IN THE SUPREME COURT OF THE STATE OF NEVADA

DOMONIC MALONE

Appellant,

vs.

THE STATE OF NEVADA

Respondent.

Docket No. 61006

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

APPELLANT'S REPLY BRIEF

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I. REPLY TO THE STATE'S ARGUMENT

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

Malone's constitutional rights were violated by the district court's order revoking his right to represent himself at trial. The State does not challenge the district court's initial decision to allow Malone to represent himself, but argues that the district court did not abuse its discretion in revoking his right of self-representation. Answering Brief at 18. The State is wrong.

1. The State's Legal Authority Does Not Support Its Arguments

The State argues that Malone abandoned or withdrew his request for self-representation. Answering Brief at 20. The State's legal authority is inapplicable and its factual assertions are contrary to the record.

The State cites to McKaskle v. Wiggins, 465 U.S. 168 (1984). Answering Brief at 20. In McKaskle, the defendant, Wiggins, was allowed to represent himself pursuant to Faretta v. California, 422 U.S. 806 (1975), and standby counsel was appointed to assist. McKaskle, 422 U.S. at 171-72. During trial, Wiggins asked that counsel not interfere with his presentation to the court, and objected to the trial court's ruling that counsel remain available for consultation, but he also repeatedly asked for help from counsel. Id. at 172.

Following his conviction, Wiggins argued that counsel had interfered with his defense. Id. at 173. Ultimately, the U.S Supreme Court found that the defendant's right of self-representation was not violated because Wiggins was allowed to control the organization and content of his own defense, make motions, argue points of law, participate in *voir dire*, question witnesses, and address the court and the jury at appropriate points in the trial. Id. at 174-75. It was not Wiggins' contention that limitations were placed on his own participation in the trial, but instead inadequate limits were placed on standby counsel's participation. Within this context, the Court found that there is "no absolute bar on standby counsel's unsolicited participation[.]" Id. at 176. The Court noted that the primary focus of a Faretta claim is on whether the defendant had a fair chance to present his case his own way and it found that there are some limits on standby counsel's unsolicited participation. Id. at 177. Specifically, the *pro se* defendant is entitled to preserve actual control over the case he chooses to present to the jury, and participation by standby counsel should not be allowed to destroy the jury's perception that the defendant is representing himself. Id. at 178. The Court distinguished actions by standby counsel before the judge from those before the jury. Id. at 179. Finally, the Court found that most of standby counsel's actions of which Wiggins complained took place before the judge, not the jury, and that standby counsel's other actions were invited by Wiggins. Id. at 181-82.

The State argues that McKaskle stands for the proposition that "It is also well recognized that, *after* the motion to proceed pro se has been granted, a defendant may, by virtue of his conduct, indicate abandonment or withdrawal of a request for self-representation." Answering Brief at 20. The State fails to acknowledge, however, that Wiggins was allowed to represent himself before the jury – a right that was denied to Malone. McKaskle concerns the extent to which standby counsel may openly participate in a trial and does not hold that the district court may revoke the right of self-representation in circumstances similar to those presented here.

The other authorities cited by the State are also inapplicable. The State relies upon Brown v. Wainwright, 665 F.2d 607 (5th Cir. 1982). There, the defendant asked to represent himself, but the ruling was deferred so the defendant and his counsel could possibly resolve their differences. Prior to trial, counsel informed the trial court that the defendant wanted counsel. Id. at 609. It was not until the third day of trial that the defendant requested the right to represent himself. This request was denied. Id. at 609-10. The Fifth Circuit found that the defendant's Faretta rights were not violated. The Court found that where the defendant requests to represent himself, the right may be waived through his subsequent conduct indicating he is vacillating on the issue or has abandoned his request altogether. Id. at 610-11. The Court found that the defendant waived his right to represent himself based upon his

conduct after his initial request. Id. at 611. The facts here are far different. In Brown, the defendant was never granted the right to represent himself and the record supports the finding that he acquiesced in his counsel's statements that they had resolved their differences, whereas Malone was granted the right to represent himself and standby counsel never informed the district court that Malone wanted to be represented by counsel. Also, the defendant in Brown did not make a firm request to represent himself until the third day of trial, whereas Malone made his request well in advance of trial.

