it has already

23 been pushed off if that would be the case that it is. So that's the reason why we're

24 told the right to do that at this point in time. And when I had filed a motion, I

25 specifically put a NRS that, you know, for a standard for somebody as in my position

1 to be able to present the argument that I tried to present. If allowed to have the oral
2 argument --

3 THE COURT: Sir, am I hearing you correct that you do not wish to represent
4 yourself now?

5 THE DEFENDANT: At this point in time, that's what I was working on, sir.

6 THE COURT: Okay, listen to my question very carefully.

7 THE DEFENDANT: Yes, sir.

8 THE COURT: Are you saying today you do not wish to represent yourself.
9 You want representatives of the Special Public Defender's Office to represent you?

10 THE DEFENDANT: Sir --

11 THE COURT: That's a yes or a no.

12 THE DEFENDANT: -- at this point in time no, sir.

13 THE COURT: Okay. And, sir, all right.

14 MR. SCHIECK: Your Honor --

15 THE COURT: We have an issue that's going to come up next week or can
16 we handle it today?

17 MR. PIKE: Well, this is -- this is a condition or this is what happened. As
18 Your Honor's aware I had back surgery and I had that in January. I'm anticipating
19 that I'd be given the clean bill of health and I was given the clean bill of health for
20 trials that proceeded towards the -- the final recovery time.

21 Because of subsequent follow-up, medical investigative and
22 treatment, it appears that there is necessary surgery that needs to be done in an
23 expeditious fashion. And enough so that my neurosurgeon bumped the patient and
24 has scheduled me for surgery for the 20th of April which will necessitate me being
25 laid out -- laid off for about three weeks.

1 It's -- it's to not have this I've been informed would adversely impact
2 the spinal fusion that I had and I got that information last week and pursuant to the
3 Court's Order I immediately notified the Chambers and so notified all counsel the
4 situation so that they could all be here today and because even to fulfill my
5 responsibilities as back-up counsel I would not be able to do that.

6 THE COURT: All right and we've had Mr. Cano and we've had Mr. Schieck.

7 MR. PIKE: Mr. Cano's out of the country and Mr. Schieck is just appearing
8 on Mr. Cano's behalf.

9 THE COURT: Okay, so Mr. Schieck you're not ready if Mr. Cano is ready;
10 correct?

11 MR. SCHNITZER: That's correct, Your Honor.

12 THE COURT: State?

13 MR. LALLI: Well, here's -- here's the concern, Your Honor. Obviously, we
14 fully accept Mr. Pike's representations and he needs to do medically what the
15 doctors are telling him to do. We certainly want him to do that.

16 With respect to standby counsel, Rule 250 is silent as to the number
17 of counsel who are required in a death penalty case to be standby. The Court has
18 currently appointed two. Even this morning, the Defendant seems somewhat
19 equivocal about his right whether he continues to invoke his right to represent
20 himself. And it is not in my opinion at all beyond the realm of possibility that in the
21 middle of this trial, he would then assert that right which I think would complicate
22 things.

23 As it is right now, if that were to happen when we have two
24 competent 250 lawyers, fine they pick up and we just continue. Without two 250
25 lawyers, it is a concern of ours what happens if we get to that point especially when

1 jeopardy will have attached to one Co-defendant. Actually, to both Co-defendants
2 and it -- I just see a lot of problems not proceeding with two 250 standby counsel.

3 THE COURT: No. I agree. That was my intent to always have to have two
4 250 standby counsel; can you go forward on Mr. McCarty?

5 MR. DIGIACOMO: Judge, we have repeatedly litigated the motions to sever
6 in this particular case. And, in fact, every previous continuance of this case has
7 been at the request of Mr. McCarty's lawyers. So I don't think it would be
8 appropriate to -- to sever the case now because now Mr. Malone is making really
9 with what amounts to be the first one.

10 As the Court will recall, we actually got to the weekend before
11 starting trial last time and then there was an emergency Mr. McCarty's lawyers.

12 THE COURT: Okay, so now we have -- we have a trial date in October 5th.

13 MR. LALLI: We do.

14 MR. DIGIACOMO: We do.

15 MR. LALLI: I mean we anticipated that there would be problems with this
16 date and -- and took two trial dates for that reason.

17 THE COURT: Let's hear from Mr. Sgro or Mr. Oram.

18 MR. ORAM: Your Honor, we understand. Mr. Pike called me immediately --
19 excuse me last week and told me this and then I received a phone call from Mr.
20 Cano as well indicating that this would was going to take place. I'm in a capital
21 murder trial against Mr. DiGiacomo right now. It doesn't look like we're even going
22 to have our jury picked until I would think it will take all of this week and we'll start
23 trial next week, so we're in a little bit of a quandary any way.

24 THE COURT: Okay, sounds like a continuance is in order. This trial date
25 will be vacated. We'll go back to the October 11th trial date.

1 THE DEFENDANT: Your Honor --

2 THE COURT: -- and October 5th Calendar Call date.

3 THE DEFENDANT: Mr. Villani, could we just pass this case to overflow to
4 get this --

5 THE COURT: This case is not overflow eligible, so --

6 THE DEFENDANT: -- 'cause -- Judge, Your Honor, as I'm hearing the -- the
7 surgery is scheduled for the 20th. We scheduled this case for the 5th, so that --

8 THE COURT: It may not be done in time, sir, that's why.

9 THE DEFENDANT: I thought that would be enough time to get this case
10 done.

11 THE COURT: Okay. It's not.

12 MR. SGRO: Your Honor?

13 THE DEFENDANT: Your Honor, you --

14 THE COURT: Okay, sir, it's not enough time.

15 THE DEFENDANT: -- I'm not trying to argue with you, Your Honor.

16 THE COURT: I'm glad. Okay, what's your next issue?

17 THE DEFENDANT: The issue is that I came to you with this before that --
18 that I have a right to go to trial, you know, so we thinking as you wrote in your letter
19 that if we have any issues right; that present them witness that the letter that you
20 had given to me which was given to me by my standby counsel first, but then you
21 sent it to me, so I'm thinking that we -- I'm finally going to get my day in Court where
22 I can get a trial.

23 Every time that I have came so far to have this issue to go to trial, I
24 keep getting pushed back and pushed back and pushed back; and I as always
25 stated in the courtroom that the only reason why I even waive my speedy trial right

1 because my attorney at the time, Cano, had advised me that he needed more time
2 to work on my case or I wouldn't have never done that.

3 Now, I'm not here to be sitting here doing prison time waiting on a
4 court trial that will never happen. Who's to say that when October comes something
5 else done now pop up and I don't never go to go to trial. Then I'll be in 2011. Then
6 2011 pass by, 2012. Then we get there it going to be 2020. I'm doing all this prison
7 time for nothing. I should have the right to go to trial. Everybody here is here.

8 THE COURT: Okay, sir, listen to me. On death penalty case, you must
9 have two attorneys represent --

10 THE DEFENDANT: And I --

11 THE COURT: -- representing you with standby, but I made the
12 determination that that requires two death penalty qualified attorneys even standby
13 because there might be a situation where there maybe coming in and representing
14 you on the entire case which I'm saying is not going to happen, but I have an order
15 that they're allowed to represent you in the penalty phase if we get that far. We will
16 not have two attorneys 'cause Mr. Pike has some medical issues.

17 Trial date is being -- is being vacated for good cause and we have a
18 new trial date in October and then you have the date here for his new motions filed.
19 All right?

20 MR. SGRO: Your Honor, may I --

21 THE COURT: Anything else?

22 MR. SGRO: -- Your Honor, may I ask a quick question?

23 THE COURT: Yes.

24 MR. SGRO: The -- as the record stands now because we filed a renewed
25 motion for severance based on the Faretta Canvass that occurred on the election of

1 Mr. Malone to proceed on his own behalf.

2 THE COURT: Is that next week or --

3 MR. SGRO: It is. I just want to make it clear we don't come back and the
4 Court has already determined that that motion maybe moot, so the motion is still a
5 viable motion based upon today's proceedings.

6 THE COURT: Oh, absolutely.

7 MR. SGRO: Okay.

8 THE COURT: Until we have an opposition.

9 MR. LALLI: Well, can I be heard on that? And I don't know if the Court's
10 has looked at the motion and I've looked at it and there's not a single case or statute
11 as legal support for the proposition that when one person presents themselves and
12 another person is represented by counsel that that is a ground for severance.

13 THE COURT: I haven't read the motion --

14 MR. LALLI: All right.

15 THE COURT: -- 'cause it's not on calendar yet.

16 MR. ORAM: So are we back on Tuesday, Your Honor?

17 THE COURT: If that's the date of the motion, then we're on that date.

18 MR. ORAM: Thank you very much.

19 MR. SCHIECK: Your Honor, could they serve Mr. Malone with that motion --

20 THE DEFENDANT: Yeah, 'cause --

21 MR. SCHIECK: -- he's attorney of record on that.

22 MR. SGRO: We'll get it to him, Judge.

23 MR. LALLI: Your Honor, can we just -- I'm sorry --

24 THE COURT: Well, we might have to bump it two weeks because since he's
25 pro per --

1 MR. SGRO: Yes.

2 THE COURT: -- he does need to have a copy of that. Okay, so --

3 MR. SGRO: And that -- the bump would be fine, so instead of next Tuesday,
4 you want it two weeks from Tuesday; that's fine.

5 [Colloquy between the Court and the Clerk]

6 MR. DIGIACOMO: Well, Judge, if you're going to vacate the trial date why
7 don't we just move them all 'til -- 'til a particular date instead of coming back multiple
8 times.

9 MR. SGRO: Right.

10 THE COURT: His renewed Motion for Writ of Habeas Corpus and Motion to
11 Sever will be on this date.

12 MR. SGRO: Great.

13 MR. DIGIACOMO: Great.

14 THE CLERK: April 13th, 8:15.

15 MR. DIGIACOMO: Thank you, Judge.

16 THE COURT: Just make sure Mr. Malone has a copy of all of those
17 motions.

18 THE DEFENDANT: Villani, could I ask you --

19 THE COURT: Sir, Judge Villani.

20 THE DEFENDANT: -- oh, excuse me. Your Honor, Judge Villani, not to be
21 disrespectful 'cause I was trying to -- when is the next trial date after October 11 if
22 we don't have that one? When is the next one?

23 THE COURT: You're going to have that date. All right.

24 THE DEFENDANT: You told me that before.

25 THE COURT: All right. We're done with this case.

1 MR. ORAM: And could Mr. McCarty -- could Correction's Officer just note
2 that Mr. McCarty should be here next time.

3 THE COURT: Yes.

4 MR. ORAM: Thank you.

5 THE COURT: We need both Defendants here.

6 MR. ORAM: Thank you very much.

7 MR. PIKE: Thank you.

8 MR. DIGIACOMO: Thank you, Judge.

9 THE COURT: Also, counsel, is there any question about a jury
10 questionnaire? I know we have a trial date in October now, but it's --

11 MR. LALLI: We had previously submitted to the Court a questionnaire and
12 actually had the questionnaires completed and returned.

13 THE COURT: Correct.

14 MR. LALLI: So we would be using the same one.

15 THE COURT: I remember that now. Yes. We'll just have a new one.

16 MR. LALLI: Does the Court still have that or should we furnish the Court
17 another copy?

18 THE COURT: We'll check.

19 MR. DIGIACOMO: I might be able to get you one in Word so that we can
20 have the dates changed 'cause obviously --

21 THE COURT: Right.

22 MR. DIGIACOMO: -- it's going to have the old dates on there. I will re-email
23 one to your JEA that to get --

24 THE COURT: And we also need to make sure Mr. -- Mr. Malone has a copy
25 of that questionnaire that had already been approved by the Court.

1 MR. LALLI: Very good.

2 MR. DIGIACOMO: Okay.

3 MR. LALLI: Thank you.

4 MR. SGRO: Thank you.

5 [Proceeding concluded at 9:03 a.m.]

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21 ATTEST: I hereby certify that I have truly and correctly transcribed the audio/video
22 proceedings in the above-entitled case to the best of my ability.

23
24 
25 Michelle Ramsey
Court Recorder/Transcriber

ORIGINAL

FILED IN OPEN COURT

MAR 2 2010

STEVEN D. GRIERSON
CLERK OF THE COURT

BY

Carol Donahoo
CAROL DONAHOO DEPUTY

0001

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DISTRICT COURT

CLARK COUNTY, NEVADA

10
11
12 THE STATE OF NEVADA,)
Plaintiff,)
13 vs.)
14 DOMONIC MALONE #1670891,
15 Defendants.)
16

CASE NO. C 224572
DEPT. NO. XVII

17 MOTION IN LIMINE TO PROHIBIT INTRODUCTION OF HEARSAY STATEMENTS
18 MADE BY CO-DEFENDANT MCCARTY AND OTHERS THAT REFERENCE
DEFENDANT MALONE AT THE TIME OF TRIAL

19 Date of Hearing:
Time of Hearing:

20
21 Comes defendant, DOMONIC MALONE, by undersigned counsel, pursuant to the sixth,
22 eighth and fourteenth amendments to the United States Constitution, and the Nevada
23 Constitution and moves this court to bar the introduction of hearsay evidence, including the
24 misuse of the co-conspirator exception to the hearsay rule, and/or to conduct an evidentiary
25 hearing to determine the admissibility of the hearsay testimony prior to it being presented
26 before the jury.

27 This Motion is based upon the attached points and authorities, arguments of counsel at
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1 the time of the hearing on this matter as well as the points and authorities contained within
2 both of the defendants Writs of Habeas Corpus heretofore file in this matter.

3 **NOTICE OF MOTION**

4 TO: THE STATE OF NEVADA, Plaintiff; and

5 TO: DISTRICT ATTORNEY'S OFFICE, Plaintiff's attorneys:

6 YOU WILL PLEASE TAKE NOTICE that the undersigned will bring the foregoing Motion
7 on for hearing before the above-entitled Court on the _____ day of August, 2009, at the hour
8 of _____ a.m.

9 **PROCEDURAL STATEMENT**

10 **POINTS AND AUTHORITIES**

11 Since this has been designated as a capital prosecution, exacting standards must be
12 met to assure that it is fair. The death penalty "is unique in its irrevocability." Furman vs.
13 Georgia, 408 U.S. 238, 306, 92 S.Ct. 2726, 33 L.Ed. 2d. 346 (1972) (Stewart, J. concurring).
14 As the United States Supreme Court has held, "[t]he fundamental respect for humanity
15 underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives
16 rise to a special "need for reliability in the determination that death is the appropriate
17 punishment" in any capital case." Johnson vs. Mississippi, 486 U.S. 578, 584, 108 S.Ct. 1981,
18 100 L.Ed. 2d 575 (1988) (quoting Gardner vs. Florida, 430 U.S. 349, 363-64, 97 S. Ct. 1197,
19 51 L.Ed 2d 393 (1977) (quoting Woodson vs. North Carolina, 428 U.S. 280, 305, 96 S.Ct.
20 2978, 49 L.Ed. 2d 944 (1976) (White, J., concurring).

21 **LEGAL ARGUMENT**

22 In the present case, the State is offering a theory of conspiracy amongst the three
23 original defendants. A conspiracy charge is, it is said, the "darling of the modern prosecutor's
24 nursery." Harrison v. United States, 7 F.2d 259, 263 (2nd Cir. 1925). One can see why this is
25 true from this case. The hearsay statements allegedly made by Co-Defendant McCarty a.k.a.
26 "Romeo" are used against Romeo and also implicate Defendant Malone. Indeed it is hard to

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1 determine how the statements of Romeo, if admitted, could be redacted sufficiently to allow a
2 joint trial. While some arguably could be construed as legitimate co-conspirators' statements,
3 much of the hearsay simply cannot fit within the definition of co-conspirators' statements and
4 must be excluded.

5 Unlike State v. White, 168 Ariz. 500, 815 P.2d 869, 875, n.1 (1991), where "defendant
6 has not claimed that admission of the hearsay statements violated his constitutional right to
7 confront witnesses against him," Defendant Malone argues exactly that. Malone's right to
8 confront and cross examine the witnesses against him will be violated if the same or similar
9 hearsay statements are admitted against him. See, U.S. Const., Amends. V, VI, VIII, XIV.

10 **STATEMENT OF FACTS**

11 Defendant, through this reference adopts the Statement of Facts contained in the
12 "FACTUAL BACKGROUND" of the Writ of Habeas Corpus heretofore filed before this
13 Honorable Court as though set forth herein. Specific to this Motion are the conflicting
14 statements of the two alleged co-conspirators, Donald Herb, who has struck a negotiation with
15 the State and has testified against his two codefendants and the codefendant McCarty, who
16 provided a statement to police in which he alleges that it was in fact Herb and Malone who
17 committed the alleged crimes. The body of this motion addresses a number of hearsay issues
18 that arise due to the joint trial ordered with the defendants. For purposes of organization only,
19 the body of the Motion shall address the hearsay statements as introduced by witness.

20 **HEARSAY TESTIMONY OF COREENA PHILLIPS**

21 Some of the statements that are most egregious were introduced at the time of the
22 preliminary hearing. In particular, "Coreena," a witness who testified at the preliminary hearing
23 stated while watching the T.V. with Romeo there was a report about the instant deaths. She
24 testified that Romeo told her that someone was "framing him and D-Roc" for the murders. (Il p.
25 51). She also testified that "days before" Romeo had told her that "they were going to take
26 them out to the desert and they were going to, weren't going to kill them or anything like that. .

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1 . [t]hey did mention going to take them out to the desert, smack them around a couple of
2 times, teach them a lesson, I guess, because they owed them money or something." (Id).
3 Coreena never talked with D-Roc about the deaths. (II p. 52). Correna Phillips, lived at the
4 Sportsman Manor with her girlfriend, Lynn Nagel (II p. 4) during the week in question. On
5 March 16th, Tuesday night, Romeo, D-Roc, Christina, and Victoria came to their residence (II
6 p. 7). It was the first time she had met Christina, although she had known Romeo for "about a
7 month and a half" prior to that date and D-Roc "a couple of weeks less than that" (II p.8-9).
8 She believed that "the leader to me, I though was kind of like Romeo. But then I thought D-
9 Roc, though too in a way. But Romeo, like Donny, controlled all the money and stuff like that.
10 Romeo and Donny would sell together, and D-Roc pretty much sold on his own. . . . It seemed
11 like Romeo, like pretty much controlled Donny, and like he and Donny not so much D-Roc. D-
12 Roc was pretty much on his own." (II p. 26).

13 On the Friday following the above events, Coreena testified that she overheard D-Roc
14 on the telephone and he had mentioned something "about I had taken their clothes off and left
15 them out there." (II p. 38). She did not know to whom he was speaking. (Id). On that same day,
16 when Romeo, Donny and D-Roc picked her up from work, D-Roc took his shorts off and threw
17 them away. Coreena did not question this, as "[D-Roc] did weird things, so I just thought it was
18 something he did". (II p. 41).

19 Coreena took the green car from Romeo the next Monday and tried to have the tires
20 replaced, was unsuccessful and returned the car to Romeo who stated, "me and D-roc will go
21 and take care of it." (II p. 45). While D-roc was in the room at the time, he didn't say anything
22 or nod his head, "he was just standing there". (II p. 48).

23 Coreena testified that she discussed them matter with Donald Herb (a.k.a. Donny) at
24 his residence. She overheard Donny telling his parents that "a couple girls were killed in the
25 desert, that they were trying to frame him for the murder." Donny and his father told her "not to
26 talk to anybody without his lawyer." (II p. 54-55).

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HEARSAY TESTIMONY OF DONALD HERB A.K.A. "DONNY"

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2 Donny was a regular at Sportsman's Lounge and he was selling drugs at that location,
3 "pretty much every day." (V p. 48). Donny testified that he was the owner of the two cars in
4 question, the 2002 green Oldsmobile Allero and the 1993 white Honda Accord (V p. 5). Donny
5 allowed Romeo to use the green car for the entire months of April and May of 2006. (V p. 6).
6 This despite the fact that the Honda was not registered and has an expired 30 day permit. (V
7 64). Romeo was a friend of Donny's for three to four years and they had resided together for a
8 period of about two years. (Id). Donny and Romeo communicated frequently by cellular
9 telephones, Donny's number was 453-9274 and Romeo's number was 237-3308 (V p. 8).
10 They saw each other "almost every day." (V p. 9)

11 Donny described the events of the night before the death of the girls. Donny stated that
12 on that evening, he called Romeo and stated "I'm going to come and get my car." (V p. 15).
13 Romeo gave him directions to Exit 56A on the 95 south. (id). Donny stated that he did this
14 because Romeo said he was going to leave the state with the car. (V p. 60) However, Donny
15 had not made any arrangements to have someone assist him in retrieving his car. (V 65) Nor
16 was there any conversation about Donny and Romeo switching cars (V 66). They had
17 numerous calls back and forth until Donny arrives (V p. 16-18). Romeo states on the cell
18 phone prior to Donny arriving: "You know what we're doing out here. We're not just beating
19 them up this time. You're involved in two murders now." (V p. 18). Allegedly in the background,
20 he hears a voice he believes to be that of Mr. Malone saying that "he broke the club that they
21 had." They only brought one. Mr. McCarty proceeds to tell him, "Okay. Just hit the bitch in the
22 head with a rock." During one cell phone call, Romeo tells Donny "Victoria is dead" and then
23 hung up (V p. 39).

24 Arriving at the scene, Donny sees Romeo and D-Roc in the green car. He follows them
25 toward Boulder City. (V p. 19). Romeo's hearsay statements (as to D-Roc) describe the prior
26 battery by D-Roc on Red. (V p. 24). About a week prior to that, Romeo complained to Donny

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1 that Victoria " had went to work and then not showed up for a couple of days. She took some
2 work [drugs] with her. She was smoking it-- this being Victoria..." (V p. 25). Red had received
3 some drugs from D-Roc, and she was also missing. (V p. 26). The two vehicles stop about
4 "four miles south of the dam" and Romeo and D-Roc start removing things from the trunk of
5 the car. (V p. 28). Donny gets out of his car, D-Roc hands him a head of a golf club and tells
6 him to get rid of it. Donny then throws it into the desert. Donny, Romeo and D-Roc discussed
7 alibis, and what everyone's alibi would be. (V p. 36). Romeo later advised Donny that " he
8 would have two of our friends, Coreena and Lynn . . . would say that he was at their house at
9 that time, and that the green car was there, they remember him." (V p. 38). After cleaning out
10 the rest of the trunk, everyone leaves in the two cars, until they stop at Russell Road and
11 Boulder highway. Romeo asks Donny, to go inside and get a bottle of water for him," to which
12 Donny complies (V p. 30).

13 From that location, Romeo "asks [Donny] to drive Mr. Malone home" Romeo "heads
14 towards the Sportsman." (Id). Donny takes D-Roc to his (Donny's) house, where Donny turns
15 off his alarm, changes his clothes for work, and drops off D-Roc near Lake Mead and Martin
16 Luther King Drive, then Donny picks up Lenny and takes him to work. (V p. 31).

17 During this time, D-Roc was wearing black shorts, sandals and a long sleeved black t-
18 shirt. At the spot near the dam, several discussions about clothing was held. This culminated
19 when Romeo "told Mr. Malone to take the girls' clothes and burn them". (V p. 34). The night
20 after the deaths, Romeo gave additional information to Donny, although he did not say exactly
21 how they were killed. (V p. 38). D-Roc "didn't say anything about it," stating " We shouldn't talk
22 about what happened at all." (V p. 40).

23 In an effort to destroy evidence, Romeo "told [Donny] we needed to change the tires so
24 they wouldn't match the tire marks at the crime scene... I then gave him \$200 cash so he could
25 take care of that" (V p. 41). D-Roc, although present, said nothing. (Id).

26 Prior to assisting the police, Donny admitted lying to them. He lied to them about his
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1 involvement as well as Romeo's and D-Roc's involvement. (V p. 43). After interrogations,
2 wherein, the police told Donny that Romeo had said that Donny and D-Roc did it and that D-
3 Roc said that Donny and Romeo did it, the police made him an offer: "I could either be a
4 witness or I could be a suspect..." (Id). After determining that he would assist the police, Donny
5 took officers out to the locations that he had described and assisted police in recovering
6 evidence. (V p. 42).

7 What is most troublesome to Mr. Malone is that number and nature of the hearsay
8 statements of the co-defendant McCarty that serve to impliedly inculcate Mr. Malone. For
9 instance: Prior to this time, Romeo had explained to Coreena how he pimps girls, how he got
10 them and how he made money off of them. (II p. 19). This included how he controlled them.
11 (Id). She did not have these conversations with D-Roc.(Mr. Malone). (Id). For instance,
12 Coreena had a conversation with Romeo (McCarty) wherein he advised her that he was
13 leaving and he was going to "take the girls to the Hard Rock. I will see you later," (II p. 12)
14 They went to the Hard Rock "because Romeo mentioned that the girls wanted to go to the
15 Hard Rock." (II p. 98).

16 Additionally, Coreena was apparently recruited by McCarty to assist him, Coreena took
17 the green car from Romeo the next Monday and tried to have the tires replaced, was
18 unsuccessful and returned the car to Romeo (II p. 45).

19 Apparently, Romeo had convinced Coreena that there was money and drugs hidden
20 somewhere. Romeo took Coreena into the desert and "showed me a spot where it was, where
21 he had buried it. Supposedly 95,000 or 90,000 and two kilos". (II p.56). Coreena was unable to
22 find the money and drugs however, "it wasn't there. I looked". (id). Coreena testified that during
23 her interview the police knew about the money due to "three way calls" from Romeo through
24 the bail bondsman to Coreena (II p. 117).

25 Certainly it appears from Coreena's testimony that Romeo was attempting to recruit her
26 into some sort of conspiracy. Yet, there is no testimony that Mr. Malone was privy to any of

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1 these conversations or telephone calls.

2 Coreena gave numerous statements to the police, when confronted by officers and
3 being told by officers that she was going to either be a suspect or a witness, she stated "I
4 wanted to be on the other side, on the witness side. I was just scared" (II p.108).

5 Melissa Estores a.k.a. "Red" told Leonard Black that she suspected "D-Roc" and Rome
6 of entering his apartment, and based on this information Leonard Black went to the Sportsman
7 to confront Rome and "D-Roc" which resulted in beating up Rome, and Red left with Leonard
8 and DeMarco (p. 129). "Red" had no further contact with either Rome or D-Roc after that. After
9 learning of the deaths, "Red" contacts the police. (p. 131). She had a number of recorded
10 statements as well as 15-20 contacts with the police. (p. 138). She was temporarily provided
11 living accommodations and food expenses by the police because of this incident. (p.147).

12 "Red" admitted to drinking "almost every day" and smoking a "blunt" (a marijuana
13 cigarette) almost every day. (Id). Red cannot read (p. 159) and has memory problems (id). She
14 must be cautioned prior to her testimony regarding any hearsay statements about Mr. Malone.

15 **1. Confrontation Clause**

16 "There are few subjects, perhaps, upon which [the Supreme] Court and other courts
17 have been more nearly unanimous than in their expressions of belief that the right of
18 confrontation and cross-examination is an essential and fundamental requirement for the kind
19 of fair trial which is this country's constitutional goal." Pointer v. Texas, 380 U.S. 400, 405
20 (1965). The Sixth Amendment's Confrontation Clause, made applicable to the States through
21 the Fourteenth Amendment, provides: "in all criminal prosecutions, the accused shall enjoy the
22 right ... to be confronted with the witnesses against him." The right to confrontation is, likewise,
23 guaranteed by the Nevada Constitution. The Confrontation Clause reflects a preference for
24 face-to-face confrontation at trial and that "a primary interest secured by [the provision] is the
25 right of cross-examination." Douglas v. Alabama, 380 U.S. 415 (1965); see also California v.
26 Green, 399 U.S. 149 (1970)("it is this literal right to 'confront' the witness at the time of the trial

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1 that forms the core of the values furthered by the Confrontation Clause"). Cross-examination
2 has been described as the "greatest legal engine ever invented for the discovery of truth."
3 California v. Green, 399 U.S. at 158 quoting 5 J.Wigmore, Evidence 1367 (3d ed. 1940).

4 The Confrontation Clause provides for a personal examination and cross-examination
5 of the witness, in which the accused has an opportunity, not only of testing the recollection and
6 sifting the conscience of the witness, but of compelling him to stand face to face with the jury
7 in order that they may look at him, and judge by his demeanor upon the stand and the manner
8 in which he gives his testimony whether he is worthy of belief. Mattox v. United States, 156
9 U.S. 237, 242-43 (1895).

10 Without these important means of testing accuracy and in the absence of proper
11 confrontation of the ***alleged primary declarant*** "the ultimate integrity of the fact finding
12 process' ... [is] call[ed] into question." Chambers v. Mississippi, 410 U.S. 284, 295 (1973),
13 quoting Berger v. California, 393 U.S. 314, 315 (1969). As a consequence, courts have been
14 reluctant to allow the admission of witness statements made outside the courtroom unless the
15 witness testifies. This preference for face-to-face confrontation does not require the exclusion
16 of all out-of-court statements of persons who do not appear at trial. There are exceptions to
17 the basic rule against hearsay. See Nevada Rules of Evidence, 51.065 et seq. But, even in
18 those situations, where courts do allow hearsay testimony, two conditions must, generally, be
19 met: (1) the declarant's in-court testimony must be unavailable, and, (2) the declarant's out-of-
20 court statement must bear an adequate "indicia of reliability." Ohio v. Roberts, 448 U.S. 56, 67
21 (1980). In addition, the Defendant's rights of confrontation will be severely limited not only with
22 the hearsay of the alleged co-conspirator Jason McCarty introduced by a variety of witnesses,
23 there is still an issue of McCarty's statement to police wherein he states that it was Donny and
24 Malone that committed the offenses.

25 Pursuant to the chosen procedure by the District Attorney in this case, codefendant,
26 Donald Herb, was allowed to plead to a lesser offense and agreed to testify against Malone

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1 and McCarty. During the testimony of "Donny" he testified regarding a number of telephone
2 conversations that were allegedly made by McCarty. These were improper to consider against
3 Mr. Malone, and may not be admitted in a joint trial.

4 Both the United States Supreme Court and the Nevada Supreme Court have issued
5 decisions concerning admission of alleged co-conspirator statements in joint trials. In Gray v.
6 Maryland, 118 S.Ct. 1151, 140 L.Ed.2d 294 (1998), the United States Supreme Court
7 explained the historical foundation for this argument:

8 The issue in this case concerns the application of Bruton v. United States, 391
9 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). Bruton involved two defendants
10 accused of participating in the same crime and tried jointly before the same jury.
11 One of the defendants had confessed. His confession named and incriminated
12 the other defendant. The trial judge issued a limiting instruction, telling the jury
13 that it should consider the confession as evidence only against the codefendant
14 who had confessed and not against the defendant named in the confession.
15 Bruton held that, despite the limiting instruction, the Constitution forbids the use
16 of such a confession in the joint trial.

17 Id. at 1153. While the same analysis should be applied in the preliminary hearing stage, in
18 binding both defendants over to trial, the Honorable Justice of the Peace did not articulate how
19 he considered the testimony as it applied in this instance.

20 The Gray case differed from Bruton because the prosecutors in Gray redacted the co-
21 defendant's confession by substituting for the defendant's name in the confession a blank
22 space or the word "deleted." Id. The Supreme Court held that these substitutions did not make
23 a significant legal difference and that Bruton's protective rule applied. Id.

24 The introduction of an out-of-court confession by a codefendant at the trial of an
25 accused violates the accused's right, protected by the Sixth Amendment, to cross-examine
26 witnesses. Bruton, 391 U.S. at 137, 88 S.Ct., at 1628. While defense concedes that the rights
27 of cross examination are not necessarily applicable to presentations before the Grand jury, but
28 the unbridled presentation of evidence against one defendant in a joint indictment, without
proper caution or instruction raises constitutional due process violations.

Bruton, as interpreted by Richardson, holds that certain "powerfully incriminating

1 extrajudicial statements of a codefendant"-- those naming another defendant -- considered as
2 a class, are so prejudicial that limiting instructions cannot work. Richardson, 481 U.S., at 207,
3 107 S.Ct., at 1707; Bruton, 391 U.S., at 135, 88 S.Ct., at 1627. Unless the prosecutor wishes
4 to hold separate indictments or to use separate empaneled grand juries or to abandon use of
5 the confession, he must redact the confession to reduce significantly or to eliminate the
6 special prejudice that the Bruton Court found.

7 The impact of a codefendant's statements have long been recognized as being so
8 harmful, that even redaction may be insufficient to ameliorate the prejudice. That is why Judge
9 Learned Hand, many years ago, wrote in a similar instance that blacking out the name of a
10 codefendant not only "would have been futile.... [T]here could not have been the slightest
11 doubt as to whose names had been blacked out," but "even if there had been, that blacking
12 out itself would have not only laid the doubt, but underscored the answer." United States v.
13 Delli Paoli, 229 F.2d 319, 321 (C.A.2 1956), aff'd, 352 U.S. 232, 77 S.Ct. 294, 1 L.Ed.2d 278
14 (1957), overruled by Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476
15 (1968). See also Malinski v. New York, 324 U.S. 401, 430, 65 S.Ct. 781, 795, 89 L.Ed. 1029
16 (1945) (Rutledge, J., dissenting) (describing substitution of names in confession with "X" or "Y"
17 and other similar redactions as "devices ... so obvious as perhaps to emphasize the identity of
18 those they purported to conceal").

19 Finally, as the court in Bruton held that the "powerfully incriminating" effect of what
20 Justice Stewart called "an out-of-court accusation," 391 U.S., at 138, 88 S.Ct., at 1629
21 (Stewart, J., concurring), creates a special, and vital, need for redress by this reviewing Court.

22 **Co-conspirators' Statements by McCarty to Herb**

23 It is anticipated that many of the hearsay statements at issue in this motion sought to be
24 admitted were made by co-conspirator Jason McCarty. While defendant Malone disputes the
25 wholesale categorization of the statements as such, because a conspiracy is alleged, a
26 discussion of the admissibility of co-conspirators' statements is, nevertheless, warranted. For a
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1 co-conspirator's hearsay statement to be admissible, the statement must be made during the
2 course of and in furtherance of the conspiracy and the State must establish: 1) the existence
3 of the conspiracy; 2) the defendant's connection to the conspiracy; 3) that the statements were
4 made in the course of the conspiracy; 4) that the statements were made in furtherance of the
5 conspiracy; and 5) the statements must satisfy the Confrontation Clause.

6 **a. During the Course of the Conspiracy**

7 The general rule for determining what behavior occurred "during the course" of the
8 conspiracy is whether the behavior "was made while the plan was in existence and before its
9 complete execution or termination." See State v. Yslas, 139 Ariz. 60, 676 P.2d 1118 (Ariz.
10 1984). A conspiracy does not continue merely because there is a concerted action to avoid
11 detection. *Id.* Similarly, a co-conspirator's statement to police incriminating another co-
12 conspirator is not made during the course of a conspiracy. State v. Darby, 123 Ariz. 368, 599
13 P.2d 821 (Ariz. App. 1979). It is crucial that there be some showing by the prosecution that the
14 activities, both preceding and proceeding the central crime, were part of the original plan.
15 State v. Yslas, *supra*. "The overt acts averred and proved may thus mark the duration, as well
16 as the scope, for the conspiracy." Fiswick v. United States, 379 U.S. 211 (1946).

17 In this case, the last overt act as demonstrated by the testimony at the preliminary
18 hearing that allegedly included Mr. Malone was the alleged destruction of the instrumentality of
19 the death near the Boulder Dam. This fact alone would exclude much of the most
20 objectionable hearsay.

21 Additionally, actions that included the attempt to trade out the tires on Donny Herb's
22 automobile, the telephone calls and attempts of Jason McCarty to retrieve drugs and funds
23 that he allegedly hid are also not admissible as co-conspirators' statements.

24 **b. In Furtherance of the Conspiracy**

25 The State must additionally prove that any out-of-court statement was made in
26 furtherance of the conspiracy. Statements are made in furtherance of a conspiracy if the
27

1 declaration advances any objectives of the conspiracy. United States v. Fielding, 630 P.2d
2 1357 (9th Cir. 1980). Casual comments, explanations and post-arrest statements are not "in
3 furtherance" of the conspiracy and must be excluded. See United States v. Bibbero, 749 F.2d
4 581 (9th Cir. 1984) (mere conversation between co-conspirators not admissible); United States
5 v. Fielding, 645 F.2d 719 (9th Cir. 1981) (mere narrative declarations not admissible); United
6 States v. Moore, 522 F.2d 1068 (9th Cir. 1975) (casual admissions of culpability not
7 admissible); United States v. Green, 600 F.2d 154, 157-8 (8th Cir. 1979) (casual comments
8 inadmissible); United States v. Lieberman, 637 F.2d 95, 102-103 (2nd Cir. 1980) (idle chatter
9 about past events not admissible). See also Leach v. State, 38 Ark.App. 117, 831 S.W.2d 615
10 (1992) (in prosecution for conspiracy to commit aggravated robbery of carrier, co-conspirator's
11 statement to wife about what he was supposed to do (pull over the truck and rob the driver)
12 were not in furtherance of the conspiracy because co-conspirator was not seeking to induce
13 his wife to join conspiracy; he was merely informing her about his activities); State v. Baruso,
14 72 Wash.App. 603, 865 P.2d 512 (1993) (casual retrospective statements about past events
15 do not fall within the co-conspirator exception to the hearsay rule); People v. Hardy, 825 P.2d
16 781, 5 Cal.Rptr.2d 796, 2 Cal.4th 86 (Cal. 1992) (co-conspirator's gratuitous ramblings to
17 girlfriend and her father about first conspirator's desire to find hitman to kill his wife could not
18 be deemed "in furtherance of conspiracy" within meaning of co-conspirator exception to the
19 hearsay rule); Williams v. State, 815 S.W.2d 743 (Tex.App. 1991) reversed on other grounds,
20 829 S.W.2d 216 (Tex.Crim.App. 1992) (types of co-conspirator statements which are made in
21 "furtherance" of conspiracy, and are thus admissible under exception to hearsay rule, include
22 those made with intent to induce another to deal with co-conspirators or in any other way to
23 cooperate with or assist co-conspirators, with intent to induce another to join conspiracy, in
24 formulating future strategies of concealment to benefit conspiracy, with intent to induce
25 continued involvement in conspiracy, or for purpose of identifying role of one conspirator to
26 another; types of co-conspirator's statements not in "furtherance" of conspiracy, and thus not

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1 admissible under hearsay exception, include those that are casual admissions of culpability to
2 someone declarant has individually decided to trust, mere narrative declarations, mere
3 conversations between co-conspirators or "puffing" or "boasts" by co-conspirator); Deeb v.
4 State, 815 S.W.2d 692 (Tex.Cr.App. 1991) (co-conspirator's statements to cellmate
5 concerning conspiracy to murder one victim for revenge and another victim to collect insurance
6 proceeds, were not made in furtherance of conspiracy for purposes of co-conspirator
7 exception to the hearsay rule; statement did not advance cause of conspiracy or serve in any
8 way to facilitate conspiracy); State v. Jennings, 815 S.W.2d 434 (Mo.App. 1991) (co-
9 conspirator's statement "we was in that," made while watching television news broadcast
10 about murders, was not made in furtherance of conspiracy and was not admissible in murder
11 prosecution under co-conspirator exception to hearsay rule; although evidence indicated that
12 conspiracy continued at time co-conspirator made statement, statement was not made in effort
13 to conceal crimes or to defeat prosecution); Henry v. State, 324 Md. 204, 596 A.2d 1024 (Md.
14 1991) (portion of witness' testimony relating statements of defendant's accomplices when they
15 heard television news reports about murders were not admissible under co-conspirator
16 exceptions to hearsay rule; defendant argued that events took place after fulfillment of
17 conspiracy and that events were not in connection with concealment or disposal of fruits of
18 crime). The great majority of the hearsay statements with which Malone is concerned can be
19 analyzed and determined to be inadmissible in the upcoming trial for the reason that they were
20 not in furtherance of the conspiracy when they were made.