The State cites to People v. Kenner, 223 Cal.App.3d 56, 62 (Ct.App. 1990). Answering Brief at 20. In that case, the defendant moved to represent himself and a hearing on the motion was scheduled. On the date of the hearing, and the next three hearing dates, the defendant was not present because he was in custody in another county on another matter. His appointed counsel informed the trial court that the defendant was trying to get his retained counsel to court. Ultimately, appointed counsel was confirmed as counsel and the defendant did not mention his Faretta motion. Trial commenced and there was no mention of the Faretta motion. Id. at 58-59. The California Court of Appeals found that the defendant's conduct amounted to a waiver or abandonment of his right of self-representation. Id. at 60, 62. It also found that "Defendants who sincerely seek to represent themselves have a

responsibility to speak up." Id. Malone did speak up. He repeatedly said, at every opportunity, that he wanted to represent himself. 5 App. 888-89, 893-918, 1106; 6 App. 1127, 1135-38, 1156, 1181. 1197, 1295. This is not a case in which the trial court overlooked a Faretta motion that was filed but not ruled upon. Rather, the trial court was very much aware of Malone's request to represent himself, it ruled on the motion following a lengthy canvass and found that Malone was entitled to represent himself, but then revoked that right without holding a hearing and without establishing a sufficient record to justify the revocation.

The State next relies upon United States v. Bennett, 539 F.2d 45, 51 (10th Cir. 1976), for the proposition that a defendant's vacillating positions on a request to continue self-representation constitute a waiver of the right to proceed *pro se.* Answering Brief at 21. Bennett involved a case of hybrid representation in which counsel conducted some of the trial and the defendant conducted other portions. Id. at 49. Disputes existed as to whether the defendant or counsel should give opening statement and closing argument. The defendant renewed his request to conduct his own defense, but the trial court denied the motion. The case was continued so the defendant could retain counsel. Subsequently, the defendant contacted an attorney, Mr. Waxse, but he could not afford to pay the attorney. The trial court appointed Mr. Waxse and he represented the defendant at trial. A few days prior to trial, the

defendant stated that he wished to conduct certain portions of the trial *pro se*, but the trial court denied that motion. Id. at 50. The appellate court affirmed this decision, finding that the defendant forfeited his right to self-representation by his vacillating positions, which continued until just days before trial. The defendant failed to take a clear and unequivocal position on self-representation, and the ruling of the trial court was therefore justified. Id. at 51. Here, there is no question that Malone clearly stated his desire to represent himself rather than be represented by his appointed counsel. His position was unequivocal and there was no issue of hybrid representation of the type at issue in Bennett.

The State's citation to Meeks v. Craven, 482 F.2d 465, 467-68 (9th Cir. 1973) is likewise inapplicable. There, the defendant waited until the second day of trial before mentioning that he wanted to represent himself. He did so because there was a motion he wanted filed and his counsel opposed filing it. The judge allowed the defendant to present his motion and then ruled against him on the motion. The judge asked the defendant if he still wanted to represent himself and the defendant responded "Yes, Your Honor, I think I will." Id. at 467. There were no additional requests to proceed in proper person. The Ninth Circuit found the request to be equivocal and insufficient to waive the right to counsel. Id. It is also important to note that Meeks was issued by the Ninth Circuit two years prior to the U.S. Supreme

Court's decision in Faretta, 422 U.S. 806. The standards for evaluating a request for self-representation were not nearly as established as they were at the time of Malone's case, which took place more than three decades after the Faretta decision.

Similarly, the State's reliance upon the decision in United States ex rel. Maldonado v. Denno, 348 F.2d 12, 14-16 (2nd Cir. 1965), is misplaced. The defendants in that case, Maldonado and DiBlasi, were assigned the same attorney for their trial, with the assignment for Maldonado taking place only 10 minutes prior to trial. Id. at 14-15. Both objected to their counsel, noting that they had never talked to him about the case. Id. at 14 & n.1. At trial, but before the jury was chosen, Maldonado stated that if the case must go on, he wanted to act as his own attorney. The judge denied the request. Id. at 14. The Second Circuit noted that the "right of a defendant in a criminal case to act as his own lawyer is unqualified if invoked prior to the start of the trial." Id. at 15. Once the trial began, however, the right was sharply curtailed and there "must be a showing that the prejudice to the legitimate interests of the defendant overbalances the potential disruption of proceedings already in progress, with considerable weight being given to the trial judge's assessment of this balance." Id. The Court further found that the request must be unequivocal. The Second Circuit found that Maldonado did in fact make an unequivocal request to represent himself and was therefore entitled to a new trial. Id. DiBlasi, however, did

not make an unequivocal request and was not entitled to conduct his own defense. Id. at 16. Here, Malone made an unequivocal request to represent himself prior to trial. Under the State's own authority in Maldonado, Malone was entitled to represent himself and is now entitled to a new trial.