21 ...

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24 **c. McCarty's statements to the police and recordings of calls while in custody**

25 None of the statements to the police were made in furtherance of the conspiracy. At
26 best, the statements were mere conversations among McCarty, an alleged co-conspirator and

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1 his attempts to extract himself from the situation by giving information to the Police. The
2 "three-way" telephone calls were to recruit others for services and/or statements concerning
3 past events. Not only were a majority of the statements made after the completion of the
4 alleged conspiracy, but they were certainly not intended to further the interests of the
5 conspiracy. Any testimony regarding these statements, therefore, is also not admissible as co-
6 conspirators' statements.

7 **d. Sufficient Indicia of Reliability**

8 Finally, even if the statements sought to be introduced were made during the course of
9 and in furtherance of the conspiracy, there must be sufficient indicia of reliability for the
10 statements not to violate the confrontation clause. United States v. Ordonez, 737 F.2d 793
11 (9th Cir. 1984); State v. Martin, 139 Ariz. 466, 679 P.2d 489 (1984); *but c.f.*, Bourjaily v. United
12 States, 483 U.S. 185, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987). The circumstances surrounding
13 the statement determine what constitutes an indicia of reliability. Circumstances to be
14 considered include whether the declaration contains assertions of past fact; did the declarant
15 have personal knowledge of the identity and role of the persons in the conspiracy; did the
16 declarant rely upon faulty recollection; and, was there reason to believe that the declarant
17 misrepresented the defendant's involvement in the crime. State v. Martin, 139 Ariz. at 479, 679
18 P.2d at 502, citing United States v. Perez, 658 F.2d 654 (9th Cir. 1981). For this reason alone,
19 their hearsay testimony should be precluded.

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26 **CONCLUSION**

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1 The statements set forth in this motion were not made during the course of or in
2 furtherance of any conspiracy. This testimony should not be admitted in a trial in which the co-
3 defendant, Malone is fighting for his very life.

4 WHEREFORE, Defendant moves this court bar the introduction of improper hearsay
5 evidence, and that, prior to attempts of admission, the Court conduct an evidentiary leave.

6 Dated this _____ day of August, 2009.

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8

RESPECTFULLY SUBMITTED:
DAVID M. SCHIECK
SPECIAL PUBLIC DEFENDER

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Attorneys for Malone

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**EXHIBIT "A" PROPOSED REDACTIONS TO MCCARTY'S STATEMENTS TO THE
POLICE.**

Redactions from May 25, 2006 interview with Jason McCarty

Page 17 through Page 18

Page 21, line 17 – Page 23, line 2

Page 25, line 1 - Page 26, line 21

Page 31, line 21 – Page 35, line 13

Page 38, line 17 – Page 39, line 8

Page 40 through Page 43, line 15

Page 47, line 2 – Page 49, line 3

Page 51, line 24 – Page , line 25

Page 54, line 4 – Page 58, line 16

Page 60, line 7 – Page 64, line 1

Page 60, line 11 – Strike Rocky D-Roc

Page 69: "What are you asking me to be a witness to?"

Page 70: "What do you want me to tell you?"

Page 71: D-Roc kind of roughed her up.

21: We put him out the car.

25: We put him out the car at the Sportman's.

Page 73: Me and Victoria and Christine started walking off.

Gave D-Roc keys to car to pick up.

Page 72: (17) Q. And then you guys took her. Took them all to the Hard Rock.

(19) A. I haven't seen them since.

Page 73: McCarty disavows knowledge of D-Roc and Red.

(9) A. We got away from them (D-Rock and Red).

(13) A. Me and Victoria and Christine start walking off like this.

1 Q. Okay

2 A. Him and Red stayed behind.

3 Page 74: In reference to beating by Defendant of Red

4 Line 12 "I didn't let him do her in"

5 Redact line 9 – Page 76, line 16.

6 Page 77

7 line 7 – line 13

8 line 21 – Page 78, line 6

9 Page 79 through Page 80

10 line 7 – line 7

11 Page 80 through Page 81

12 line 18 – line 4

13 Page 85 through Page 86

14 line 25 – line 2

15 Page 94 through Page 95

16 line 8 – line 4

17 Page 96 through Page 97

18 line 21 – line 4

19 Page 98 through Page 98

20 line 3 – line 10

21 Page 99, line 9 – Page 100, line 18

22 Page 100, line 23 – Page 108, line 17

23 Page 109, line 17 – 18

24 Page 111, line 16 – Page 113, line 5

25 Page 116, line 3 – Page 117, line 24

26 Page 119, line 13 – Page 121, line 11

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- 1 Page 124, line 22 – "And D-Roc"
- 2 Page 125, line 24 – "You and D-Roc"
- 3 Page 126, line 2 "And D-Roc"
- 4 Page 129, line 10 – Page 132, line 12
- 5 Page 135, line 17 – line 25
- 6 Page 138, line 18 – line 19
- 7 Page 141, line 7 – line 24
- 8 Page 143, line 4 – line 18
- 9 Page 145, line 2
- 10 Page 148, line 2
- 11 Page 149, line 17 – Page 151, line 10
- 12 Page 156 – Change "they" to Donnie" or he
- 13 Page 157, line 19 – Page 158, line 15
- 14 Page 159, line 25 – Page 160, line 10

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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,)	CASE NO. C 224572
)	DEPT. NO. XVII
Plaintiff,)	
vs.)	
DOMONIC MALONE #1670891,)	
Defendants.)	

RECEIPT OF COPY
DATE OF HEARING:
TIME OF HEARING:

1 RECEIPT of copy of Motion in Limine to Prohibit Introduction of Statements Made by
2 Co-Defendant McCarty at the Time of Trial is hereby acknowledged.

3 Dated: _____

4 DISTRICT ATTORNEY'S OFFICE

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6 200 Lewis Ave. 3rd Floor
7 Las Vegas, NV 89155
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CLERK OF THE COURT

OPPS
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Clark County District Attorney
Nevada Bar #002781
CHRISTOPHER J. LALLI
Chief Deputy District Attorney
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200 Lewis Avenue
Las Vegas, Nevada 89155-2212
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Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,

-vs-

DOMONIC RONALDO MALONE,
#0670891
JASON DUVAL McCARTY,
#0932255,
Defendants.

Case No: C224572
Dept. No: XVII
Date: April 13, 2010
Time: 8:15 a.m.

**STATE'S OPPOSITION TO McCARTY'S RENEWED
MOTION TO SEVER**

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through CHRISTOPHER J. LALLI, Chief Deputy District Attorney, and hereby opposes Defendant McCarty's Renewed Motion to Sever. This Opposition is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

DATED this 9th day of April, 2010.

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY /s/ Christopher J. Lalli
CHRISTOPHER J. LALLI
Chief Deputy District Attorney
Nevada Bar #005398

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1 As in *DeMasi*, the Defendant here has failed to point out any specific prejudice
2 resulting from going to trial with Malone. His argument is unconvincing that this fact –
3 alone – creates the need for severance. His Renewed Motion to Sever should, therefore, be
4 denied.

5 DATED this 9th day of April, 2010.

6 DAVID ROGER
7 Clark County District Attorney
8 Nevada Bar #002781

9 BY /s/ Christopher J. Lalli
10 CHRISTOPHER J. LALLI
11 Chief Deputy District Attorney
12 Nevada Bar #005398

13
14 CERTIFICATE OF FACSIMILE TRANSMISSION

15 I hereby certify that service of the above and foregoing was made this 9th day of
16 April, 2010, by facsimile transmission to:

17 ANTHONY SGRO, ESQ.
18 FAX: (702) 386-2737

19 CHRISTOPHER ORAM, ESQ.
20 FAX: (702) 974-0623

21 BY: /s/ Jennifer Georges
22 Secretary for the District Attorney's Office
23
24
25
26
27
28


CLERK OF THE COURT

1 **OPPS**
2 DAVID ROGER
3 Clark County District Attorney
4 Nevada Bar #002781
5 MARC DIGIACOMO
6 Chief Deputy District Attorney
7 Nevada Bar #006955
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

7 DISTRICT COURT
8 CLARK COUNTY, NEVADA
9

10 THE STATE OF NEVADA,)

11 Plaintiff,)

12 -vs-)

13 DOMONIC RONALDO MALONE,
14 #1670891)

15 Defendant.)

CASE NO: C224572

DEPT NO: XVII

16 **OPPOSITION TO DEFENDANT MALONE'S MOTION FOR**
17 **RECONSIDERATION OF WRIT OF HABEAS CORPUS**

18 DATE OF HEARING: 04-13-10
19 TIME OF HEARING: 8:15 A.M.

20 COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through
21 MARC DIGIACOMO, Chief Deputy District Attorney, and hereby submits the attached
22 Points and Authorities in Opposition to Defendant's Motion.

23 This opposition is made and based upon all the papers and pleadings on file herein,
24 the attached points and authorities in support hereof, and oral argument at the time of
25 hearing, if deemed necessary by this Honorable Court.

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1 **STATEMENT OF FACTS**

2 On May 20, 2006 at approximately 0915, the Henderson Police Department received
3 a 9-1-1 emergency call that there were two naked deceased females in the desert just west of
4 Paradise Hills and Dawson Street. (PH, vol 3, p. 366). Patrol officers responded to the
5 location and secured the scene. At the time, there was no identification for the partially
6 decomposed females who appeared to have been killed by both blunt and sharp force trauma.
7 (PH, vol 3, p. 368).

8 **MELISSA ESTORES aka "RED"**

9 The next day, during the autopsies, two individuals contacted the HPD about the
10 bodies, Ryan Noe and Melissa Estores (hereinafter "Red"). (PH, vol 1, p. 130). Red was a
11 friend of Noe who informed him that she believed she knew who the two females in the
12 desert were. Noe brought Red to the police station. (PH, vol 1, p. 131).

13 Red is a street hustler that sells both "hard" and "soft" drugs for various people.
14 "Hard" refers to crack cocaine while "soft" refers to methamphetamine. In the months leading
15 up to the killings, Red worked mainly for an individual named Tre Black (later identified as
16 Ramaan Hall) selling methamphetamine. (PH, vol 4, p. 75). Tre Black had a protégée named
17 D-Roc (later identified as Defendant Domonic Malone). Red would sell crack for D-Roc.
18 (PH, Vol 1, 52-58). Red's main area of sale was the bar at the Royal Sportsman Manor
19 located at the corner of Tropicana and Boulder Highway. (PH, vol 1, p. 60).

20 **APRIL KIDNAPPING AND**

21 **BEATING OF RED**

22 At some point, Red and D-Roc struck up some sort of sexual relationship. Thereafter,
23 D-Roc either wanted more than Red, or wanted it exclusive with Red which she did not.
24 (PH, vol 1, p. 91). Sometime in April of 2006, D-Roc showed up at the bar in the Royal
25 Sportsman Manor and told Red he wanted to talk to her. Red left the bar with D-Roc and he
26 led her behind it, at night, where no one could see them. (PH, vol 1, pp. 103, 225, 230).
27 Once they were back there, D-Roc demanded his "work" and money back from Red. Red
28 gave D-Roc all of his stuff D-Roc then told Red it was "PT" time or "prayer time." This is a

1 saying for getting a beating. (PH, vol 1, p. 68). Other witnesses have said "PT" stands for
2 Pimp Training. (PH, vol 2, p. 18).

3 D-Roc explained the rules of the beating. (PH, vol 1, p. 65). He was going to punch
4 Red in the chest. If she tried to block, he was going to hit her in the right temple, left temple
5 and forehead. Then he was going to do it all over again. D-Roc began by punching Red in
6 the chest. When he did so, she naturally tried to block. (PH, vol 1, p. 66). Then he would
7 punch her in the head three times, and start all over. This went on for a lengthy period of
8 time until Red ultimately was down and severely hurt. (PH, vol 1, p. 67). In fact, her injuries
9 and pain lasted for more than six weeks. (PH, vol 1, p. 70). At that point, a friend came and
10 helped her to a car. (PH, vol. 1, p. 68).

11 During the beating, Red lost Tre Black's work and money, although she isn't sure
12 how. After several days of convalescing, Red went back to work. When she went back, she
13 learned that Tre Black never received the "work" she had given back to D-Roc, and he
14 wanted to get paid.

15 **TUESDAY MAY 16th KIDNAPPING OF VICTORIA**

16 On Tuesday, May 16, 2006, Red was "working" in the Royal Sportsman manner when
17 she saw Charlotte Combado (hereinafter "Christine"). Christine was another local hustler who
18 sold drugs for "D boys," or low level street drug dealers. (PH, vol 1, p. 77). On this occasion,
19 Christine was selling for another individual known simply as "Black" (later identified as
20 Leonard Robinson, hereinafter Leonard Black). Christine sold her work in the bar; however,
21 she lost all of her money in the gambling machines, so she owed Leonard Black \$150 and
22 didn't know what to do. (PH, vol 1, pp. 79, 122). Red offered to help Christine. (PH, vol 1, p.
23 78). This eventually led to them coming into contact with Defendant Jason McCarty
24 (hereinafter Rome) in a green Oldsmobile Alero. (PH, vol 1, p. 80).

25 While everyone knew the green Oldsmobile as Rome's car, the car is actually owned
26 by Donald Herb (hereinafter "Donny") the accessory after the fact to the murder. (PH, vol 2,
27 p. 20). Donny is "D Boy" that hung around D-Roc and Rome. (PH, vol 1, p. 174).

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1 Rome began driving downtown. As they were going, Christine told Rome her
2 problem of needing \$150. Rome explained that he was having an issue with one of his girls,
3 Victoria Magee as she owed him \$80. (PH, vol 1, pp. 87-9). The group wound up at the
4 Oasis hotel downtown and began to smoke Marijuana. (PH, vol 1, p. 84). During this time,
5 Rome and Christine struck up an agreement that Christine would find Victoria and bring her
6 to Rome and Rome would cover her debt to Leonard Black. (PH, vol 1, pp. 87-9).

7 Red fell asleep in the room. When she woke up, Christine and Rome were gone.
8 While they were gone, she looked out the window, saw the green Oldsmobile across the
9 street at a Burger King. In the parking lot, Christine had her arm around Victoria and was
10 leading her to the car. (PH, vol 1, pp. 93-4).

11 The car left, however, shortly thereafter, Rome arrived at the room. Rome and Red
12 left the Oasis on foot and walked towards the Stratosphere. (PH, vol 1, p. 94). On the way,
13 Rome was on the Nextel two-way with Christine in the green Oldsmobile. (PH, vol 1, p.
14 95). Rome told Christine that they would meet at the valet to the Sahara Hotel. By this time,
15 it was early evening.

16 When Red and Rome arrived at the valet, they came into contact with green
17 Oldsmobile. In the Oldsmobile with Donny, who was driving, was D-Roc, Christine and
18 Victoria. (PH, vol 1, pp. 95-7). Everyone piled into the Green Oldsmobile. From the
19 Sahara, the group drove to Donny's house, where Donny got out and the group left.

20 Eventually, the group, minus Donny, arrived back at the Sportsman. D-Roc and Red
21 remained in the car, while Rome, Victoria and Christine went into the complex. (PH, vol 1,
22 p. 97). D-Roc told Red that she still owed Tre Black \$360 but Red told D-Roc that she had
23 paid off her debt. The \$360 was allegedly the money owed from the incident in April where
24 D-Roc had beaten Red. (PH, vol 1, p. 283). After a while, Rome, Victoria and Christine
25 came back to the car. (PH, vol 1, p. 98).

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1 **TUESDAY MAY 16TH KIDNAPPING**

2 **AND BEATING OF RED**

3 From the Sportsman, Rome began driving south on I-95. As he was driving, D-Roc
4 was acting strange. (PH, vol 1, p. 99). Eventually, the group pulled off the Wagonwheel
5 exit and wound up in a desert site near some new home construction. (PH, vol 1, p. 101).
6 Once she got there, Red was ordered out of the car by Rome. (PH, vol 1, p. 103). When she
7 got out, D-Roc guided her to a location, and began to beat her again. (PH, vol 1, p. 104). D-
8 Roc explained that once again, this was "PT" time. As D-Roc continued to beat her, Rome
9 was yelling at Red to just take her beating. (PH, vol 1, p. 106). The beating was related to
10 the prior April beating.

11 Ultimately, Red went down and played unconscious. Rome told D-Roc to leave her
12 there to die and "let's go." When D-Roc stopped, Rome yelled to Red, that she had five (5)
13 seconds to get into the car or he was going to leave her there. (PH, vol 1, p. 106).
14 Ultimately, D-Roc dragged Red back into the car. At this point, it was approximately
15 midnight or early morning on Wednesday, May 17th.

16 On the way back into town, D-Roc wanted Red's purse. (PH, vol 1, p. 110).
17 Ultimately, Red gave D-Roc her purse, and he threw the contents of it out of the window.
18 (PH, vol 1, p. 111). Once they got back into town, D-Roc and Rome explained what was
19 going to happen. (PH, vol 1, p. 113).

20 **THREATS TO KILL PRIOR TO**
21 **DROPPING THE GIRLS OFF AT THE**
22 **HARDROCK**

23 D-Roc and Rome explained to the girls that Victoria had to make \$80 to give to
24 Rome, Red had to make \$360 to give to D-Roc and Christine had to make sure no one got
25 away. (PH, vol. 1, p. 281). If any one of them did not do what they were told, there would
26 be three shallow graves in the desert where Red had just been beaten. (PH, vol 1, p. 113).
27 Defendant Malone alleged the \$360 was owed to Tre Black from the April beating, even
28 though Red believed she had paid the money back to Tre Black. (PH, vol 1, p. 283).

Thereafter, the three girls were left off at the Hardrock Hotel. Red felt like D-Roc and Rome were trying to “put her on the track.” (Prostituting). (PH, vol 1, p. 115). The group remained at the hotel for hours; however, Red had nothing to sell and refused to prostitute herself, Victoria couldn’t catch a date, and Christine used all the drugs that she was supposed to sell. (PH, vol 1, pp. 115-6).

Ultimately, fearing that D-Roc and Rome were coming back, Red called a friend named David Parker. Parker came and picked all three girls up and took them back to his house behind the Cancun Hotel. (PH, vol 1, p. 116).

The group spent most of Wednesday, during the day, at Parker's house. (PH, vol 1, p. 117). Finally, the three decided that they needed to head back to the South Cove Apartments where both Tre and Leonard Black live. Early in the evening on Wednesday, the group wound up at the South Cove Apartments.

WEDNESDAY KIDNAPPING OF VICTORIA AND CHRISTINE FROM THE SOUTH COVE APARTMENTS

When they got there, they tried to go to Leonard Black's apartment which is 222, however, they could not get in. (PH, vol 1, p. 117). The group ran into Tre Black near his apartment at 217 and Tre Black told Red that D-Roc was looking for her. (PH, vol 1, p. 118). Finally, Leonard Black arrived, with a friend named DeMarcus. The three girls then got into 222. (PH, vol 1, p. 120). Leonard Black, Red and Demarcus left to go get gas in Demarcus' car.

When they return to the apartment, Victoria and Christine were gone, there was a golf club missing from the apartment, as well as signs that they did not leave voluntarily. (PH, vol 1, pp. 124-5). The clothes of both people were still there along with other personal items. Most importantly, Victoria's sandals were still there. They were the only shoes that Victoria owned, and she would not have left without them.

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1 Leonard Black was upset that someone broke into his home and asked Red who did it.
2 Red told Leonard Black that it was D-Roc and Rome. (PH, vol 1, p. 127). Early the next
3 morning, Leonard went looking for D-Roc and Rome at the Sportsman.