None of the cases cited by the State support the district court's decision to revoke Malone's right of self-representation.

2. The State's Factual Assertions Are Not Supported By The Record: Malone Was Not Equivocal In His Request For Self-Representation

The State argues that following the initial grant of self-representation, Malone made equivocal statements as to whether he wanted to represent himself and thus demonstrated an abandonment of his right to represent himself. Answering Brief at 22. This assertion is not supported by the record.

The State begins its analysis of this issue with the Faretta canvass that was held on January 8, 2010. 5 App. 893. The relevant facts, however, began much earlier. On January 7, 2009, Malone filed a proper person motion to dismiss counsel from the Special Public Defender's Office ("SPD"). 3 App. 607. On December 3, 2009, Malone filed a proper person motion for a speedy trial, or in the alternative, motion to withdraw counsel. 5 App. 876. The district court heard argument on the motion on December 15, 2009. 5 App. 887. The district court denied the motion because it

was filed in proper person. 5 App. 888. Malone stated he asked his counsel to withdraw, counsel refused, and he would rather represent himself than be represented by his current counsel. Malone noted his concerns about counsel and stated that it would be in his best interest to represent himself. 5 App. 889.

On January 8, 2010, the district court informed Malone that he was not entitled to select his counsel and then conducted a Faretta canvass. 5 App. 895-928. The district court granted the motion, allowed Malone to represent himself, and appointed the SPD as standby counsel. 5 App. 918, 926.

In March of 2010, counsel for Malone's co-defendant renewed a motion to sever the trials. 5 App. 929. At a hearing on March 25, 2010, the district court asked Malone if he wished to have the SPD represent him. He responded, "at this point in time no, sir." 5 App. 1012. Standby counsel then informed the district court of medical issues which made him unavailable for the April 2010 trial date. 5 App. 1012. Likewise, McCarty's counsel informed the district court that he was starting a capital murder trial against the prosecutor who was also assigned to this case, so they were "in a little bit of a quandary any way." 5 App. 1014. The trial date was vacated and the date of October 11, 2010, was assigned for trial. 5 App. 1014. Malone noted his objection and stated that he was ready to go to trial. 5 App. 1015.

In its Answering Brief, the State next references the proceedings in October of 2010. Answering Brief at 23. Prior relevant matters took place. On April 29, 2010, severance was granted and the parties discussed the order of the trials. The district court initially stated his intention to have Malone's trial go first, but at the prosecutor's insistence, it was agreed that McCarty's trial would be first and Malone's would follow immediately thereafter. 5 App. 1107-08.

On September 14, 2010, there was a discussion of the trial date at which McCarty's counsel was not present, 6 App. 1192. During the hearing, one of the prosecutors stated his belief that Malone's trial would be first, while Malone and his standby counsel correctly noted that during the April 29, 2010, hearing the district court, at the State's request, had ordered that McCarty's trial be first. The district court advised Malone that his Calendar Call was set for October 5th and that he should be prepared to go forward on that date. 6 App. 1194.

On September 30, 2010, there was a discussion regarding the trial schedule. McCarty's counsel stated that they were ready for trial. Malone and his standby counsel also agreed that it was previously stated that McCarty's trial was to be first. The prosecutors stated their beliefs that they did not think a decision had been made and their belief that Malone would have the first trial. The parties agreed to discuss the schedule and the matter was continued. 6 App. 1212-13.

On October 5, 2010, all parties appeared before the district court. 6 App. 1214. Malone stated that he was not ready to go to trial because he was told that his trial would follow McCarty's and he still needed to prepare witness lists and other materials. 6 App. 1217. Standby counsel also noted that this issue was first resolved in April and Malone was scheduled to have the second trial. 6 App. 1219. McCarty's counsel stated that they planned to go first and had been relying on having the first trial. 6 App. 1219, 1222. The Court ordered that McCarty's trial go first. 6 App. 1223. Malone's trial was scheduled to follow McCarty's trial, with a tentative date of November 1, 2010. 6 App. 1233; 19 App. 3870. Malone stated he would be ready on that day. 6 App. 1233.