4 **THURSDAY MAY 18th BEATING OF**
5 **ROME BY LEONARD BLACK**

6 On May 18th, at 4 a.m., Leonard Black found Rome in the parking lot of the
7 Sportsman and beat him pretty badly. (PH, vol 1, p. 128). The police were called and the
8 ambulance arrived.

9 A couple of days later, Red saw a news story related to the two bodies and knew,
10 since she had not seen them, that the two girls in the desert were Victoria and Christine. (PH,
11 vol 1, p. 130). The police had Red show them where her beating took place, and she directed
12 them to a desert area just across the street from where the bodies were taken. Based upon
13 this information, the police set out to find D-Roc, Rome, and Donny.

14 **CORRINA PHILLIPS AND LYNN NAGEL**

15 In the Sportsman, a lesbian couple, Corrina Phillips and Lynn Nagel were eventually
16 contacted. Corrina initially tried to alibi Rome and D-Roc but eventually changed her tune.
17 (PH, vol 2, p. 103).

18 Corrina corroborated that Rome, Victoria and Christine showed up at their place in at the
19 Sportsman on Tuesday night. (PH, vol 2, pp. 7-8). While there, Rome and D-Roc sent Victoria
20 upstairs to "give a blow job to somebody for a rock." (PH, vol 2, 12). Also, D-Roc was on the
21 phone talking about taking the girls out to the desert for "PT time." (PH, vol 2, 14).

22 Rome had once explained to her that he was a pimp, and the "PT training" or Pimp
23 Training, was a method of putting his prostitutes to work and keeping them in line. (PH, vol
24 2, p. 18). He had previously explained that he and D-Roc were going to take the girls out to
25 the desert and smack them around. (PH, vol 2, p. 51).

26 Corrina remembers D-Roc and Rome picking her up on Wednesday night from work
27 and taking her home somewhere around 11 p.m. (PH, vol 2, p. 26). At around midnight, D-
28 Roc and Rome left together. They did not see Rome until several hours later when he was

1 beat up in the parking lot by Leonard Black. (PH, vol 2, p. 30). They heard statements by
2 Rome in front of D-Roc after the murder about having the tires on the car changed. (PH, vol
3 2, pp. 43-44). In fact, Corrina at one point tried to get the tires changed. When queried why
4 he needed the tires changed, Rome, in the presence of D-Roc, stated that he had been out in
5 the desert where the girls had been killed. (PH, vol 2, p. 46). When Corrina could not get
6 the tires changed, she told Rome and D-Roc about the problem. They indicated that they
7 would take care of it. (PH, vol 2, p. 49). Corrina heard D-Roc make mention of leaving the
8 girls in the desert without clothing. (PH, vol 2, p. 37). Corrina overheard a conversation
9 between D-Roc and Rome on Friday where they were checking the paper to see if there was
10 any news in it. (PH, vol 2, p. 40).

11 **ACCESSORY DONNY HERB'S TESTIMONY**

12 Donny Herb waived his preliminary hearing to plead guilty to accessory to murder.
13 Donny testified during the preliminary hearing. Donny testified that he owned the green
14 Oldsmobile but that Rome had borrowed it for the past two months. (PH, vol 5, pp. 5-6). On
15 some day in mid-May, Donny said he drove the green Oldsmobile to the Sahara Casino to
16 pick-up Rome and Red. (PH, vol 5, p. 12). At the time, D-Roc, Victoria, and Christine were
17 in the vehicle. After picking them up, he drove to his house and stayed there. (PH, vol 5, p.
18 13). The rest left in the green Oldsmobile. Sometime thereafter, Rome told Donny that D-
19 Roc beat up Red and that Rome, Victoria and Christine were there also. (PH, vol 5, pp. 22-
20 3). After the beating, Rome told Donny that they drove to the Hard Rock to "put the girls to
21 work" to sell drugs and prostitute themselves. (PH, vol 5, p. 24). D-Roc and Rome
22 explained the reason for the beatings was the money owed by Victoria and Red. (PH, vol 5,
23 p. 25). Additionally, both Defendants had been looking for the girls for several days.

24 At approximately 1:30 a.m., on Thursday morning, Donny received a call from Rome.
25 (PH, vol 5, p. 15). At the time, Donny was home. In the first phone call, Rome told Donny
26 that D-Roc and Rome had the girls, that they were "had to put in some work", and asked him
27 if he wanted to come. (PH, vol 5, p. 27). Donny said no. Rome called back and told him
28 that if he wanted the green Oldsmobile, he was going to have to come and get it or they were

1 Donny drove the detectives out to the remote location. (PH, vol 5, p. 42). During the
2 ensuing search, a golf putter, broken in three places was found.

3 **DETECTIVE COLLINS**

4 Detective Collins testified to the examination of the crime scene. One thing of note,
5 was a golf ball that appeared to be relatively new. (PH, vol 3, p. 373). On one occasion,
6 Accessory Donald Herb helped him locate some of the murder weapons. (PH, vol 4, p. 87).
7 On another occasion, Rome helped him locate some of the murder weapons. (PH, vol 4, p.
8 88). Additionally, Detective Collins interviewed the Defendant D-Roc.

9 **D-ROC'S STORY**

10 D-Roc was first contacted on May 23, 2006 by HPD. (PH, vol 3, p. 378). At that
11 time, D-Roc denied any knowledge of the any of the crimes, with the exception of beating
12 Red in April. (PH, vol 3, p. 382). Specifically, D-Roc told Detective Collins that Red owed
13 money to Tre Black, and D-Roc felt it was his responsibility to collect, so he beat her. (PH,
14 vol 3, p. 383). On May 31st, D-Roc admitted to being at the Sportsman the day of the crime,
15 however, said that Rome took him home around midnight. (PH, vol 4, p. 68).

16 **AUTOPSIES**

17 **CHARLOTTE "CHRISTINE" COMBADO**

18 On May 21, 2006, Dr. Piotr Kubicek of the Clark County Coroner's Office conducted
19 an autopsy on the person of Charlotte Combrado. (PH, vol 4, p. 5). Dr. Kubicek identified
20 multiple blunt force and sharp force injuries to the head, neck, thorax, abdomen, and upper
21 and lower extremities. (PH, vol 4, p. 16). Ultimately, he appeared to identify at least 20 blunt
22 force injuries and two sharp force injuries. (PH, vol 4, pp. 17-20). The one to the chest
23 appears to be a superficial incision before death, however, the stab wound to the neck is peri-
24 mortum as there is no injury to the skin itself from the wound. Ultimately, the cause of death
25 is blunt and sharp force trauma to the head and thorax. The manner of death is homicide.
26 There is an amount of methamphetamine in both the decomposition fluid and the liver.

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28 **VICTORIA MAGEE**

1 On the same date, Dr. Piotr Kubicek of the Clark County Coroner's Office conducted
2 an autopsy on the person of Victoria Magee. (PH, vol 4, p. 5). Dr. Kubicek identified
3 multiple blunt force and sharp force injuries to the head, neck, thorax, abdomen, and upper
4 and lower extremities. (PH, vol 4, p. 6) Ultimately, he appeared to identify at least 31 blunt
5 force injuries and three sharp force injuries. (PH, vol 4, pp. 8-15). All three appear to be
6 superficial to the head, however, the stab wound to the jaw is peri-mortum as there is no
7 injury to the skin itself from the wound. Ultimately, the cause of death is blunt and sharp
8 force trauma to the head and thorax. The manner of death is homicide. There is an amount
9 of cocaine in both the decomposition fluid and the liver.

10 POINTS AND AUTHORITIES

11 I.

12 THE MOTION BEFORE THE COURT IN NOT COGNIZABLE

13 NRS 34.700 provides almost the exclusive authority to attack an indictment:

14 1. Except as provided in subsection 3, a pretrial petition for a writ of habeas
15 corpus based on alleged lack of probable cause or otherwise challenging
16 the court's right or jurisdiction to proceed to the trial of a criminal charge
may not be considered unless:

17 (a) The petition and all supporting documents are filed within 21 days
after the first appearance of the accused in the district court; and

18 (b) The petition contains a statement that the accused:

19 (1) Waives the 60-day limitation for bringing an accused to trial; or

20 (2) If the petition is not decided within 15 days before the date set for trial,
21 consents that the court may, without notice or hearing, continue the trial
indefinitely or to a date designated by the court.

22 2. The arraignment and entry of a plea by the accused must not be continued to
23 avoid the requirement that a pretrial petition be filed within the period
specified in subsection 1.

24 3. The court may extend, for good cause, the time to file a petition. Good
25 cause shall be deemed to exist if the transcript of the preliminary hearing or of
26 the proceedings before the grand jury is not available within 14 days after the
27 accused's initial appearance and the court shall grant an ex parte application to
28 extend the time for filing a petition. All other applications may be made only
after appropriate notice has been given to the prosecuting attorney.

1 (Emphasis added). NRS 34.710 precludes the consideration of the petition unless it is in the
2 proper form:

3 1. A district court shall not consider any pretrial petition for habeas corpus:

4 (a) Based on alleged lack of probable cause or otherwise challenging the
5 court's right or jurisdiction to proceed to the trial of a criminal charge unless a
petition is filed in accordance with NRS 34.700.

6 Defendant cannot avoid the requirements of NRS 34.700 *et seq.* by entitling the petition a
7 motion for reconsideration.

8 Moreover, not only is Defendant barred by the timing of his motion under NRS
9 34.700, but any argument is successive in that Defendant already filed a pre-trial writ of
10 habeas corpus which was denied. NRS 34.710 (b) specifically states:

11 1. A district Court shall not consider any pretrial petition for habeas corpus:

12 (b) Based on a ground which the petitioner could have included as a ground
13 for relief in any prior petition for habeas corpus or other petition for
extraordinary relief.

14 Defendant certainly was aware from the original indictment, that was returned several
15 years ago. His failure to raise any issue in his prior petition precludes this court from even
16 considering the merits of his allegation.

17 In Craig v. Sheriff, Washoe County, 92 Nev. 741, 557 P.2d 710 (1976), the defendant
18 filed a pretrial petition for habeas corpus challenging probable cause at the time of the
19 preliminary hearing. One month later he filed a second pretrial petition for habeas corpus
20 contending that the grand jury was without jurisdiction to indict him. The Nevada Supreme
21 Court held that the petitioner's second pretrial petition for habeas corpus was not cognizable
22 "because it contained grounds for relief which could have-and should have-been asserted in
23 the prior petition. 92 Nev. at 742.

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1 **II.**
2 **EVEN IF THE COURT COULD CONSIDER A TIME BARRED AND SUCCESSIVE**
3 **PETITION, DEFENDANT DOES NOT ASSERT A GROUND FOR**
4 **RECONSIDERATION**

5 Defendant has previously made a petition for writ of habeas corpus which the Court
6 denied. Now, without permission, Defendant Counts has filed a request of the Court for
7 reconsideration with the Court. District Court Rule 19 and Eighth Judicial District Court
8 Rule 7.12 states

9 When an application or a petition for any writ or order has been made to a
10 judge and is pending or has been denied by such judge, the same application,
11 petition or motion may not again be made to the same or another district judge,
12 except in accordance with any applicable statute and upon the consent in
writing of the judge to whom the application, petition or motion was first
made.

13 Clearly, Defendant Counts has failed to abide by the rule and his motion should be
14 denied on that basis alone. Additionally, Defendant has provided no reasonable change in
15 circumstances to re-assert a petition already denied by the Court.

16 **III.**
17 **EVEN IF THE COURT HAD JURISDICTION, AND DEFENDANT HAD BEEN**
18 **PROVIDED WRITTEN PERMISSION OF JUDGE GLASS FOR**
19 **RECONSIDERATION OF HIS WRIT, THIS COURT WOULD STILL DENY THE**
20 **WRIT**

21 The burden before a grand jury or justice of the peace is slight as compared to the
22 burden of proof at trial. See Sheriff v. Hodes, 96 Nev. 184, 186, 606 P.2d 178, 180 (1980);
23 Woodal v. Sheriff, 95 Nev. 218, 220, 591 P.2d 1144, 1144-5 (1979). Probable cause to
24 support a criminal charge "may be based on slight, even 'marginal' evidence, . . . because it
25 does not involve a determination of the guilt or innocence of an accused." Sheriff v.
26 Steward, 109 Nev. 831, 835, 858 P.2d 48, 51 (1993) (quoting Sheriff v. Hodes, 96 Nev. 184,
27 186, 606 P.2d 178, 180 (1980)). To commit an accused for trial, the State is not required to
28 negate all inferences which might explain his conduct, but only to present enough evidence

1 to support a reasonable inference that the accused committed the offense. Kinsey v. Sheriff,
2 87 Nev. 361, 363, 487 P.2d 340, 341 (1971); see also, Sheriff v. Milton, 109 Nev. 412, 851
3 P.2d 417 (1993).

4 The sole function of the justice of the peace is to determine whether all of the
5 evidence establishes probable cause to believe that an offense has been committed by a
6 specific individual. The Court need not consider whether the evidence presented in the
7 record would support a conviction since the State need not produce the quantum of proof
8 required to establish guilt of the accused beyond a reasonable doubt. Miller v. Sheriff, 95
9 Nev. 255, 256-7, 952 P.2d 774, 774-5 (1973). By applying the evidence elicited at the
10 preliminary hearing to the probable cause standard, it is apparent the State met its burden.

11 IV.

12 SUFFICIENT EVIDENCE WAS PRESENTED INDEPENDENT OF DONALD 13 HERB'S TESTIMONY TO SUPPORT DEFENDANT MALONE'S INVOLVEMENT 14 IN THE HOMICIDES

15 Defendant Malone asserts that without the testimony of Donald Herb, there was
16 insufficient evidence to support his involvement in the murders. Defendant Malone's
17 assertion fails to account for the motive evidence, his statements of prior intent, his plan to
18 commit the homicide, his admissions after the homicides and his involvement in concealing
19 the homicides.

20 Red described how Defendant Malone beat her in April of 2006. This beating was
21 what prompted Defendant Malone to allege that Red owed Tre Black \$360 in lost "work."
22 Defendant Malone felt it was his responsibility to collect. On May 16, 2006, Defendant
23 Malone attempted to collect the debt. The manner in which he did so was to engage in a
24 coordinated series of acts with Rome to lure Red out to a desert location to beat her. At the
25 time, Rome was engaged in an effort to collect \$80 from Victoria. After the two engaged in
26 the beating of Red, Defendant Malone and Rome drove the three girls to the Hard Rock.
27 During the drive, Defendant Malone told all three girls, that if Victoria and Red did not pay
28

1 back the money, or if Christine allowed either one of them to get away, there would be three
2 shallow graves out in the desert where Red was beaten.

3 Red escaped and Victoria did not pay back the money. Christine and Victoria were
4 found in the desert exactly where Defendant Malone stated they would be killed, just a day
5 after they got away. The evidence shows the girls were taken from Room 222 of the South
6 Cove Apartments and that Defendant Malone lived in Room 217 of those Apartments with
7 Tre Black. Moreover, Defendant himself acknowledged that he felt compelled to collect the
8 debt from Red to the police.

9 If that were not enough, Corrina Phillips testified that Defendant Malone and Rome
10 were in her apartment at the Sportsman on Tuesday May 16th. During that time, Defendant
11 Malone indicated he was overheard on the phone indicating he was going to take the girls
12 out to the desert for "PT time." Additionally, during that time, he pandered Victoria by
13 ordering her to "give a blow job to somebody for a rock." (PH, vol 2, 12).

14 On Wednesday evening, Corrina puts Defendant Malone and Rome together at the
15 Sportsman after 11 p.m. on Wednesday, May 17th. Corrina indicated that they left at about
16 midnight, together. Corrina next saw Rome after he had been beaten by Leonard Black.
17 After the homicide, Corrina overheard Rome and Defendant Malone discuss changing the
18 tires. She also heard Defendant Malone indicate that he left the girls in the desert without
19 clothing. The victims were found naked. Finally, Defendant Malone was witnessed looking
20 in the newspaper for stories about the bodies before they were reported. Certainly, that alone
21 is sufficient evidence to support the bindover of Defendant Malone on the homicide charges.
22 However, the Court still needs to consider Donald Herb.

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V.

**DONALD HERB IS NOT A CO-CONSPIRATOR AS A MATTER OF LAW, AND
THEREFORE NEED NOT BE CORROBORATED**

NRS 175.291 states:

1. A conviction shall not be had on the testimony of an accomplice unless he is corroborated by other evidence which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense; and the corroboration shall not be sufficient if it merely shows the commission of the offense or the circumstances thereof.

2. An accomplice is hereby defined as one who is liable to prosecution, for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.

While a reading of the statute appears to only apply to trial, the Nevada Supreme Court has ruled that the corroboration rule applies to preliminary hearings. *See Lamb v. Bennett*, 87 Nev. 89, 482 P.2d 298 (1971).

Under 175.291, an accomplice is defined as a person who is liable to prosecution for the identical offense charged against the defendant. If, from the testimony of the witness' alone, there is no doubt the witness is liable for the charged crimes, he is an accomplice as a matter of law. *See Rowland v. State*, 118 Nev. 31, 39 P.3d 114 (2002). However, if the testimony of the witness leaves doubt whether he is liable for the charged crime, then the question of whether or not he is an accomplice is a matter of fact. *See id* (citing *Austin v. State* 87 Nev. 578, 588-89, 491 P.2d 724, 730-31 (1971)). Matters of fact are determinations for a jury. *See Ford v. State*, 99 Nev. 209, 660 P.2d 992 (1983).

Donald Herb's testimony taken at face value alone does not establish that he is liable for the murders of Christine and Victoria. From his testimony, there is no evidence to support an accusation that Donny participated in the killing of Victoria and Christine. At most, it may be argued that at some point, he had knowledge that the murder was occurring. However, mere knowledge or approval of, or acquiescence in, the object and purpose of a conspiracy without an agreement to cooperate in achieving such object or purpose does not make one a party to conspiracy. *Doyle v. State*, 112 Nev. 879, 894, 921 P.2d 901, 911 (1996)

1 (overruled on other grounds by, Kaczmarek v. State, 120 Nev. 314, 91 P.3d 16 (2004)).
2 Mere presence is never sufficient to make someone liable for a crime. See Winston v.
3 Sheriff, Clark County, 92 Nev. 616, 555 P.2d 1234 (1976). Moreover, in order to hold
4 someone liable for a crime on an aiding and abetting theory, it must be shown that the person
5 had the specific intent that the crime be committed. See Sharma v. State, 118 Nev. 648, 56
6 P.3d 868 (2002). As such, Defendant is not a co-conspirator as a matter of law. Therefore,
7 the determination of whether or not he is a co-conspirator is a question left to the jury. As
8 such, he need not be corroborated, unless and until, a jury determines he is a co-conspirator.
9 See Rowland v. State, 118 Nev. 31, 39 P.3d 114 (2002) and Ford v. State, 99 Nev. 209, 660
10 P.2d 992 (1983).

11 VI.

12 **EVEN IF DONNY WERE A CO-CONSPIRATOR AS A MATTER OF LAW,** 13 **HE WAS CORROBORATED**

14 The Nevada Supreme Court has defined sufficient corroboration as:

15 Corroboration evidence need not be found in a single fact or circumstance and
16 can, instead, be taken from the circumstances and evidence as a whole. LaPena
17 v. State, 92 Nev. 1, 544 P.2d 1187 (1976). Corroboration evidence also need
18 not in itself be sufficient to establish guilt, and it will satisfy the statute if it
merely tends to connect the accused to the offense. See State v. Hilbish, Et.
Al., 59 Nev. 469, 97 P.2d 435 (1940).

19 Cheatham v. State, 104 Nev. 500, 761 P.2d 419 (1988). As discussed *supra*, even without
20 the testimony of Donny, there was sufficient evidence to hold Defendant to answer for the
21 charges of murder. However, that is not the standard. Donny is sufficiently corroborated
22 should there be any evidence which "merely tends to connect the accused to the offense." Id
23 (*citing State v. Hilbish, Et. Al.*, 59 Nev. 469, 97 P.2d 435 (1940)).

24 As has been repeatedly discussed, there is a mountain of evidence which tends to
25 connect Defendant Malone to the instant offense. He participated in the kidnapping and
26 beating of Red the night before. He threatened to kill the victims in the exact manner they
27 were killed. He made statements to Corrina Phillips both before and after the crime
28 connecting him to the offenses. Finally, he engaged in destruction of evidence and

1 reviewing of the newspaper for the body before the crimes were reported Certainly, that is
2 more than sufficient corroboration should it even be required.

3 **VII.**

4 **ROME'S STATEMENTS DURING THE CRIME WERE STATEMENTS BY A**
5 **CO-CONSPIRATOR DURING THE COURSE AND IN FURTHERANCE OF THE**
6 **CRIME**

7 Defendant Malone asserts that the statements made to Donny during the crime were a
8 violation of the Bruton rule and as such inadmissible against him. Nothing could be further
9 from the truth. As statement made during the course and in furtherance of the conspiracy by
10 a co-conspirator is admissible under NRS 51.035(e) against all co-conspirators. Statements
11 admitted under NRS 51.035(3)(e) are non-hearsay and not a violation of the Bruton rule.
12 See Bourjaily v. United States, 483 U.S. 171, 182-84, 107 S.Ct. 2775, 97 L.Ed.2d 144
13 (1987). Moreover, the decision in Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354
14 (2004), excludes them from the definition of "testimonial." Crawford. at 56, 124 S.Ct. 1354.

15 If there is any question that the Confrontation Clause only applies to "testimonial"
16 statements, that question was answered in Davis v. Washington, 547 U.S. ___, 126 S.Ct.
17 2266 (2006). In Davis, the Court needed to decide whether the Confrontation Clause **ONLY**
18 applied to testimonial statements:

19 We must decide, therefore, whether the Confrontation Clause applies only to
20 testimonial hearsay; and, if so, whether the recording of a 911 call qualifies.

21 The answer to the first question was suggested in Crawford, even if not
explicitly held:

22 "The text of the Confrontation Clause reflects this focus [on
23 testimonial hearsay]. It applies to 'witnesses' against the
24 accused-in other words, those who 'bear testimony.' 1 N.
25 Webster, An American Dictionary of the English Language
26 (1828). 'Testimony,' in turn, is typically 'a solemn
27 declaration or affirmation made for the purpose of
establishing or proving some fact.' Ibid. An accuser who
makes a formal statement to government officers bears
testimony in a sense that a person who makes a casual
remark to an acquaintance does not."

28 541 U.S., at 51, 124 S.Ct. 1354.

A limitation so clearly reflected in the text of the constitutional provision must fairly be said to mark out not merely its “core,” but its perimeter.

Davis, 126 S.Ct. at 2274 (footnotes omitted, emphasis added).

In the instant matter, the statements made by Rome while he and Defendant Malone were at the murder scene viciously killing Christine and Victoria clearly qualify under NRS 51.035(e). The statements were made by a co-conspirator, Rome. All but one of the statements were made to enlist the help of the accessory after the fact to come and help the co-conspirators conceal the crime. The other statement was giving direction to his other co-conspirator, Defendant Malone, on how to kill one of the victims. As such, they are in the course of and in furtherance of the conspiracy, and admissible.

VIII.

**DEFENDANT MALONE WAS PROPERLY CHARGED WITH A KIDNAPPING IN
RELATION TO BOTH BEATINGS OF RED**

Defendant Malone asserts that because no force was used to get Red behind the bar or to the desert location, he cannot be held to answer for a kidnapping. Defendant is incorrect in his assertion that force is necessary for a kidnapping. The crime of kidnapping only requires an act which seizes, confines, **inveigles, entices, decoys**, abducts, conceals, kidnaps or carries away a person **by any means whatsoever** with the intent to hold or detain . . . for the purpose of substantial bodily harm. NRS 200.310 (emphasis added). Certainly the facts of this case fall within that definition.

As to the location behind the bar, Defendant Malone enticed Red behind the bar where she was excluded from the view of other people. The purpose in doing so was to beat her with impunity without anyone seeing or coming to her rescue. While no force was used to get her to the secluded location behind the bar, forcible movement is never a requirement of a kidnapping. *See Bridges v. State*, 116 Nev. 752, 765 (2000).

In Bridges, the Defendant convinced his ex-wife and her new boyfriend to drive to a location where Defendant claimed a trailer with his ex-wife's stuff was located. Once they got to the location, Defendant killed the new boyfriend. Defendant Bridges asserted

1 essentially the same claim that Defendant McCarty now claims, essentially that the new
2 boyfriend voluntarily went to the location of his death. In rejecting the argument and
3 affirming his death sentence, the Supreme Court indicated using taking someone without
4 force still constitutes a kidnapping. This analysis clearly applies to this case.

5 As to the May 16th beating, Defendant Malone and Rome drove Red to a remote
6 location so she could be beaten with impunity. The only purpose for going to the location
7 was to beat Red where she would neither be seen or heard. In fact, Defendant Malone
8 indicated that the purpose in taking the girls to the desert location was so that he could give
9 them "PT time." As such, he is guilty of kidnapping even if Red went along willingly as,
10 forcible movement is never a requirement of a kidnapping. See Bridges v. State, 116 Nev.
11 752, 765 (2000).

12 VIII

13 **DEFENDANT MALONE WAS PROPERLY CHARGED FOR A CONSPIRACY TO** 14 **COMMIT KIDNAPPING AND A BATTERY OF RED ON MAY 16th**

15 Defendant asserts that no evidence was presented which indicated that Defendant
16 Malone and Rome entered into an agreement to kidnap Red on the night she was beaten by
17 Defendant Malone. The circumstances of Defendant Malone and Rome's behavior
18 demonstrates that he is guilty of conspiracy.

19 Nevada law defines a conspiracy as "an agreement between two or more
20 persons for an unlawful purpose." "A person who knowingly does any act to
21 further the object of a conspiracy, or otherwise participates therein, is
22 criminally liable as a conspirator" **"Evidence of a coordinated series of
acts furthering the underlying offense is sufficient to infer the existence of
an agreement and support a conspiracy conviction."**

23 Bolden v. State, 124 P.3d 191, 194 (Nev.2005) (internal footnotes and citations omitted)
24 (Emphasis added).

25 "[C]onspiracy is seldom susceptible of direct proof and is usually established
26 by inference from the conduct of the parties." Gaitor v. State, 106 Nev. 785,
27 790 n. 1, 801 P.2d 1372, 1376 n. 1 (1990) (quoting State v. Dressel, 85 N.M.
28 450, 451, 513 P.2d 187, 188 (1973)).

1 Doyle v. State, 112 Nev. 879, 894, 921 P.2d 901, 911 (1996) (overruled on other grounds by,
2 Kaczmarek v. State, 120 Nev. 314, 91 P.3d 16 (2004)).

3 Certainly, slight or marginal evidence was presented that Defendant Malone and
4 Rome engaged in a coordinated series of acts furthering the underlying kidnapping and
5 beating of Red. First, Rome lured Red to the green oldsmobile at the Sahara Valet which
6 contained Defendant Malone. Thereafter, once Donny was dropped off, Rome drove the car
7 back to the Royal Sportsman where D-Roc was acting strange with Red. After getting back
8 in the car, Rome proceeded to drive Red to a remote location where D-Roc beat her without
9 any evidence that Rome was told where to go. While she was getting beaten by Defendant
10 Malone, Rome told Red not to fight back and just take the beating. Rome told Defendant
11 Malone to leave her out there to die. Finally, Rome told her if she did not get back into the
12 vehicle, Rome would leave her there. On the way back from the desert, Defendant Malone
13 and Rome engaged in the threats to kill Red if she did not repay the money owed to D-Roc.
14 Defendant Malone and Rome also threatened to kill Christine if she left Red get away.
15 These coordinated series of acts is enough to convict Defendant Malone of the Conspiracy to
16 Kidnap Red on May 16th, let alone the "slight or marginal evidence" necessary to hold
17 Defendant to answer.

18 If that overwhelming amount of evidence was not enough, Corrina Phillips testified
19 that both Rome and Defendant Malone were talking about taking the girls out into the desert
20 to beat them prior to it happening. So in addition to the "coordinated series of acts", there is
21 evidence of prior planning. All of the evidence is more than necessary to hold Defendant
22 Malone to answer to the charge.

23 IX.

24 DEFENDANT MALONE WAS PROPERLY CHARGED WITH PANDERING

25 Defendant Malone asserts there was insufficient evidence to establish that he
26 pandered either Victoria or Christine. There was direct evidence of his pandering of Victoria
27 and the facts and circumstances of the case establishes that he pandered Christine.

28 ///

1 Corrina Phillips testified that Defendant Malone and Rome sent Victoria upstairs to
2 "give a blow job to somebody for a rock." (PH, vol 2, 12). That alone is sufficient to
3 support the charge of pandering. However, Donny testified that Rome told him, before the
4 murder but after the beating, that they had dropped the girls off at the Hard Rock to "put
5 them to work." Such a statement is admissible against Defendant Malone as a co-
6 conspirator statement in the course and in furtherance of the crime. See NRS 51.035(e).

7 Defendant Malone was overheard indicating that he intended to take the girls out to
8 the desert for "PT time." What happened on the evening of May 17th was an extension of
9 pimp training. Pimp training is just an inarticulate word for pandering. As such, the beating
10 of Christine was an extension of Defendant Malone's pandering efforts.

11 Moreover, the facts of the case when the victims were dropped off at the Hard Rock
12 demonstrate that Defendants were attempting to pander all three (3) victims. They were
13 dropped off at a hotel and told to make money. Red took this to mean that they were trying
14 to prostitute them. Additionally, the evidence showed that Christine was one of Defendant
15 McCarty's girls and he described himself as a pimp. Defendant Malone was his co-
16 conspirator.

17 **X.**

18 **DEFENDANT MALONE WAS PART OF A CONSPIRACY TO MURDER OF**
19 **CHRISTINE AND VICTORIA**

20 Defendant Malone asserts there is insufficient evidence to charge him with a
21 conspiracy in the killing of Victoria and Christine.

22 **"Evidence of a coordinated series of acts furthering the underlying**
23 **offense is sufficient to infer the existence of an agreement and support a**
conspiracy conviction."

24 Bolden v. State, 124 P.3d 191, 194 (Nev.2005) (internal footnotes and citations omitted)
25 (Emphasis added).

26 "[C]onspiracy is seldom susceptible of direct proof and is usually established
27 by inference from the conduct of the parties." Gaitor v. State, 106 Nev. 785,
28 790 n. 1, 801 P.2d 1372, 1376 n. 1 (1990) (quoting State v. Dressel, 85 N.M.
450, 451, 513 P.2d 187, 188 (1973)).

1 Doyle v. State, 112 Nev. 879, 894, 921 P.2d 901, 911 (1996) (overruled on other grounds by,
2 Kaczmarek v. State, 120 Nev. 314, 91 P.3d 16 (2004)).

3 Aside from the overwhelming evidence of the coordinated series of acts to commit
4 the murder with Rome, there was direct evidence of the murder. First, Defendant Malone
5 indicated before the murders that they intended to take the girls out to the desert and beat
6 them. Once he was out in the desert, Rome told Donny that they were going to murder the
7 girls. See NRS 51.035(e). Finally during the murders, Rome told Defendant Malone to hit
8 one of the girls with a rock when Defendant Malone indicated that the golf club had broken.
9 After the murder, Defendant Malone engaged in disposal of the murder weapons and
10 clothing.

11 Defendant McCarty indicated to Donny during while driving the girls to the murder
12 scene, that Defendant Malone and he had the girls and were going to "put in some work."
13 See NRS 51.035(e). If that were not enough, Defendant Malone along with Rome
14 specifically told the victims they were going to kill them if they did not make the money.
15 Defendant Malone, along with Rome, told them they would be killed in the area where Red
16 was beaten. The money wasn't repaid and the girls wound up dead in the exact location
17 Defendant Malone and Rome said they would be killed. Additionally, Defendant Malone
18 was overheard by Corrina Phillips that he left the girls in the desert without their clothes.

19 XI.

20 **DEFENDANT WAS PROPERLY CHARGED WITH BOTH A BURGLARY AND** 21 **A CONSPIRACY TO COMMIT BURGLARY**

22 The evidence reflects that Defendant McCarty and D-Roc engaged in a coordinated
23 series of acts which resulted in the Burglary of 222. The last place that Victoria and
24 Christina were seen alive was in Room 222 of the South Cove Apartments. The evidence
25 shows that they were taken from that location because of the items which remained in that
26 location, including the shoes of Victoria, the only pair she owned and would not have left.
27 Moreover, one of the murder weapons was taken from Room 222. When Red was first in
28 Room 222, there were several golf clubs. When she returned, not only were the girls

1 missing, but so was a golf club. One of the murder weapons located was a broken golf club.
2 Also, at the scene of the murder was a fresh golf ball.

3 **“Evidence of a coordinated series of acts furthering the underlying**
4 **offense is sufficient to infer the existence of an agreement and support a**
5 **conspiracy conviction.”**

6 Bolden v. State, 124 P.3d 191, 194 (Nev.2005). As such, Defendant McCarty is properly
7 charged.

8 Defendant Malone also asserts that because there was no evidence that Defendant
9 Malone was not welcome at Room 222, that the crime of Burglary cannot be established.
10 Defendant is charged in Count 12:

11 Defendants did, on or between May 17, 2006 and May 19, 2006, then and
12 there wilfully, unlawfully, and feloniously enter, with intent to commit assault
13 and/or battery and/or a felony, to-wit: Kidnapping and/or Murder, that certain
14 building occupied by LEONARD ROBINSON, located at 1525 East Fremont,
15 Room No. 222, Las Vegas, Clark County, Nevada.

16 (Exhibit 1). Evidence presented at the preliminary hearing is that the occupant of the
17 apartment was Leonard Robinson and that Victoria and Christine were left there by Leonard
18 Black, DeMarcus, and Red shortly before their abduction.

19 Consent to enter is not a defense to the crime of burglary so long as it is shown that
20 entry was made with the specific intent to commit the alleged crimes. See Thomas v. State,
21 94 Nev. 605 (1978). The intention with which entry was made is a question of fact which
22 may be inferred from the defendant's conduct and all other circumstances disclosed by the
23 evidence. See Flynn v. State, 93 Nev. 247 (1977). Whether Leonard Robinson gave consent
24 to enter is not relevant to the determination of whether a person committed a burglary. In
25 fact, a person can burglarize their own home. The question is whether the evidence shows
26 that Defendant entered with the intent to commit an assault, battery, kidnapping, or murder
27 therein. Clearly, the evidence demonstrates those facts.

28 Defendant also asserts that there is insufficient notice in the charging document to
allow him to know what conduct he is being charged with. Such an argument is meritless.

1 Defendant is alleged to have entered Room 222, whose owner is Leonard Robinson, on May
2 17th, with the intent to commit the alleged crimes. What more information need he be
3 provided. Moreover, Defendant provides no authority for the proposition that if this Court
4 found insufficient notice in the pleading document, that dismissal is the proper remedy. The
5 proper remedy would be to allow the State to amend the information. See NRS NRS
6 173.095(1); State v. Eighth Judicial District Court, 997 P.2d 126 (Nev. 2000).

7 **XII.**

8 **THERE IS NOTHING IMPROPER WITH PLEADING AN ACCESSORY AFTER**
9 **THE FACT TO THE CRIME HE COMMITTED WITH AN AGREEMENT TO**
10 **TESTIFY TRUTHFULLY**

11 Defendant asserts, without citing to controlling authority in this jurisdiction to the
12 contrary, that plea bargaining of Donny was inappropriate. The Nevada Supreme Court has
13 stated:

14 We now conclude that bargaining for specific trial testimony, i.e.,
15 testimony that is essentially consistent with the information represented to be
16 factually true during negotiations with the State, and withholding the benefits
17 of the bargain until after the witness has testified, is not inconsistent with the
18 search for truth or due process. However, we emphasize that our ruling does
19 not countenance a bargain for testimony conforming to a predetermined script
20 or for leniency or other consideration contingent upon the State obtaining a
21 conviction. We hold only that when our prosecutors bargain in good faith for
22 testimony represented to be factually accurate, it is not a violation of due
23 process or public policy to withhold the benefit of the bargain until after the
24 witness testifies.

25 Although we have concluded that executory plea agreements are
26 acceptable under Nevada law, we are not unmindful of the danger posed by
27 perjured testimony concocted by persons seeking lenient treatment in
28 connection with their own criminal problems. We have already noted that the
State may properly enter into plea arrangements when the putative witness
persuasively professes to have truthful information of value and a willingness
to accurately relate such information at trial. The less than remote possibility
remains, however, that the recipient of the State's promise has fabricated his or
her information and will repeat it at trial as a perjurer. Courts across the land
have, in part, sought to deal with the incentive to commit perjury by requiring
at trial the baring of all aspects of the bargain pursuant to which the testimony
is given. As a result, it is generally determined that the terms of the State's
bargain concern only the weight, and not the admissibility of the testimony.

In accordance with the foregoing, we now embrace the rule generally
prevailing in both state and federal courts, and hold that any consideration
promised by the State in exchange for a witness's testimony affects only the

1 weight accorded the testimony, and not its admissibility. Second, we also hold
2 that the State may not bargain for testimony so particularized that it amounts
3 to following a script, or require that the testimony produce a specific result.
4 Finally, the terms of the *quid pro quo* must be fully disclosed to the jury, the
5 defendant or his counsel must be allowed to fully cross-examine the witness
6 concerning the terms of the bargain, and the jury must be given a cautionary
7 instruction.

8 Sheriff, Humboldt County v. Acuna, 107 Nev. 664, 819 P.2d 197 (1991). The State strictly
9 conformed to this holding. In the Guilty Plea Agreement as well as the Agreement to Testify,
10 the State did not bargain for anything other than the truth from Donald Herb. See Exhibit 2.
11 Additionally, it isn't even the State's responsibility to decide what that truth is; it is the
12 responsibility of the Court. As such, Defendant's argument is without merit.

13 CONCLUSION

14 As the Court lacks jurisdiction, Defendant has not received permission for
15 reconsideration and overwhelming evidence was presented to support each and every charge
16 in the information, Defendant Malone's Motion for Reconsideration of his Writ of Habeas
17 Corpus (Pre-Trial) should be denied.