Also missing from the State's timeline of events is the hearing that took place on October 26, 2010. Malone, his standby counsel, and the State appeared before the district court for Calendar Call and announced they were ready for trial. 6 App. 1259. Over Malone's objection, the case was continued until June, 2011. Much of that delay was caused by the calendars of the district court and the prosecutors. 6 App. 1261-62. Malone stated that he was ready to go, he had being doing research in the legal library, and he had reviewed the evidence code. 6 App. 1266. On November 23, 2010, a new trial date of January 9, 2012, was established. 19 App. 3876.

On January 8, 2011, Malone filed two motions, one of which was a request to dismiss standby counsel 6 App. 1276, 1278. The State asserts that Malone did not attach any points and authorities in support of his motion. Answering Brief at 23. The motion cited the 5th, 6th, 8th and 14th Amendments and also noted that they were based upon previous motions. 6 App. 1276, 1278. During the hearing on that motion, Malone explained that he had a conflict with standby counsel, which was the same conflict that he had when that counsel fully represented him. 6 App. 1282. Within the context of that explanation, he stated:

> So in essence, if this case was to get to the point where I need not no longer represent myself, you still give the counsels in which I had contained conflict with which is under the constitution which is that you provided – you denied me the right to have representation even though you have in presence standby counsel which is from the Special Public Defender's Office whom I have a conflict with has not provided me with representation at all, not even on a standby level.

6 App. 1282. Following discussion on the merits of the motion that Malone wanted filed, the district court noted that the motion to dismiss standby counsel was not supported by points and authorities and stated: "You break the rules again, I'm going to determine that you cannot follow the rules and therefore you'll have these gentlemen who will represent you as opposed to standby; do you understand that,

sir?"[1] 6 App. 1286.

As the State notes, on June 29, 2011, Malone sent a letter to the judge. 7 App. 1348. The State characterizes this letter as a statement that Malone "had 'been forced to represent himself,' that he 'did not want to represent himself,' and that he had 'always been more than willing to accept proper assistance.'" Answering Brief at 24. This is not an accurate summary of the letter. The full text was provided in the Opening Brief. It is clear from the context of the letter that Malone had concerns about discovery and had found that certain documents had not been provided to standby counsel. He expressed his dissatisfaction with the SPD and noted that he would not have been provided with the proper discovery had he not been forced to represent himself. Malone acknowledged that he did not want to represent himself, but elected to do so instead of being represented by the SPD. Malone firmly stated his desire to represent himself rather than accept representation by attorneys from that office:

> The Defendant is at the mercy of this Court and can not do more than which this Court allows him to do which thus far has been nothing.

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[1]The district court asserted that it advised Malone the last time that if he "did not follow the rules as you're supposed to that could be grounds for me to no longer allow you to represent yourself." 6 App. 1286. In fact, this was not the admonition given to Malone on the prior occasion. Rather, the district court informed Malone that if his motions were not in the proper form, or if there was no legal basis for the motion, then more than likely, the court would deny the motion. 5 App. 923.

> Maybe in hopes that by overwhelming the Defendant he would somehow see the light and allow Mr. Cano and Mr. Pike to lead him like cattle to his slaughter. By handing over the case back to the Special Public Defender Office.
>
> The Defendant will do no such thing. [H]e is more than ready and willing to fight to the point of death for the rights giving onto him by his beloved country when the 14th Amendment was added to the United States Constitution. The rights of which this Court as representative of the United States is willfully and unlawfully denying him.

7 App. 1348-50. On July 19, 2011, the district court asked Malone if everything in his letter was true and correct, and upon receiving a positive response, the district court revoked Malone's right of self-representation and appointed the SPD as counsel. 7 App. 1454-56.

The State asserts that "even *after* the court reappointed counsel based on Appellant's requests for assistance, Appellant *again* equivocated, filed a Motion to Withdraw Counsel." Answering Brief at 25 (citing 7 App. 1460). See also Answering Brief at 26 (claiming that Malone made many equivocations). The State also asserts that Malone's conduct, and particularly his letter of June 29, 2011, constituted an explicit abandonment of his Faretta waiver and request for appointment of counsel. Answering Brief at 26. The record does not support these assertions. The district court did not reappoint counsel based upon Malone's request for assistance. Rather, Malone clearly stated, as he has from the beginning of the case, that he did not want to be represented by the SPD, he wanted appointment of other

attorneys, and he elected to represent himself rather than be represented by the SPD. 7 App. 1348-50, 1461-62. This was always Malone's position and he was never equivocal about this position. The district court refused appointment of new counsel, so Malone represented himself until this right was revoked. At no point did Malone change his position on this issue.