18 DATED this 9th day of April, 2010.

19 Respectfully submitted,

20 DAVID ROGER
21 Clark County District Attorney
22 Nevada Bar #002781

23 BY /s/ Marc Digiacommo
24 MARC DIGIACOMO
25 Chief Deputy District Attorney
26 Nevada Bar #006955
27
28

1 CERTIFICATE OF FACSIMILE TRANSMISSION

2 I hereby certify that service of the above and foregoing was made this 9th day of
3 April, 2010, by facsimile transmission to:

4 DOMONIC MALONE, #1670891
5 c/o CCDC Court Services
6 FAX: (702) 671-3763

7 BY: /s/ Jennifer Georges
8 Secretary for the District Attorney's Office

9
10
11 CERTIFICATE OF ELECTRONIC FILING

12 I hereby certify that service of the above and foregoing was made this 9th day of
13 April, 2010, by Electronic Filing to:

14 SPECIAL PUBLIC DEFENDER
15 E-mail Address: KFitzger@co.clark.nv.us

16 BY: /s/ Jennifer Georges
17 Secretary for the District Attorney's Office


CLERK

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5 CHRIS J. OWENS
6 Chief Deputy District Attorney
7 Nevada Bar #001190
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9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

7 DISTRICT COURT
8 CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,)

10 Plaintiff,)

11 -vs-)

12 DOMONIC RONALDO MALONE,)
13 #1670891,)
14 JASON DUVAL MCCARTY, #0932255)

15 Defendants.)

Case No: C224572

Dept No: V

AMENDED
INFORMATION

15 STATE OF NEVADA }
16 COUNTY OF CLARK } ss.

17 DAVID ROGER, District Attorney within and for the County of Clark, State of
18 Nevada, in the name and by the authority of the State of Nevada, informs the Court:

19 That DOMONIC RONALDO MALONE and JASON DUVAL MCCARTY, the
20 Defendant(s) above named, having committed the crimes of CONSPIRACY TO COMMIT
21 KIDNAPPING (Felony - NRS 200.310, 200.320, 199.480); FIRST DEGREE
22 KIDNAPPING (Felony - NRS 200.310, 200.320); BATTERY WITH SUBSTANTIAL
23 BODILY HARM (Felony - NRS 200.481); PANDERING (Felony - NRS 201.300);
24 CONSPIRACY TO COMMIT MURDER (Felony - NRS 200.010, 200.030, 199.480);
25 CONSPIRACY TO COMMIT BURGLARY (Gross Misdemeanor - NRS 205.060,
26 199.480); BURGLARY (Felony - NRS 205.060); MURDER WITH USE OF A DEADLY
27 WEAPON (Felony - NRS 200.010, 200.030, 193.165); and ROBBERY WITH USE OF A
28 DEADLY WEAPON (Felony - NRS 200.380, 193.165), on or between April, 2006 and May

1 19, 2006, within the County of Clark, State of Nevada, contrary to the form, force and effect
2 of statutes in such cases made and provided, and against the peace and dignity of the State of
3 Nevada,

4 COUNT 1 - FIRST DEGREE KIDNAPPING

5 Defendant DOMONIC RONALDO MALONE did, in April of 2006, wilfully,
6 unlawfully, feloniously, and without authority of law, seize, confine, inveigle, entice, decoy,
7 abduct, conceal, kidnap, or carry away MELISSA ESTORES, a human being, with the intent
8 to hold or detain the said MELISSA ESTORES against her will, and without her consent, for
9 the purpose of inflicting substantial bodily harm on the said MELISSA ESTORES.

10 COUNT 2 - BATTERY WITH SUBSTANTIAL BODILY HARM

11 Defendant DOMONIC RONALDO MALONE, did, in April of 2006, then and there
12 wilfully, unlawfully, and feloniously use force or violence upon the person of another, to-
13 wit: MELISSA ESTORES, by beating and kicking the said MELISSA ESTORES about the
14 head and body, resulting in substantial bodily harm to the said MELISSA ESTORES

15 COUNT 3 - CONSPIRACY TO COMMIT KIDNAPPING

16 Defendants did, on or about May 16, 2006, then and there meet with each other and
17 between themselves, and each of them with the other, wilfully, unlawfully, and feloniously
18 conspire and agree to commit a crime, to-wit: kidnap MELISSA ESTORES, and in
19 furtherance of said conspiracy, Defendants did commit the acts as set forth in Counts 4-6,
20 said acts being incorporated by this reference as though fully set forth herein.

21 COUNT 4 - FIRST DEGREE KIDNAPPING

22 Defendants did, on or about May 16, 2006, wilfully, unlawfully, feloniously, and
23 without authority of law, seize, confine, inveigle, entice, decoy, abduct, conceal, kidnap, or
24 carry away MELISSA ESTORES, a human being, with the intent to hold or detain the said
25 MELISSA ESTORES against her will, and without her consent, for the purpose of inflicting
26 substantial bodily harm on the said MELISSA ESTORES.

27 COUNT 5 - BATTERY WITH SUBSTANTIAL BODILY HARM

28 Defendants did, on or about May 16, 2006, then and there wilfully, unlawfully, and

1 feloniously use force or violence upon the person of another, to-wit: MELISSA ESTORES,
2 by beating and kicking the said MELISSA ESTORES about the head and body, resulting in
3 substantial bodily harm to the said MELISSA ESTORES, the Defendants being responsible
4 under one or more of the following theories of criminal liability, to-wit: (1) by directly or
5 indirectly committing said crime, and/or (2) by conspiring with each other to commit the
6 crime of battery and/or kidnapping where each co-conspirator is liable for the general intent
7 crimes committed by fellow co-conspirators which were a foreseeable consequence of the
8 conspiracy; and/or (3) by aiding and abetting, by Defendant JASON DUVAL MCCARTY
9 driving the said MELISSA ESTORES and Defendant DOMONIC RONALDO MALONE to
10 the location where said battery took place, then instructing the said MELISSA ESTORES to
11 submit to said beating.

12 COUNT 6 - ROBBERY

13 Defendants did, on or between May 16, 2006 and May 17, 2006, then and there
14 wilfully, unlawfully, and feloniously take personal property, to-wit: purse and/or its contents,
15 from the person of MELISSA ESTORES, or in her presence, by means of force or violence
16 or fear of injury to, and without the consent and against the will of the said MELISSA
17 ESTORES, the Defendants being responsible under one or more of the following theories of
18 criminal liability, to-wit: (1) by directly or indirectly committing said crime, and/or (2) by
19 conspiring with each other to commit the crime of battery and/or kidnapping where each co-
20 conspirator is liable for the general intent crimes committed by fellow co-conspirators which
21 were a foreseeable consequence of the conspiracy; and/or (3) by aiding and abetting, by
22 Defendant JASON DUVAL MCCARTY driving the said MELISSA ESTORES and
23 Defendant DOMONIC RONALDO MALONE to the location where a battery took place,
24 then instructing the said MELISSA ESTORES to submit to said beating, thereafter driving
25 both DOMONIC RONALDO MALONE and MELISSA ESTORES from the location as
26 DOMONIC RONALDO MALONE robbed MELISSA ESTORES of her purse and/or its
27 contents.

28 //

1 COUNT 7 - CONSPIRACY TO COMMIT KIDNAPPING

2 Defendants did, on, about, or between May 17, 2006 and May 19, 2006, then and
3 there meet with each other and between themselves, and each of them with the other,
4 wilfully, unlawfully, and feloniously conspire and agree to commit a crime, to-wit: kidnap
5 MELISSA ESTORES and/or CHARLOTTE COMBADO and/or VICTORIA MAGEE, and
6 in furtherance of said conspiracy, Defendants did commit the acts as set forth in Counts 2-3,
7 said acts being incorporated by this reference as though fully set forth herein.

8 COUNT 8 - PANDERING

9 Defendants did, on or between May 16, 2006 and May 17, 2006, then and there
10 wilfully, unlawfully, and feloniously induce, persuade, encourage, inveigle, entice, or
11 compel CHARLOTTE COMBADO to become a prostitute, and/or to engage or continue to
12 engage in prostitution.

13 COUNT 9 - PANDERING

14 Defendants did, on or between May 16, 2006 and May 17, 2006, then and there
15 wilfully, unlawfully, and feloniously induce, persuade, encourage, inveigle, entice, or
16 compel VICTORIA MAGEE to become a prostitute, and/or to engage or continue to engage
17 in prostitution.

18 COUNT 10 - CONSPIRACY TO COMMIT MURDER

19 Defendants did, on or between May 17, 2006 and May 19, 2006, then and there meet
20 with each other and between themselves, and each of them with the other, wilfully,
21 unlawfully, and feloniously conspire and agree to commit a crime, to-wit: Murder, and in
22 furtherance of said conspiracy, Defendants did commit the acts as set forth in Counts 13-19,
23 said acts being incorporated by this reference as though fully set forth herein.

24 COUNT 11 - CONSPIRACY TO COMMIT BURGLARY

25 Defendants did, on or between May 17, 2006 and May 19, 2006, then and there meet
26 with each other and between themselves, and each of them with the other, wilfully and
27 unlawfully conspire and agree to commit a crime, to-wit: Burglary, and in furtherance of
28 said conspiracy, Defendants did commit the acts as set forth in Count 13, said acts being

1 incorporated by this reference as though fully set forth herein.

2 COUNT 12 - BURGLARY

3 Defendants did, on or between May 17, 2006 and May 19, 2006, then and there
4 wilfully, unlawfully, and feloniously enter, with intent to commit assault and/or battery
5 and/or a felony, to-wit: Kidnapping and/or Murder, that certain building occupied by
6 LEONARD ROBINSON, located at 1525 East Fremont, Room No. 222, Las Vegas, Clark
7 County, Nevada.

8 COUNT 13 - FIRST DEGREE KIDNAPPING

9 Defendants did, on or between May 17, 2006 and May 19, 2006, wilfully, unlawfully,
10 feloniously, and without authority of law, seize, confine, inveigle, entice, decoy, abduct,
11 conceal, kidnap, or carry away CHARLOTTE COMBADO, a human being, with the intent
12 to hold or detain the said CHARLOTTE COMBADO against her will, and without her
13 consent, for the purpose of committing murder.

14 COUNT 14 - FIRST DEGREE KIDNAPPING

15 Defendants did, on or between May 17, 2006 and May 19, 2006, wilfully, unlawfully,
16 feloniously, and without authority of law, seize, confine, inveigle, entice, decoy, abduct,
17 conceal, kidnap, or carry away VICTORIA MAGEE, a human being, with the intent to hold
18 or detain the said VICTORIA MAGEE against her will, and without her consent, for the
19 purpose of committing murder.

20 COUNT 15 - MURDER WITH USE OF A DEADLY WEAPON

21 Defendants did, on or between May 17, 2006 and May 19, 2006, then and there
22 wilfully, feloniously, without authority of law, and with premeditation and deliberation, and
23 with malice aforethought, kill CHARLOTTE COMBADO, a human being, by striking the
24 said CHARLOTTE COMBADO about the head and body with a deadly weapon, to-wit: a
25 golf club and/or a knife and/or a rock and/or an unknown blunt object and/or an unknown
26 sharp object, the said actions of the Defendants resulting in the death of the said
27 CHARLOTTE COMBADO; the Defendants being responsible under one or more of the
28 following principles of criminal liability, to-wit: (1) by having premeditation and

1 deliberation in its commission; and/or (2) the killing occurring during the perpetration or
2 attempted perpetration of kidnapping and/or robbery and/or burglary and/or (3) by being
3 liable as co-conspirator for the acts done in furtherance of the conspiracy, which acts were
4 intended by the Defendants; and/or (4) by aiding and abetting in the commission of the crime
5 by accompanying each other to the crime scene where the Defendants acted as lookouts for
6 one another, the Defendants did physically take the said CHARLOTTE COMBADO, to a
7 remote area, the Defendants did take personal property from the person or presence of the
8 said CHARLOTTE COMBADO, the Defendants did either both physically strike the said
9 CHARLOTTE COMBADO, or did act as lookout and prevent her from escaping while the
10 other struck the said CHARLOTTE COMBADO about the head and body with a golf club
11 and/or a knife and/or a rock and/or an unknown blunt object and/or an unknown sharp
12 object, the said actions of the Defendants resulting in the death of the said CHARLOTTE
13 COMBADO, the Defendants left the crime scene together, the Defendants encouraging one
14 another throughout by actions and words, the Defendant and the accomplice acting in
15 concert throughout each with intent to commit murder.

16 COUNT 16 - MURDER WITH USE OF A DEADLY WEAPON

17 Defendants did, on or between May 17, 2006 and May 19, 2006, then and there
18 wilfully, feloniously, without authority of law, and with premeditation and deliberation, and
19 with malice aforethought, kill VICTORIA MAGEE, a human being, by striking the said
20 VICTORIA MAGEE about the head and body with a deadly weapon, to-wit: a golf club
21 and/or a knife and/or a rock and/or an unknown blunt object and/or an unknown sharp
22 object, the said actions of the Defendants resulting in the death of the said VICTORIA
23 MAGEE; the Defendants being responsible under one or more of the following principles of
24 criminal liability, to-wit: (1) by having premeditation and deliberation in its commission;
25 and/or (2) the killing occurring during the perpetration or attempted perpetration of
26 kidnapping and/or robbery and/or burglary and/or (3) by being liable as co-conspirator for
27 the acts done in furtherance of the conspiracy, which acts were intended by the Defendants;
28 and/or (4) by aiding and abetting in the commission of the crime by accompanying each

1 other to the crime scene where the Defendants acted as lookouts for one another, the
2 Defendants did physically take the said VICTORIA MAGEE, to a remote area, the
3 Defendants did take personal property from the person or presence of the said VICTORIA
4 MAGEE, the Defendants did either both physically strike the said VICTORIA MAGEE, or
5 did act as lookout and prevent her from escaping while the other struck the said VICTORIA
6 MAGEE about the head and body with a golf club and/or a knife and/or a rock and/or an
7 unknown blunt object and/or an unknown sharp object, the said actions of the Defendants
8 resulting in the death of the said VICTORIA MAGEE, the Defendants left the crime scene
9 together, the Defendants encouraging one another throughout by actions and words, the
10 Defendant and the accomplice acting in concert throughout each with intent to commit
11 murder.

12 COUNT 17 - ROBBERY WITH USE OF A DEADLY WEAPON

13 Defendants did, on or between May 17, 2006 and May 19, 2006, then and there
14 wilfully, unlawfully, and feloniously take personal property, to-wit: clothing, from the
15 person of CHARLOTTE COMBADO, or in her presence, by means of force or violence or
16 fear of injury to, and without the consent and against the will of the said CHARLOTTE
17 COMBADO, said Defendants using a deadly weapon, to-wit: a golf club and/or a knife
18 and/or a rock and/or other unidentified blunt or sharp object, during the commission of said
19 crime.

20 COUNT 18 - ROBBERY WITH USE OF A DEADLY WEAPON

21 Defendants did, on or between May 17, 2006 and May 19, 2006, then and there
22 wilfully, unlawfully, and feloniously take personal property, to-wit: clothing, from the
23 person of VICTORIA MAGEE, or in her presence, by means of force or violence or fear of
24 injury to, and without the consent and against the will of the said VICTORIA MAGEE, said

25 //

26 //

27 //

28 //

Defendants using a deadly weapon, to-wit: a golf club and/or a knife and/or a rock and/or other unidentified blunt or sharp object, during the commission of said crime.

BY



DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

Names of witnesses known to the District Attorney's Office at the time of filing this

Information are as follows:

<u>NAME</u>	<u>ADDRESS</u>
ALLRED, CLAY	HPD #1221
BENJAMINS, FELICIA	HPD #720
COLLINS, GERARD	HPD #324
ESTORES, MELISSA	UNKNOWN ADDRESS
FUENTES, FRANKLIN	HPD #621
HALL, RAMAAN	UNKNOWN ADDRESS
HERB, DONALD	UNKNOWN ADDRESS
HERB, HAROLD	140 SIR NOBLE ST., LVN
HOSAKA, MARK	HPD #777
KUBICZEK, PIOTR DR.	CORONER'S OFFICE
NAGEL, LYNN	C/O CCDA OFFICE
PARKER, DAVID	CANCUN APARTMENTS
PHILLIPS, CORRINA	C/O CCDA OFFICE
RIDINGS, CRAIG	HPD #358
ROBINSON, LEONARD	1525 E. FREMONT #F-222, LVN
WEBSTER, MICHAEL	HPD #899

DA#06FH0742A, B/mb
HPD EV#06-11513
CONSP; KIDNAP; BWSBH; BURG; MWDW; RWDW - F
(TK5)

ORIGINAL

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8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

FILED IN OPEN COURT
AUG 02 2006
CHANEL WEST
BY *Chanel West*

DISTRICT COURT

CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,
10 Plaintiff,

11 -vs-

12 DONALD JAY HERB,
13 #1217129

14 Defendant.

Case No.

C 20572

Dept No.

XII

16 AGREEMENT TO TESTIFY

17 IT IS HEREBY AGREED by and between the State of Nevada, by the Clark County
18 District Attorney and through the undersigned Deputy, MARC DIGIACOMO, and
19 DONALD JAY HERB, by and through his undersigned defense attorney, BEN DURHAM:

20 1. DONALD JAY HERB will cooperate voluntarily with the Clark County District
21 Attorney's Office and the Las Vegas Metropolitan Police Department in the investigation
22 and prosecution in Case No. 06FH0742A, B, *State of Nevada vs. Domonic Ronaldo Malone*
23 *and/or Jason Duval McCarty*, concerning the murder and/or kidnapping and/or pandering of
24 Charlotte Combado and/or Victoria Magee and/or Melissa Estores, which occurred on or
25 between May 16, 2006 and May 19, 2006.

26 2. DONALD JAY HERB will cooperate voluntarily by providing true information
27 and by testifying fully and truthfully in all court proceedings in the above referenced case
28 against the co-defendants Domonic Ronaldo Malone and/or Jason Duval McCarty.

3. The full terms of the plea agreement are set forth in the document styled Guilty

1 Plea Memorandum, a copy of which is attached hereto and incorporated herein by reference.
2 DONALD JAY HERB shall receive the benefits described in this agreement subject to his
3 compliance with all of the terms and conditions contained in this document.

4 4. It is further understood that as a result of entering this agreement, DONALD JAY
5 HERB is waiving all appeal rights with respect to the entry of plea, speedy trial rights, and
6 any other right to appeal any issue as a result of his prosecution in the instant case.

7 **OBLIGATION TO BE TRUTHFUL**

8 **OVERRIDING ALL ELSE**, it is understood that this agreement requires from
9 DONALD JAY HERB an obligation to do nothing other than to tell the truth. It is
10 understood between all the parties to this agreement that DONALD JAY HERB, at all times,
11 shall tell the truth, both during the investigation and while testifying on the witness stand.
12 DONALD JAY HERB shall tell the truth, no matter who asks the questions, including but
13 not limited to investigators, prosecutors, judges and defense attorneys.

14 It is further understood that this entire agreement shall become null and void and
15 DONALD JAY HERB shall lose the benefits of this agreement for any deviation from the
16 truth, for failure to answer any question that is the subject matter of this investigation, for
17 purposely withholding information regarding this investigation, for providing evasive
18 answers to questions asked by law enforcement officers investigating this case, for providing
19 false information at any time on any matter concerning this investigation. Further,
20 DONALD JAY HERB shall be subject to prosecution for perjury for any intentional false
21 statement which occurs while he is on the witness stand.

22 The parties agree that the trial court shall determine if DONALD JAY HERB
23 complied with his obligation of truthfulness for purposes of this agreement.

24 **ADDITIONAL CONDITIONS**

25 1. It is further agreed that if this agreement is declared null and void as a result of
26 violation of the terms and conditions by DONALD JAY HERB, the District Attorney will
27 use any statements made by regarding this investigation against him, in any subsequent
28 criminal trial/prosecution arising in the instant case.

1 2. It is agreed that no interviews or communication with DONALD JAY HERB shall
2 be conducted by the District Attorney or its agents unless defense counsel BEN DURHAM
3 has been notified and BEN DURHAM agrees to expressly waive his right to be present.

4 3. Any failure by the Office of the District Attorney and its agents to comply with the
5 above requirements shall render this Agreement null and void and may result in DONALD
6 JAY HERB taking any action which would otherwise be available to him, including but not
7 limited to refusing to testify based on his Fifth Amendment right or seeking to withdraw
8 from the plea agreement in the instant case.

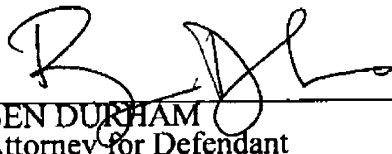
9 4. All parties realize and understand their obligations and duties under this
10 Agreement. Each party enters this Agreement with full knowledge of the meaning and effect
11 of such Agreement.

12 5. DONALD JAY HERB has discussed this matter fully with his attorney. The
13 parties realize and understand that there are no terms to this Agreement other than what is
14 contained herein and in the Guilty Plea Agreement. DONALD JAY HERB fully and
15 voluntarily accepts all the terms and conditions of this agreement and understands the
16 consequences of entering into this agreement.