In the Opening Brief, Malone cited numerous cases with facts similar to those presented here. In each of those cases, the courts found that the request for self-representation is not equivocal under these circumstances. See Gallego v. State, 117 Nev. 348, 358, 23 P.3d 227, 234 (2001), overruled on other grounds, Nunnery v. State, 263 P.3d 235, 253 n.12 (Nev. 2011); Hamilton v. Groose, 28 F.3d 859, 862 (8th Cir. 1994); Adams v. Carroll, 875 F.2d 1551, 1444-45 (9th Cir. 1989); United States v. Mendez-Sanchez, 563 F.3d 935, 946 (9th Cir. 2009) ("A conditional waiver can be stated unequivocally, as for example when a defendant says in substance: 'If I do not get new counsel, I want to represent myself.' There is a condition, but the demand is unequivocal); State v. Jordan, 44 A.3d 794, 809 (Conn. 2012) (collecting cases and noting the rule that if a defendant requests alternative relief of either new counsel or self-representation, his request to represent himself is not equivocal). The State fails to address this authority. Its failure to address Gallego is especially troubling, given the fact that it is controlling authority on this issue in this

jurisdiction.

3. Malone Was Not Disruptive, Obstructive Or Dilatory And The District Court Did Not Make Any Finding Supporting Such A Conclusion

The State asserts that the district court had numerous grounds upon which to revoke Malone's *pro se* status. Answering Brief at 30. First, the State alleges that he caused at least two continuances of his trial. Answering Brief 30-31 (citing 5 App. 1011-16; 6 App. 1217). This argument is not supported by the record. On March 25, 2010, the parties appeared before the district court to address some pretrial motions. 5 App. 1010. During this hearing, standby counsel noted that he had a recent back surgery and was going to need a second surgery, which would require him to be off of work for about three weeks beginning on April 20, 2010. 5 App. 1012. The State acknowledged that previous continuances had been at the request of McCarty's counsel and this was the first request by Malone's standby counsel. McCarty's counsel also noted that he was in a trial with one of the prosecutors, so they were "in a little bit of a quandary any way." 5 App. 1014. Thus, contrary to the State's claim, this continuance had nothing whatsoever to do with Malone's decision to represent himself, but was instead caused by counsel's medical problems and a conflicting trial that involved McCarty's counsel and the prosecutor. Likewise, the trial date in October 2010, was not continued because of Malone's actions. Rather, after the trials

of the two co-defendants were severed, it was determined that McCarty's trial would take place first, and McCarty's trial took place during the October 2010 setting. 6 App. 1217. Although Malone stated that he was not prepared to have his trial heard before McCarty's trial, this statement did not result in any adverse action or continuance because McCarty's counsel insisted that they have the first trial setting, as ordered by the district court in April 2010. 6 App. 1218.

Second, the State asserts that Malone engaged in conduct that was disruptive and obstructive to the judicial process. Answering Brief at 31. The district court did not make any finding that Malone was disruptive to the judicial process and it did not rely on this ground as a reason for revoking Malone's right of self-representation. The State notes that Malone filed motions without attaching any points and authorities. Answering Brief at 31. The State fails to cite any authority holding that the proper remedy for this "abuse" is revocation of Faretta rights rather than denial of the motion at issue. In the Opening Brief Malone noted that the types of abuses found in other cases were not presented here. See Gallego, 117 Nev. at 361, 23 P.3d at 236; Vanisi v. State, 117 Nev. 330, 340, 22 P.3d 1164, 1171 (2001); Tanksley v. State, 113 Nev. 997, 1000-02, 946 P.2d 148, 149-51 (1997). The State fails to address this authority. The State also fails to address authority holding that a request for self-representation should not be denied solely because of the inherent

inconvenience often caused by *pro se* litigants. Tanksley, 113 Nev. at 1001, 946 P.2d at 150; Lyons v. State, 106 Nev. 438, 444 n.1, 796 P.2d 210, 217 n.1 (1990).