17 7/19/06
18 DATE

19 
20 DONALD JAY HERB
21 Defendant

22 7/19/06
23 DATE

24 
25 BEN DURHAM
26 Attorney for Defendant

27 7/19/06
28 DATE


 MARC DIGIACOMO
 Deputy District Attorney

mb

1 **GMEM**

2 **DAVID ROGER**
3 **DISTRICT ATTORNEY**

4 Nevada Bar #002781

5 **MARC DIGIACOMO**

6 Deputy District Attorney

7 Nevada Bar #006955

8 200 Lewis Avenue

9 Las Vegas, NV 89155-2212

10 (702) 671-2500

11 Attorney for Plaintiff

12 **DISTRICT COURT**

13 **CLARK COUNTY, NEVADA**

14 **THE STATE OF NEVADA,**

15 Plaintiff,

16 **CASE NO:**

17 **C**

18 **DEPT NO:**

19 **XII**

20 **-vs-**

21 **DONALD JAY HERB,**
22 **#1217129**

23 Defendant.

24 **GUILTY PLEA AGREEMENT**

25 I hereby agree to plead guilty to: **ACCESSORY TO MURDER** (Category C Felony -
26 **NRS 195.030, 195.040, 200.010**), as more fully alleged in the charging document attached
27 hereto as Exhibit "1".

28 My decision to plead guilty is based upon the plea agreement in this case which is as
follows:

29 The State has agreed to retain the right to argue at the rendition of sentence.

30 **CONSEQUENCES OF THE PLEA**

31 I understand that by pleading guilty I admit the facts which support all the elements of
32 the offense(s) to which I now plead as set forth in Exhibit "1".

33 I understand that as a consequence of my plea of guilty the Court must sentence me to
34 imprisonment in the Nevada Department of Corrections for a minimum term of not less than
35 one (1) year and a maximum term of not more than five (5) years. The minimum term of
36 imprisonment may not exceed forty percent (40%) of the maximum term of imprisonment. I

37 **EXHIBIT "1"**

38 PAWPDOCS\INF\OUTLYING\6H016h074202.doc

1 understand that I may also be fined up to \$5,000.00. I understand that the law requires me to
2 pay an Administrative Assessment Fee.

3 I understand that, if appropriate, I will be ordered to make restitution to the victim of
4 the offense(s) to which I am pleading guilty and to the victim of any related offense which is
5 being dismissed or not prosecuted pursuant to this agreement. I will also be ordered to
6 reimburse the State of Nevada for any expenses related to my extradition, if any.

7 I understand that I am eligible for probation for the offense to which I am pleading
8 guilty. I understand that, except as otherwise provided by statute, the question of whether I
9 receive probation is in the discretion of the sentencing judge.

10 I understand that if more than one sentence of imprisonment is imposed and I am
11 eligible to serve the sentences concurrently, the sentencing judge has the discretion to order
12 the sentences served concurrently or consecutively.

13 I also understand that information regarding charges not filed, dismissed charges, or
14 charges to be dismissed pursuant to this agreement may be considered by the judge at
15 sentencing.

16 I have not been promised or guaranteed any particular sentence by anyone. I know
17 that my sentence is to be determined by the Court within the limits prescribed by statute.

18 I understand that if my attorney or the State of Nevada or both recommend any
19 specific punishment to the Court, the Court is not obligated to accept the recommendation.

20 I understand that if the State of Nevada has agreed to recommend or stipulate a
21 particular sentence or has agreed not to present argument regarding the sentence, or agreed
22 not to oppose a particular sentence, or has agreed to disposition as a gross misdemeanor
23 when the offense could have been treated as a felony, such agreement is contingent upon my
24 appearance in court on the initial sentencing date (and any subsequent dates if the sentencing
25 is continued). I understand that if I fail to appear for the scheduled sentencing date or I
26 commit a new criminal offense prior to sentencing the State of Nevada would regain the full
27 right to argue for any lawful sentence.

28 I understand if the offense(s) to which I am pleading guilty to was committed while I

1 was incarcerated on another charge or while I was on probation or parole that I am not
2 eligible for credit for time served toward the instant offense(s).

3 I understand that as a consequence of my plea of guilty, if I am not a citizen of the
4 United States, I may, in addition to other consequences provided for by federal law, be
5 removed, deported, excluded from entry into the United States or denied naturalization.

6 I understand that the Division of Parole and Probation will prepare a report for the
7 sentencing judge prior to sentencing. This report will include matters relevant to the issue of
8 sentencing, including my criminal history. This report may contain hearsay information
9 regarding my background and criminal history. My attorney and I will each have the
10 opportunity to comment on the information contained in the report at the time of sentencing.
11 Unless the District Attorney has specifically agreed otherwise, then the District Attorney
12 may also comment on this report.

13 WAIVER OF RIGHTS

14 By entering my plea of guilty, I understand that I am waiving and forever giving up
15 the following rights and privileges:

16 1. The constitutional privilege against self-incrimination, including the right to refuse
17 to testify at trial, in which event the prosecution would not be allowed to comment to the
18 jury about my refusal to testify.

19 2. The constitutional right to a speedy and public trial by an impartial jury, free of
20 excessive pretrial publicity prejudicial to the defense, at which trial I would be entitled to the
21 assistance of an attorney, either appointed or retained. At trial the State would bear the
22 burden of proving beyond a reasonable doubt each element of the offense charged.

23 3. The constitutional right to confront and cross-examine any witnesses who would
24 testify against me.

25 4. The constitutional right to subpoena witnesses to testify on my behalf.

26 5. The constitutional right to testify in my own defense.

27 6. The right to appeal the conviction, with the assistance of an attorney, either
28 appointed or retained, unless the appeal is based upon reasonable constitutional jurisdictional

1 or other grounds that challenge the legality of the proceedings and except as otherwise
2 provided in subsection 3 of NRS 174.035.

3 VOLUNTARINESS OF PLEA

4 I have discussed the elements of all of the original charge(s) against me with my
5 attorney and I understand the nature of the charge(s) against me.

6 I understand that the State would have to prove each element of the charge(s) against
7 me at trial.

8 I have discussed with my attorney any possible defenses, defense strategies and
9 circumstances which might be in my favor.

10 All of the foregoing elements, consequences, rights, and waiver of rights have been
11 thoroughly explained to me by my attorney.

12 I believe that pleading guilty and accepting this plea bargain is in my best interest,
13 and that a trial would be contrary to my best interest.

14 I am signing this agreement voluntarily, after consultation with my attorney, and I am
15 not acting under duress or coercion or by virtue of any promises of leniency, except for those
16 set forth in this agreement.

17 I am not now under the influence of any intoxicating liquor, a controlled substance or
18 other drug which would in any manner impair my ability to comprehend or understand this
19 agreement or the proceedings surrounding my entry of this plea.

20 My attorney has answered all my questions regarding this guilty plea agreement and
21 its consequences to my satisfaction and I am satisfied with the services provided by my
22 attorney.

23 DATED this _____ day of July, 2006.

24 _____
25 DONALD JAY HERB
26 Defendant

26 AGREED TO BY:

27 _____
28 MARC DIGIACOMO
Deputy District Attorney
Nevada Bar #006955

1 CERTIFICATE OF COUNSEL:

2 I, the undersigned, as the attorney for the Defendant named herein and as an officer of
3 the court hereby certify that:

4 1. I have fully explained to the Defendant the allegations contained in the charge(s)
5 to which guilty pleas are being entered.

6 2. I have advised the Defendant of the penalties for each charge and the restitution
7 that the Defendant may be ordered to pay.

8 3. All pleas of guilty offered by the Defendant pursuant to this agreement are
9 consistent with the facts known to me and are made with my advice to the Defendant.

10 4. To the best of my knowledge and belief, the Defendant:

11 a. Is competent and understands the charges and the consequences of pleading
12 guilty as provided in this agreement.

13 b. Executed this agreement and will enter all guilty pleas pursuant hereto
14 voluntarily.

15 c. Was not under the influence of intoxicating liquor, a controlled substance or
16 other drug at the time I consulted with the defendant as certified in paragraphs
17 1 and 2 above.

18 Dated: This ____ day of July, 2006.

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ATTORNEY FOR DEFENDANT

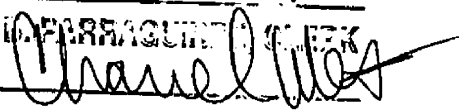
mb

ORIGINAL

1 GMEM
2 DAVID ROGER
3 DISTRICT ATTORNEY
4 Nevada Bar #002781
5 MARC DIGIACOMO
6 Deputy District Attorney
7 Nevada Bar #006955
8 200 Lewis Avenue
9 Las Vegas, NV 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

FILED IN OPEN COURT

AUG 02 2006

SHIRLEY M. PARRAGUIN, CLERK
BY 

DEPUTY
CHANEL WEST

DISTRICT COURT

CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,

10 Plaintiff,

11 -vs-

12 DONALD JAY HERB,
13 #1217129,

14 Defendant.

CASE NO:
DEPT NO:

C 224572
XII

15 GUILTY PLEA AGREEMENT

16 I hereby agree to plead guilty to: ACCESSORY TO MURDER (Category C Felony -
17 NRS 195.030, 195.040, 200.010), as more fully alleged in the charging document attached
18 hereto as Exhibit "1".

19 My decision to plead guilty is based upon the plea agreement in this case which is as
20 follows:

21 The State has agreed to retain the right to argue at the rendition of sentence.

22 CONSEQUENCES OF THE PLEA

23 I understand that by pleading guilty I admit the facts which support all the elements of
24 the offense(s) to which I now plead as set forth in Exhibit "1".

25 I understand that as a consequence of my plea of guilty the Court must sentence me to
26 imprisonment in the Nevada Department of Corrections for a minimum term of not less than
27 one (1) year and a maximum term of not more than five (5) years. The minimum term of
28 imprisonment may not exceed forty percent (40%) of the maximum term of imprisonment. I

1 understand that I may also be fined up to \$5,000.00. I understand that the law requires me to
2 pay an Administrative Assessment Fee.

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9 receive probation is in the discretion of the sentencing judge.

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12 the sentences served concurrently or consecutively.

13 I also understand that information regarding charges not filed, dismissed charges, or
14 charges to be dismissed pursuant to this agreement may be considered by the judge at
15 sentencing.

16 I have not been promised or guaranteed any particular sentence by anyone. I know
17 that my sentence is to be determined by the Court within the limits prescribed by statute.

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19 specific punishment to the Court, the Court is not obligated to accept the recommendation.

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21 particular sentence or has agreed not to present argument regarding the sentence, or agreed
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4 United States, I may, in addition to other consequences provided for by federal law, be
5 removed, deported, excluded from entry into the United States or denied naturalization.

6 I understand that the Division of Parole and Probation will prepare a report for the
7 sentencing judge prior to sentencing. This report will include matters relevant to the issue of
8 sentencing, including my criminal history. This report may contain hearsay information
9 regarding my background and criminal history. My attorney and I will each have the
10 opportunity to comment on the information contained in the report at the time of sentencing.
11 Unless the District Attorney has specifically agreed otherwise, then the District Attorney
12 may also comment on this report.

13 WAIVER OF RIGHTS

14 By entering my plea of guilty, I understand that I am waiving and forever giving up
15 the following rights and privileges:

16 1. The constitutional privilege against self-incrimination, including the right to refuse
17 to testify at trial, in which event the prosecution would not be allowed to comment to the
18 jury about my refusal to testify.

19 2. The constitutional right to a speedy and public trial by an impartial jury, free of
20 excessive pretrial publicity prejudicial to the defense, at which trial I would be entitled to the
21 assistance of an attorney, either appointed or retained. At trial the State would bear the
22 burden of proving beyond a reasonable doubt each element of the offense charged.

23 3. The constitutional right to confront and cross-examine any witnesses who would
24 testify against me.

25 4. The constitutional right to subpoena witnesses to testify on my behalf.

26 5. The constitutional right to testify in my own defense.

27 6. The right to appeal the conviction, with the assistance of an attorney, either
28 appointed or retained, unless the appeal is based upon reasonable constitutional jurisdictional

1 or other grounds that challenge the legality of the proceedings and except as otherwise
2 provided in subsection 3 of NRS 174.035.

3 VOLUNTARINESS OF PLEA

4 I have discussed the elements of all of the original charge(s) against me with my
5 attorney and I understand the nature of the charge(s) against me.

6 I understand that the State would have to prove each element of the charge(s) against
7 me at trial.

8 I have discussed with my attorney any possible defenses, defense strategies and
9 circumstances which might be in my favor.

10 All of the foregoing elements, consequences, rights, and waiver of rights have been
11 thoroughly explained to me by my attorney.

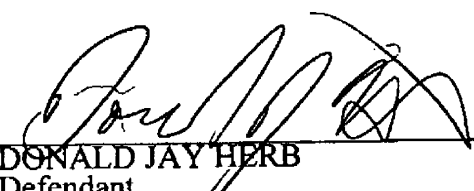
12 I believe that pleading guilty and accepting this plea bargain is in my best interest,
13 and that a trial would be contrary to my best interest.

14 I am signing this agreement voluntarily, after consultation with my attorney, and I am
15 not acting under duress or coercion or by virtue of any promises of leniency, except for those
16 set forth in this agreement.

17 I am not now under the influence of any intoxicating liquor, a controlled substance or
18 other drug which would in any manner impair my ability to comprehend or understand this
19 agreement or the proceedings surrounding my entry of this plea.

20 My attorney has answered all my questions regarding this guilty plea agreement and
21 its consequences to my satisfaction and I am satisfied with the services provided by my
22 attorney.

23 DATED this 19 day of July, 2006.

24 
25 DONALD JAY HERB
26 Defendant

26 AGREED TO BY

27 
28 MARC DIGIACOMO
Deputy District Attorney
Nevada Bar #006955

1 CERTIFICATE OF COUNSEL:

2 I, the undersigned, as the attorney for the Defendant named herein and as an officer of
3 the court hereby certify that:

4 1. I have fully explained to the Defendant the allegations contained in the charge(s)
5 to which guilty pleas are being entered.

6 2. I have advised the Defendant of the penalties for each charge and the restitution
7 that the Defendant may be ordered to pay.

8 3. All pleas of guilty offered by the Defendant pursuant to this agreement are
9 consistent with the facts known to me and are made with my advice to the Defendant.

10 4. To the best of my knowledge and belief, the Defendant:

11 a. Is competent and understands the charges and the consequences of pleading
12 guilty as provided in this agreement.

13 b. Executed this agreement and will enter all guilty pleas pursuant hereto
14 voluntarily.

15 c. Was not under the influence of intoxicating liquor, a controlled substance or
16 other drug at the time I consulted with the defendant as certified in paragraphs
17 1 and 2 above.

18 Dated: This 19 day of July, 2006.

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ATTORNEY FOR DEFENDANT

mb

1 **INFO**

2 DAVID ROGER
3 Clark County District Attorney
4 Nevada Bar #002781
5 MARC DIGIACOMO
6 Deputy District Attorney
7 Nevada Bar #006955
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

12 **DISTRICT COURT**
13 **CLARK COUNTY, NEVADA**

14 I.A.

15 B. DURHAM

16 THE STATE OF NEVADA,

17 Plaintiff,

18 -vs-

19 DONALD JAY HERB,
20 #1217129

21 Defendant.

Case No: C
Dept No: XII

22 **INFORMATION**

23 STATE OF NEVADA }
24 COUNTY OF CLARK } ss.

25 DAVID ROGER, District Attorney within and for the County of Clark, State of
26 Nevada, in the name and by the authority of the State of Nevada, informs the Court:

27 That DONALD JAY HERB, the Defendant(s) above named, having committed the
28 crime of ACCESSORY TO MURDER (Felony - NRS 195.030, 195.040, 200.010), on or
between May 16, 2006 and May 19, 2006, within the County of Clark, State of Nevada,
contrary to the form, force and effect of statutes in such cases made and provided, and
against the peace and dignity of the State of Nevada, did then and there wilfully, unlawfully
and feloniously harbor, conceal, or aid DOMONIC RONALDO MALONE and/or JASON
DUVAL MCCARTY, with the intent that the said DOMONIC RONALDO MALONE
and/or JASON DUVAL MCCARTY might avoid or escape from arrest, trial, conviction, or
punishment, having knowledge that the said DOMONIC RONALDO MALONE and/or

P:\WPDOCS\INFO\OUTLYING\6H0\6H074201.DOC

EXHIBIT "1"

1 JASON DUVAL MCCARTY had committed a felony, to-wit: murder, and was liable to
2 arrest therefore.

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6 BY



DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

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28 ACC TO MURDER - F
(TK5)

TRAN

COPY

DISTRICT COURT

CLARK COUNTY, NEVADA

FILED

APR 14 11 03 AM '10

[Signature]
CLERK

THE STATE OF NEVADA,

Plaintiff,

vs.

DOMONIC RONALDO MALONE,
JASON DUVAL McCARTY,

Defendant.

CASE NO. C224572

DEPT. XVII

BEFORE THE HONORABLE MICHAEL P. VILLANI, DISTRICT COURT JUDGE

TUESDAY, APRIL 13, 2010

***RECORDER'S TRANSCRIPT OF HEARING RE:
ALL PENDING MOTIONS***

APPEARANCES:

For the State:

MARC DiGIACOMO, ESQ.,
Deputy District Attorney

For the Defendant, Malone:

RANDALL H. PIKE, ESQ.,
DAVID M. SCHIECK, ESQ.,
Special Public Defenders
(Standby Counsel)

For the Defendant, McCarty:

CHRISTOPHER R. ORAM, ESQ.,
ANTHONY P. SGRO, ESQ.,

RECORDED BY: MICHELLE L. RAMSEY, COURT RECORDER

1 LAS VEGAS, NEVADA; TUESDAY, APRIL 13, 2010

2 [Proceeding commenced at 9:12 a.m.]

3
4 THE COURT: 224572, State versus Domonic Malone. Mr. Malone's
5 present in custody. We have Mr. Pike, Mr. Cano, Mr. Oram, Mr. Sgro. This is
6 Malone's Motion for Reconsideration of the Court's denial of the Writ of Habeas
7 Corpus; anything further to add, Mr. Malone?

8 THE DEFENDANT, MALONE: Which what, sir?

9 THE COURT: The Motion for Reconsideration of your Writ of Habeas
10 Corpus.

11 THE DEFENDANT, MALONE: Well, Your Honor, I received the State's
12 opposition today.

13 THE COURT: All right.

14 THE DEFENDANT, MALONE: The -- the denial letter; right? Well, from my
15 understanding -- excuse me, Court's indulgence -- from my understanding for that
16 District Court Rule 13 subsection 3 that they had 10 days to serve and file the
17 motion and they have yet to serve me, Your Honor. I had received this from my
18 standby counsel, Randall Pike, sir.

19 THE COURT: Sir, what -- sir, what motion?

20 THE DEFENDANT, MALONE: The State's opposition. The State has yet to
21 serve me this opposition, sir. I have a copy of it from Randall Pike, sir, this morning.

22 THE COURT: All right. Mr. DiGiacomo?

23 MR. DIGIACOMO: It was served on the fax number at the jail pursuant to
24 the procedures for pro per counsel or pro per Defendants on Friday, Judge. I
25 believe there's a receipt on the back of our response, Judge.

1 THE COURT: All right. The issue here Mr. Malone is that the Court found
2 that there was sufficient evidence to bind you over on these charges. The standard
3 slighter marginal evidence and the Court had previously found that nothing has
4 changed to -- to convince the Court that the original decision was incorrect, so
5 therefore your motion for reconsideration --

6 THE DEFENDANT, MALONE: Your Honor --

7 THE COURT: -- is denied.

8 THE DEFENDANT: -- excuse me, Your Honor. I didn't even argue my facts.

9 THE COURT: But, sir, I'm telling you that there was sufficient evidence
10 presented to meet the burden of slighter marginal evidence and therefore your
11 motion is denied. Furthermore, pursuant to EDCR 7.12 you did not seek permission
12 from the Court to file this motion. And you're held by the same rules of all attorneys
13 are. And so for those reasons, your motion is denied.

14 Now, we have Mr. McCarty's Motion to Sever Trial from the Co-
15 defendant.

16 MR. SGRO: Yes, sir.

17 THE COURT: Are you going to argue that, Mr. Sgro or Mr. Oram?

18 MR. SGRO: I am, Your Honor.

19 THE COURT: Okay.

20 MR. SGRO: Your Honor, essentially here's -- here's what occurred and just
21 so we can briefly touch on a procedural history in this matter because this Court
22 hasn't been on the case since jump street.

23 When we got the case initially was in front of Judge Glass where
24 most of the pre-trial motion work was done. And amongst the things that were filed
25 in that case were a motion for severance. And the motions for severance were done

1 that time specifically because of the volume and amount of statements given by
2 each of the Defendants in the case and the potential for Martin -- Ducksworth
3 violation where inadvertently or not a person testifying would impute criminal liability
4 to the other and we have a problem in our record.

5 And after the State, and Mr. DiGiacomo has been on this case from
6 the beginning, so after we argue in front of Judge Glass, she takes it under
7 advisement and I remember when we got -- when we went back to get the decision,
8 her initial inclination was to grant severance based on the volume and amount of
9 statements that exist in our case. And it was after some vigorous argument by the
10 State and some representations on what they would and wouldn't use relative to
11 redacting and non-redacting and simply not using certain statements that Judge
12 Glass was persuaded to move from her original position and ultimately deny the
13 motion for severance.

14 And the reason I point that out is because a lot of times some things
15 are done for form, sometimes are done for substance, sometimes are done just to
16 protect the record. We had a righteous issue. There was some consternation on
17 behalf of the District Court Judge who was hearing it at the time and the State
18 prevailed, but not after some healthy debate.

19 So now we have still the same Ducksworth kind of problem that
20 exists and we have the prosecutor making representations to this Court just like they
21 did before saying we're going to stay away from certain things and we're going to do
22 what we need to do to make sure we don't have this problem. And we have at that
23 time counsel that's all part of the ruling as well.

24 Now, when there is a departure from, I don't know, 30 or 40 years
25 collectively of trial experience here and knowledge on how to do capital cases, when

1 that departs from that level to a pro per litigant, that causes some concern. And
2 frankly and I know I say this somewhat flippantly, but I'm a little bit surprised that
3 they oppose it because what's going to happen in this record, Your Honor.

4 We have a situation where we have a complicated -- the Court's
5 already determined this case has got some complicated issues. Separate and apart
6 from the -- the fact issues that exist in the case, we have complicated legal issues.
7 And we have nuances and I quoted in the brief the Ducksworth where the Supreme
8 Court talks about inferences that were impermissible when the State was asking
9 questions. And by the way, Ducksworth's Co-defendant was Carl Martin. I had Carl
10 Martin, so this was my case at the trial in appellate level, so I'm very familiar with the
11 facts and circumstances.

12 When -- whenever persons got on the stand and talked about one
13 without the other because they were both sitting at the same defense table and
14 because the State had put them both together and all the things we all know now
15 about Ducksworth and Martin henceforth, the Supreme Court reverses.

16 Now with respect to the pre-trial ruling for severance that occurred in
17 front of Judge Glass, it is what it is. The record stands and if we don't prevail in the
18 trial in this matter then we have it for appeal. However, consider now the fact that
19 none of us here want to do this for batting practice. None of us here want to revisit
20 this case again unnecessarily. If it should occur, it should occur. We all want to do
21 it just once. We want to do it correctly.

22 This Court after conducting its *Faretta* Canvass concluded that there
23 was sufficient cause to allow Mr. Malone to proceed pro se; that's the ruling and
24 that's fine. We're not quarreling with that ruling, but now that that ruling has been
25 entered and Mr. Malone is proceeding pro se, we have no assurance. And the

1 Court in our opinion can't give us any assurance that Mr. Malone can or can't ask
2 certain questions.

3 Even this morning, and I understand this morning was a renewal for
4 reconsideration on the Writ, I get that; but even this morning there was a rule cited
5 relative to filing and non-responsive pleadings. And that's a simple rule perhaps. I
6 don't fault Mr. Malone. I only suggest to the Court that if Mr. Malone wants to go on
7 his own, he's entitled too and the Court's given him that latitude, but he can't do it at
8 the expense of Mr. McCarty because if we're all sitting here at the same table and
9 Mr. Malone asks the inappropriate question, what's the Court going to face then; a
10 severance after a week of trial, after two weeks? I think the trial I'll submit in this
11 case is five weeks.

12 And maybe -- maybe the Court's confidence is greater than mine and
13 Mr. Oram's, but I can't imagine in five weeks in a double homicide case where death
14 is an option for the jurors to consider; and where I think Mr. McCarty alone gave six
15 or seven statements. I can't imagine that this case is going to be so clean that Mr.
16 Malone's lack of legal experience isn't going to matter. This isn't a hand to hand
17 sale with an undercover agent in a parking lot of a Target. This is a very
18 complicated matter and while we don't quarrel with any of the rulings we've gotten
19 so far, the circumstances now have changed where the Court is now causing us to
20 rely on the abilities of Mr. Malone who's not a trained legal professional to comply
21 with Court rulings that were made in this case I think 18 to 24 months ago, it's been
22 a long time, based on Orders that the parties got.

23 And that's the essence of our -- of our motion and the State has cited
24 to Your Honor a number of Federal Court cases. There's not a single State the
25 Nevada case in their -- in their brief. We rely on -- on the Ducksworth decision to

1 illustrate the -- the concern that we have and we'll submit it on that Your Honor.

2 THE COURT: Mr. Malone, although you didn't file anything regarding this
3 motion, do you have a position on Mr. McCarty's Motion to Sever the Trials?

4 THE DEFENDANT, MALONE: No, sir. Not that I know of. No.

5 THE COURT: Okay. Mr. DiGiacomo?

6 MR. DIGIACOMO: Thank you, Judge. Apparently, Mr. Sgro read our
7 response and realized that he had to assert a prejudice --

8 THE COURT: I'm sorry that?

9 MR. DIGIACOMO: -- he had to assert a prejudice to the fact that they can't
10 just merely 'cause its bad policy to let two Defendants sever themselves by one
11 Defendant taking a *Faretta* Canvass particularly a Defendant who's already said I'm
12 most likely going to take my counsel back, so the issue will probably be moot by the
13 time we get to trial.

14 The problem for Mr. Sgro though is while he made a very eloquent
15 record about Ducksworth it's his client's statements that are at issue. Not Mr.
16 Malone's statements. So the prejudice doesn't attach to Mr. McCarty from the
17 severance. The argument in front of Judge Glass was that things that Mr. Sgro's
18 client said could implicate Mr. Malone. Not what Mr. Malone says because Mr.
19 Malone doesn't implicate Mr. McCarty in the crime.

20 So the prejudice they're asserting to you is not a prejudice that they
21 have a right to assert because there isn't any prejudice to them. It's their client's
22 statement who says things like Mr. Malone did it and those types of things which the
23 State has already agreed with the Court that we're going to redact out. So there's
24 no prejudice to Mr. Sgro's client of the Ducksworth-Martin type nature because
25 there's no evidence that would seem to implicate that particular issue for his client.

1 So that leaves you with what; a Defendant who went pro per.

2 What they're saying essentially is hey it's a capital case whenever
3 one Defendant decides to go pro per we have an automatic right to a severance.
4 The case law is clearly in opposite to that position and certainly its bad policy to
5 allow two Defendants to automatically get a severance by one person doing a
6 *Faretta* Canvass and then later on he can always choose his counsel back. I don't
7 think that they've established to you that there's any particular prejudice of any piece
8 of evidence that now is going to change for their client. And I'll submit it.

9 THE COURT: Mr. Sgro?

10 MR. SGRO: Your Honor, first of all his representations not accurate. These
11 two individuals know the same witnesses according to what the testimony has been
12 thus far. They've had conversations with the same witnesses. Statements have
13 been attributed to them all throughout the case both by the police department as
14 well as by other witnesses. I was simply articulating to the Court one small part of a
15 much larger puzzle and Mr. DiGiacomo knows that.

16 And Mr. Malone also spoke to the police and we don't know how he's
17 going to conduct his examination. And if he says anything relative to when I said
18 this to you, I was talking about me and Mr. McCarty or any, any -- I don't know how
19 to categorize it because I can't articulate what I don't know. I don't know stylistically
20 how's he's going to approach it, but almost every witness in this case, every lay
21 person knows both of them. Some will say that they've hung out together and knew
22 each other for some period of time. There are very few persons in this entire trial
23 that are going to testify as to the conduct of only one and not the other.

24 And it's not their testimony that comes out that's going to be the
25 issue because we can regulate the prosecutor by objecting at the appropriate time

1 the Court's going to make rulings. It's during cross-examination that we have no
2 control. And -- and with all due respect, I don't think the Court can impose the same
3 sort of responsibility on Mr. Malone that he can on an attorney. There's no
4 sanctionable remedy for which Mr. Malone will be accountable.

5 So it is the prejudice is the nature and circumstances of the case
6 can't be more serious. We have a situation here where there's significant cross over
7 amongst the Defendants where Ducksworth situation is highly likely. No one wants
8 to do a five week trial over again and what I would suggest to the Court is this, we
9 got a trial date in October. It's still six months away. This is not being done at some
10 strategic ploy so that Mr. Malone after we win our severance motion can say good
11 job now I want my lawyers back. I would suggest to the Court, the Court can sever
12 the case on the caveat that when we come to calendar call, Mr. Malone's still pro
13 per. And if has elected in that intervening timeframe to reinstitute his attorneys, then
14 the issue was moot and we recognize that.

15 So my -- my suggestion and our request, Your Honor, would be that
16 the Court enter an Order of Severance in this case based on the grounds we've
17 asserted subject to reporting at Calendar Call that Mr. Malone's still going to
18 proceed pro per. And if he doesn't then although we still wanted the severance way
19 back when the case started, we recognized we've lost that motion. The record goes
20 up how it goes up, but we're not looking for -- this is not some strategic ploy.

21 So we would ask the Court to order it conditionally and then we'll
22 figure out at calendar call.

23 THE COURT: Anything further, Mr. DiGiacomo?

24 MR. DIGIACOMO: No, Judge. Obviously, you know, as the case law says
25 at some point during trial that issue comes up then that issue we can address, but

1 you shouldn't conditionally grant a motion. If you want to take it under advisement,
2 take it under advisement, but to me there is no legal basis and that's what the law
3 says to you is you need a legal basis to grant a severance. All the legal issues have
4 been addressed. The sole legal issue for you is if a Defendant goes pro per does
5 the Co-Defendant get a severance and that answers got to be no.

6 MR. SGRO: Your Honor, may I just speak one statement for the record.

7 THE COURT: All right.

8 MR. SGRO: I appreciate the Court's patience. Mr. DiGiacomo said now two
9 or three times the case law is in opposite, there's no cases which is not true. Their -
10 - their pleading only speaks in terms of Federal case law. There's not one Nevada
11 Supreme Court case they rely for those bold assertions. And I'll submit it on that
12 Your Honor.

13 THE COURT: I want to consider this matter further. We'll pass this to either
14 Tuesday or Thursday of next week. And also I want to review the previous motion
15 to sever.

16 MR. DIGIACOMO: Thank you, Judge.

17 MR. SGRO: Thank you, Your Honor.

18 THE COURT: Actually, pass it two weeks.

19 THE CLERK: Two weeks, April 29th at 8:15.

20 THE COURT: And also I request from the State whether they're severed or
21 not if there's issues of redaction. Mr. DiGiacomo, I would request from the State to
22 provide those redactions at least 30 days before the trial date, so if there's issues of
23 that more needs to be redacted or if the defense wants to file the motion say there's
24 a couple more lines you should have redacted, we can address those issues before
25 calendar call.

1 MR. DIGIACOMO: Sure.

2 THE COURT: All right.

3 MR. SGRO: Thank you very much, Your Honor.

4 MR. CANO: Your Honor, Mr. Malone is requesting to be brought back here
5 as well.

6 THE COURT: I'm sorry. Mr. Malone --

7 MR. CANO: Even though this is Mr. McCarty's motion on the severance, Mr.
8 Malone's requesting to be brought to the hearing as well.

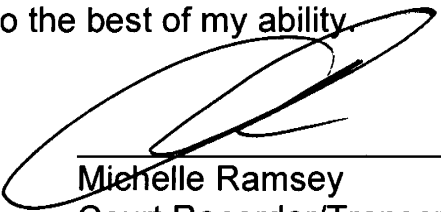
9 THE COURT: Okay, that'll be fine. That'll be the Order.

10 MR. SGRO: Thank you, Your Honor.

11 [Proceeding concluded at 9:28 a.m.]

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20 ATTEST: I hereby certify that I have truly and correctly transcribed the audio/video
21 proceedings in the above-entitled case to the best of my ability.

22
23 
24 Michelle Ramsey
25 Court Recorder/Transcriber

MAY 18 2010

STEVEN D. GRIERSON
CLERK OF THE COURT

CAROL DONAHOO

BY

DEPUTY

TRAN

COPY

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

JASON DUVAL McCARTY,
DOMONIC RONALDO MALONE,

Defendant.

CASE NO. C224572

DEPT. XVII

BEFORE THE HONORABLE MICHAEL P. VILLANI, DISTRICT COURT JUDGE

THURSDAY, APRIL 29, 2010

**RECORDER'S TRANSCRIPT OF HEARING RE:
McCARTY'S RENEWED MOTION TO SEVER**

APPEARANCES:

For the State:

MARC DiGIACOMO, ESQ.,
CHRISTOPHER LALLI, ESQ.,
Deputy District Attorneys

For the Defendant, McCarty:

CHRISTOPHER R. ORAM, ESQ.,
ANTHONY P. SGRO, ESQ.,

For the Defendant, Malone:

DAVID M. SCHIECK, ESQ.,
Special Public Defender
(Standby Counsel)

RECORDED BY: MICHELLE L. RAMSEY, COURT RECORDER

1 LAS VEGAS, NEVADA; THURSDAY, APRIL 29, 2010

2 [Proceeding commenced at 8:42 a.m.]

3
4 THE COURT: 224572; this is the Malone matter and McCarty. Is this just --
5 is this just relating to Malone or to both today?

6 MR. DIGIACOMO: It was on for status check on your decision on McCarty's
7 Motion -- Renewed Motion to Sever.

8 THE COURT: Mr. Malone, are you -- where is he?

9 THE DEFENDANT, MALONE: Yeah, I'm here.

10 THE COURT: Stand up please. Mr. Malone, are -- are you still hellbent on
11 representing yourself in this matter?

12 THE DEFENDANT, MALONE: Yes, sir.

13 THE COURT: All right. Anything further, Mr. Sgro?

14 MR. SGRO: Nothing, Your Honor.

15 THE COURT: All right. You know, Mr. DiGiacomo, I've reviewed this matter
16 and just because someone's represents themselves that's not in and of itself good
17 cause to sever the case. And I definitely don't want to do any trial twice. And I don't
18 want to do it three times either. I think because of the problems with Mr. Malone, I
19 don't know if he's playing games here. At the last minute he's going to say he wants
20 the Special PD to represent him or not, but due to the nature of this case I think
21 we're going to prevent some problems by severing this.

22 Like I said, I don't do this easily because I don't want to do this trial
23 twice and I really -- like I said, I really don't want to do it three times if you know what
24 I mean 'cause of some issue caused by Mr. Malone.

25 Now, is there a death penalty against both parties or just one?

1 MR. DIGIACOMO: Yes, sir.

2 THE COURT: Okay. Mr. Malone, we're going to give you your wish. You're
3 going to go first. We'll keep this trial date for Mr. Malone.

4 THE DEFENDANT, MALONE: Okay. Thank you.

5 THE COURT: Okay. It's not going to be continued, sir.

6 MR. DIGIACOMO: Judge --

7 THE COURT: You understood when I did the Faretta canvassing that --

8 MR. DIGIACOMO: -- Judge, may I be heard on that issue?

9 THE COURT: Yes.

10 MR. DIGIACOMO: All due respect to the Court, the State would prefer to try
11 Mr. McCarty first. You're severing the case. I think the State should have the right
12 to make that choice. We chose to try Mr. McCarty first, Judge. We can try them
13 back to back though.

14 THE COURT: All right.

15 MR. DIGIACOMO: We'll go twelve, fourteen weeks. Whatever we need to
16 do. We'll start October 14th and we'll just keep going, Judge.

17 THE COURT: Well, I'm assuming Mr. Sgro, Mr. Oram will be ready; correct?

18 MR. ORAM: We'll be ready, Judge.

19 MR. SGRO: We will.

20 THE COURT: All right. We'll go with McCarty first. We got the trial date. Is
21 there any outstanding discovery issues?

22 MR. DIGIACOMO: No, Judge. We've come up to trial the weekend before
23 trial on this case twice now, but of personal issues that caused it to get continued,
24 so I think everybody's ready to go. I don't think there's any issues related to
25 anything else.

1 THE COURT: I still have that pending Order for counsel to meet with the
2 submitting detective at least two months prior just in case something pops up. I
3 don't want to be here at Calendar Call and then we're going to bump this to 2011.

4 MR. SGRO: We'll do -- we'll do that.

5 MR. DIGIACOMO: Fine, Judge.

6 THE COURT: Okay. And so we need to reset the trial date for Mr. Malone.
7 We'll still be --

8 MR. DIGIACOMO: Can we just leave the same trial date? First of all, Mr.
9 Malone chooses his lawyers back between now and then that might change the
10 dynamic here, but also why can't we keep the same trial date? We're going to have
11 the witnesses here. Can't we just set it trailing the other one; we'll do them both?

12 THE COURT: Don't forget I have a civil, criminal calendar and --

13 MR. DIGIACOMO: You never know what's going to happen as to one
14 Defendant versus the other, Judge; and so it would seem more appropriate to keep
15 the trial date as to both and we'll just go on the first Defendant first and who knows if
16 that resolves the other case or whatever, but I think we should keep the trial dates.

17 THE COURT: All right. Will Special PD's office still be available?

18 MR. SCHIECK: Your Honor, we have calendared that date --

19 THE COURT: All right.

20 MR. SCHIECK: -- as stand-by counsel and for presentation of mitigation if
21 there's a penalty hearing pursuant to the Court's previous Order, so that -- that's the
22 date we have on our calendar right now.

23 THE COURT: Okay. Mr. Malone, looks like you wanted to say something?

24 THE DEFENDANT, MALONE: I was just saying that you say there ain't
25 going to be no continuance. Somehow if Mr. Sgro and them is not ready, I would

1 like to go.

2 THE COURT: They're announcing -- I mean, even though it's not Calendar
3 Call today --

4 THE DEFENDANT, MALONE: Yeah --

5 THE COURT: -- if there's -- they will be ready.

6 THE DEFENDANT, MALONE: Okay. 'Cause I don't know what going to
7 happen in October. I'm saying I'm ready.

8 THE COURT: I appreciate that.

9 THE DEFENDANT, MALONE: Okay.

10 THE COURT: We'll have both cases set for that time. If one negotiates
11 perhaps, the other one will go.

12 MR. DIGIACOMO: Thank you, Judge.

13 THE COURT: All right.

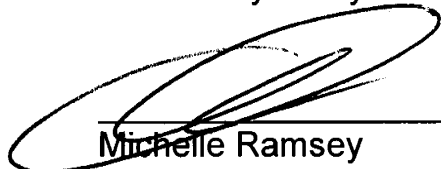
14 MR. ORAM: Thank you, Judge.

15 MR. SGRO: Thank you.

16 [Proceeding concluded at 8:47 a.m.]
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21 ATTEST: I hereby certify that I have truly and correctly transcribed the audio/video
22 proceedings in the above-entitled case to the best of my ability.

23
24 
Michelle Ramsey
Court Recorder/Transcriber
25