4. Complexity Of The Case Is Not A Valid Reason To Revoke The Right of Self-Representation

Finally, the State acknowledges that complexity of the case and fair trial concerns cannot serve as an independent basis for denying the right of self-representation, but then argues that the complexity of the case and the skill of the prosecutors serves as a basis for denying the right. Answering Brief at 31. This same rationale was relied upon by the district court. 7 App. 1455. In Vanisi, however, this Court made it clear that this factor is relevant to whether a defendant's decision to waive counsel was made understanding the potential consequences of the decision, but is not an independent basis for denial of a Faretta motion. Vanisi, 117 Nev. at 341; 22 P.3d at 1171-72. See also Godinez v. Moran, 509 U.S. 389, 400 (1993). The district court clearly misapplied the law in finding that the complexity of the case served as a basis for revoking Malone's Faretta rights.

5. Malone Is Entitled To A New Trial

Malone contends that the erroneous denial of his right of self-representation entitles him to a new trial. The State does not argue against this remedy. The judgment of conviction must therefore be reversed and this matter remanded for a

new trial.

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

Malone contends his state and federal constitutional rights to due process of law, equal protection, a fair trial and right to proper jury instructions were violated by the district court's rejection of his proffered instructions and the district court's acceptance of the State's erroneous proposed instructions.

1. Robbery Must Be Defined As A Specific Intent Offense

Malone contends that the offense of robbery, and felony murder based upon robbery as a predicate offense, must be defined as specific intent offenses, and this decision in Litteral v. State, 97 Nev. 503, 508, 634 P.2d 1226, 1228-29 (1981), should be overruled. The State argues that Litteral was correctly decided and robbery, even when used as a predicate offense for felony murder, should be defined as a general intent offense. Answering Brief at 33.

The State first argues that stare decisis precludes this Court's reconsideration of the rule announced in Litteral absent compelling grounds. Answering Brief at 33. Malone recognizes that under the doctrine of stare decisis, this Court will not overturn precedent absent compelling reasons for doing so. Adam v. State, 261 P.3d 1063, 1065 (Nev. 2011). The doctrine, however, "'must not be so narrowly pursued

that the . . . law is forever encased in a straight jacket.'" Id. (quoting Rupert v. Stienne, 90 Nev. 397, 400, 528 P.2d 1013, 1015 (1974)). This Court has repeatedly overruled existing authority despite the stare decisis doctrine. See e.g. Adam, 261 P.3d at 1065 (overruling Hillis v. State, 103 Nev. 531, 535, 746 P.2d 1092, 1095 (1987) and Love v. State, 111 Nev. 545, 548-49, 893 P.2d 376, 378 (1995), pertaining to the procuring agent defense); Jackson v. State, 291 P.3d 1274, 1282 (Nev. 2012) (addressing the redundancy doctrine and overruling Salazar v. State, 119 Nev. 224, 70 P.3d 749 (2003) and other cases); Nunnery, 263 P.3d at 248, 250-51 (overruling Herman v. State, 122 Nev. 199, 128 P.3d 469 (2006), as to the admission of presentence investigation reports at a penalty hearing, and overruling Johnson v. State, 118 Nev. 787, 59 P.3d 450 (2002), as to the weighing equation for death penalty cases). If legal precedents are shown to be unsound in principle, stare decisis will not preclude renewed consideration of an issue. Asap Storage Inc. v. City of Sparks, 123 Nev. 639, 653, 173 P.3d 734, 744 (2007).

The doctrine of stare decisis did not preclude this Court from redefining robbery as a general intent offense in Litteral, 97 Nev. at 505-08, 634 P.2d at 1227-29, despite Nevada's long history of defining robbery as a specific intent offense. See Turner v. State, 96 Nev. 164, 605 P.2d 1140 (1980), overruled by Litteral; Rogers v. State, 83 Nev. 376, 432 P.2d 331 (1967), overruled on other grounds, Alford v. State,

111 Nev. 1409, 1415, 906 P.2d 714, 718 (1995); State v. Sala, 63 Nev. 270, 169 P.2d 524 (1946). The doctrine should not now preclude this Court from overruling Litteral.

The State claims that the legislature defined NRS 200.380 as a general intent offense, overriding previous common law interpretation of robbery as a specific intent offense. Answering Brief at 34. The State also claims that this Court addressed the statutory language of NRS 200.380 for the first time in Litteral. The operative language of NRS 200.380 remains the same, both before and after Turner and Litteral. See State v. Feinzilber, 76 Nev. 142, 146, 350 P.2d 399 (1960) (noting that NRS 200.380 defines the offense of robbery as the "unlawful taking of personal property from the person of another, or in his presence, against his will, by means of force or violence or fear of injury, immediate or future, to his person or property . . ."). At no point did the legislature designate robbery as a general intent offense. Moreover, the legislature did not change the statutory definition of the offense in response to a decision by this Court stating that it was a specific intent offense.

The State does not contest the fact that at common law, robbery was defined as a specific intent offense. See State v. Slingerland, 19 Nev. 135, 138, 7 P. 280, 283 (1885). Nor does the State contest the fact that NRS 200.380 does not designate whether it is a general intent or specific intent offense, and that where a statute

creating or describing a criminal offense uses a general term that is not defined, the general practice is to give the term its common-law meaning. See NRS 1.030; U.S. v. Gray, 448 F.2d 164, 167 (9th Cir. 1971); Adler v. Sheriff, Clark County, 92 Nev. 641, 643, 556 P.2d 549 (1976). The State fails to address Malone's argument concerning the rule of lenity. Accordingly, Litteral should be overruled and robbery should once again be defined as a specific intent offense.

In the Opening Brief, Malone contended that even if robbery as a stand-alone offense is not defined as a specific intent offense, the specific intent element must be satisfied for felony-murder with robbery as a predicate offense. Malone recognized that this Court has held the contrary. See e.g. Leonard v. State, 117 Nev. 53, 77, 17 P.3d 397, 412 (2006). In response, the State notes authority holding that robbery is a general intent offense and serves as a predicate offense for felony murder, see Answering Brief at 35, but it fails to address the logic of such a rule, fails to address the policy arguments as to why a general intent offense cannot serve as a predicate offense under the felony-murder doctrine, and fails to address the substituting role for the malice element of murder. See State v. Contreras, 118 Nev. 332, 334, 46 P.3d 661, 662 (2002).

. . .

This issue was addressed by the Ninth Circuit Court of Appeals in United States v. Lilly, 512 F.2d 1259, 1261 (9th Cir. 1975):

> There were special and important reasons for requiring that element when robbery was to serve as the basis for felony murder . . . .-- It was robbery's specific intent that served to supply the element of premeditation. If the Government be correct in its view that robbery today, as that term is used in [18 U.S.C. § 1111, defining murder], does not require specific intent, the extraordinary result would be that first-degree murder, the essence of which historically has been cold-blooded premeditation in the nature of poisoning or lying in wait, could, as federal felony murder, be committed without specific intent to commit any crime at all. If the element of premeditation or its surrogate is to be completely eliminated from federal first-degree murder in this fashion, congressional intent to this effect should, in our view, be more expressly stated than it was in the case of the 1948 revision which resulted in [18 U.S.C. § 2111, defining robbery].
>
> We conclude that specific intent remains an element of robbery as used in § 1111; that appellant was entitled to an instruction to the effect that intoxication may negate the existence of specific intent . . .; that it was error not to instruct to this effect.

(Footnotes and citation omitted). As with the federal system, when NRS 200.030 was enacted, robbery was defined as a specific intent offense. There is no indication that the legislature intended felony murder to be based upon a general intent predicate offense. See Cutting, Compiled Laws of Nevada (1900), Section 4672, 17 ("All murder which shall be perpetrated, or attempt to perpetrate, any arson, rape, robbery, or burglary, shall be deemed murder of the first degree . . ."); Crimes and Punishments Act of 1911, Ch. 28, Sec. 2, pg. 67 ("All murder which shall be

perpetrated by means of poison, or lying in wait, or torture, or which shall be committed in the perpetration, or attempt to perpetrate, any arson, rape, robbery, or burglary, or which shall be committed by a convict in the state prison serving a sentence of life imprisonment, shall be deemed murder of the first degree . . ."); State v. Lopez, 15 Nev. 407, 413-14 (1880) ("An involuntary killing which is committed in the prosecution of a felonious intent is murder; and if the felony attempted is arson, rape, robbery, or burglary, it is murder in the first degree."). As the Ninth Circuit Court of Appeals concluded in Lilly, this Court should also find that even if robbery is a general intent offense, a specific intent is required if robbery is used as a predicate offense for felony murder.

Finally, the State argues that Malone does not have standing to raise an issue concerning robbery as an aggravating circumstance for the death penalty because the jury did not return a verdict for the death penalty. Answering Brief at 36. The State misconstrues Malone's argument. The argument was not that the aggravators in this case were unlawful. Rather, it was Malone's argument that construing robbery as a specific intent offense was consistent with the constitutional mandate that the death penalty be narrowly construed. See McConnell v. State, 120 Nev. 1043, 1066 & n. 62, 102 P.3d 606, 622 & n. 62 (2004).

In the Opening Brief Malone set forth extensive argument concerning the

prejudice caused by the erroneous jury instructions. Based upon those reasons, he contends that his convictions for robbery and first-degree murder must be vacated and this case remanded for a new trial with proper jury instructions on the elements of robbery and felony-murder.

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

Malone contends that the district court gave an erroneous, and unconstitutional, instruction on the presumption of innocence. He urges this Court to overrule its decision in Nunnery, 263 P.3d at 259-60, because the cases cited in that case in support of the Court's decision do not address this issue. He also urges this Court to find that the statutory definitions of the presumption of innocence were correct statements of the law and that those statutory definitions should be given instead of the State's proffered instruction. This portion of the issue was not addressed in Nunnery. The State argues that the instruction is proper and that Nunnery should not be overruled. Answering Brief at 37-38.

The State first argues that the term "material element," as used in Instruction 45, was not erroneous and cites to Nunnery and cases cited therein. Answering Brief at 37-38. In the Opening Brief, Malone set forth extensive argument as to why the cases cited in Nunnery did not support its conclusion. The State fails to address the

merits of these cases, but instead merely argues that "[w]hile the cases cited in Nunnery may not have explicitly focused on the 'material element' language contained within the jury instruction, they nonetheless explicitly approved the instruction in its entirety." Answering Brief at 38. None of the cases cited in Nunnery, however, addressed the "material elements" language at issue here and none of the cases addressed the constitutionality of the statute in light of this argument. The State also argues that this Instruction has long been upheld as constitutional in Nevada. Answering Brief at 38. Courts, of course, do not issue blanket pronouncements of constitutionality for all purposes. Rather, courts wait until specific issues are raised and then address those issue. Prior opinions mentioning the concept of "material element" did not address the specific issue presented here. The mere fact that this Court has generally discussed "material elements," within entirely different contexts, is insufficient to establish the constitutionality of the instruction. See Anderson v. Harless, 459 U.S. 4, 6-7 (1982). Nunnery should therefore be overruled as to this issue.

The State next argues that the instruction given at trial is supported by Sullivan v. Louisiana, 508 U.S. 275, 277-78 (1993). Answering Brief at 38. Sullivan does not support the State's position. Malone's argument here is that Instruction No. 45 is erroneous and unconstitutional because of the term "material elements." Because the

jury was not instructed on which elements of the offenses were "material," the jurors were free to speculate about which elements were material and which were not. This resulted in the lessening of the State's burden of proof because the State was not required to prove all elements of the offenses and was instead only required to prove those elements that the jury arbitrarily determined to be "material." The language cited by the State in its Answering Brief supports Malone's argument: "The prosecution bears the burden of *proving all elements of the offense charged . . . and must persuade the factfinder 'beyond a reasonable doubt' of the facts necessary to establish each of those elements."* Sullivan, 508 U.S. at 277-78 (emphasis added in State's Brief). Unlike Instruction 45, Sullivan references "all elements," not just those deemed to be material. Contrary to the State's argument, Instruction 45 does not track the language in Sullivan, but instead adds an unconstitutional qualifier that lessens the State's burden of proof. This is not a merely "slightly different words," resulting in the same standard. Rather, the use of the term "material" changes entirely the State's obligation to prove the defendant's guilt of each element of each of the charges.

Finally, the State fails to explain why its proffered instruction should have been given instead of the instruction provided for by Nevada's governing statutes. The State does not contend that the statutory definitions are improper or wrong, and it

does not contend that its proffered instruction is somehow superior to that provided for by the Legislature. The jury should have been instructed in accord with the statutory definition. See Leonard, 117 Nev. at 79, 17 P.3d at 413 (approving instruction on malice, despite its archaic language, because it was based on a statute).

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

II. CONCLUSION

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

DATED this 1st day of May, 2013.

Respectfully submitted,

/s/ JONELL THOMAS

By:_____

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CERTIFICATE OF COMPLIANCE

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

2. I hereby certify that this brief does comply with the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word Perfect Office 11 in 14 point font of the Times New Roman style.

3. I hereby certify that this brief does comply with the word limitation requirement of NRA 32(a)(7)(A)(ii). The word count is 6,967.

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

DATED this 1st day of May, 2013

/s/ JONELL THOMAS

_____

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 2nd day of May, 2013, copy of the foregoing Opening Brief (and Appendix) was served as follows:

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