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IN THE SUPREME COURT OF THE STATE OF NEVADA

CEASAR SANCHEZ VALENCIA,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

No. 75282

Electronically Filed
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Elizabeth A. Brown
Clerk of Supreme Court

APPELLANT'S OPENING BRIEF

*(Direct Appeal from Judgment of Conviction,
District Court Case No.: C-16-315580-1)*

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B. Timeliness: Judgment of Conviction filed 02/06/2018, Notice of Appeal filed 03/01/2018.

C. This appeal is from a final judgment entered on 02/06/2018.

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This case is the direct appeal from a judgment of conviction based on a jury verdict of ‘guilty’ to Category-B felonies. Pursuant to Nevada Rules of Appellate Procedure “NRAP”, Rule 28(a)(5), this routing statement hereby asserts that this case is presumptively assigned to the Supreme Court because it is specifically excluded from the presumptive Court of Appeals assignments described in NRAP 17(b)(1).

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- I. THE TRIAL COURT ERRED BY IMPROPERLY DENYING THE DEFENDANT HIS RIGHT TO REPRESENT HIMSELF**
- II. THE TRIAL COURT ERRED BY REFUSING TO GRANT A MISTRIAL**

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On June 9, 2016, Appellant Ceasar Sanchez Valencia (hereinafter “Mr. Valencia” or “Valencia”) was charged via Information in Eighth Judicial District Court, Clark County, State of Nevada (*see* Appellant’s Appendix “AA” Volume 1, Bates numbered pages AA0001-AA0003). The charges against Valencia were as follows: COUNT 1 – Assault on a Protected Person with Use of a Deadly Weapon, COUNT 2 – Ownership or Possession of Firearm by Prohibited Person, COUNT 3 – Trafficking in Controlled Substance (low level, heroin), COUNT 4 – Possession of Controlled Substance (cocaine), and COUNT 5 – Possession of Controlled Substance (methamphetamine) (1 AA0001-AA0003).

As Valencia's case proceeded to trial, the ex-felon in possession of firearm charge was bifurcated out from the remaining charges. A Second Amended Information was filed on November 27, 2017, which altered the order of the Counts (1 AA0122-AA0124). A Third Amended Information was filed on December 1, 2017 which contained only the ex-felon in possession of firearm charge (4 AA0776-AA0777).

1 From November 27, 2017 to December 1, 2017, the charges against
2 Valencia were presented to a jury in two phases with the ex-felon firearm
3 charge presented last. The jury found Valencia guilty on all counts (4
4 AA0918-AA0920).

5
6 On January 25, 2018, Valencia was sentenced to a term of
7 imprisonment under the small habitual criminal statute and received an
8 aggregate total sentence of one hundred eight (108) to three hundred twelve
9 months (312) months (4 AA0921-AA0934). Judgment of Conviction was
10 filed on February 6, 2018 (4 AA0935). Notice of Appeal was filed on March
11 1, 2018 (4 AA0938). This timely direct appeal now follows.

12 STATEMENT OF FACTS

13 A. Primary Incident Date: May 19, 2016

14
15 On May 19, 2016, at approximately 7:45 p.m., Las Vegas Metropolitan
16 Police Officers Jeremy Jacobitz and Christopher Houston were on patrol in
17 the Downtown Area Command region (2 AA0424-AA0425; and 3 AA0507).
18 As they were leaving the police station, the officers spotted a moped travelling
19 at a fairly high rate of speed through an alley between 9th and 10th streets (2
20 AA0425; and 3 AA0510). Jacobitz was driving the police car and Houston
21 was riding passenger (2 AA0428; and 3 AA0510). The officers decided to
22 follow and observe the moped (2 AA0429; and 3 AA0512). At the corner of
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1 Wilson and 11th streets, the moped failed to stop at a stop sign so the officers
2 attempted to initiate a traffic stop by activating lights and sirens (2 AA0429;
3 and 3 AA0513-AA0514).
4

5 The moped driver failed to pull over for the police officers and a short
6 pursuit ensued. The police officers eventually followed the moped south
7 down the alley between 10th and 11th streets (2 AA0433-AA0434; and 3
8 AA0516-AA0517). At approximately 610 N. 10th street, the moped driver
9 pulled into a small parking area, ditched the moped, and began fleeing on foot
10 (2 AA0434; and 3 AA0518). The moped driver ran toward a narrow
11 passageway adjacent to the south side of the building at 610 N. 10th street (2
12 AA0434-AA0435, AA0454-AA0456; and 3 AA0519-AA0520). The officers
13 pulled into the lot, exited their patrol car, and began chasing the suspect (2
14 AA0434; and 3 AA0519).
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19 Officer Jacobitz, exiting the driver's side of the patrol car, was the first
20 officer to reach the passageway in pursuit of the fleeing moped driver because
21 Officer Houston, exiting the passenger side, had to make his way around
22 patrol car before heading into the passageway (2 AA0434-AA0435). As
23 Officer Jacobitz chased the suspect into the passageway, he saw the suspect
24 pull a firearm from his hip (3 AA0521-AA0522). According to Officer
25 Jacobitz, the suspect turned his torso toward Jacobitz while running away
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1 from him, at which time the suspect's arm hit a metal pole (apparently a pole
2 that once supported a no-longer existent chain-link fence). Jacobitz claimed
3 that just as the suspect pointed the gun towards him, the suspect's arm struck
4 the metal pole causing the gun to fall to the ground (3 AA0522).

5
6 Officer Jacobitz stopped the foot pursuit to stay with the now-
7 abandoned firearm (3 AA0523). Officer Houston, who was unable to have
8 witnessed the alleged assault due to his vantage point, continued the foot
9 pursuit of the suspect while Officer Jacobitz stayed with the gun (2 AA0437,
10 AA0455-AA0457; and 3 AA0525). Somewhere in the area near 625 S. 10th
11 street, Officer Houston lost sight of the suspect and discontinued the pursuit (2
12 AA0457, AA0464-AA0465).

13
14 After losing the suspect on foot, a massive effort was immediately
15 launched in an attempt to surround and locate the suspect. Police established
16 a perimeter around several city blocks, which consisted of every available
17 officer in the area, K9 units, and air units (2 AA0441; and 3 AA0536-
18 AA0538). Despite the vigorous efforts of law enforcement on May 19, 2016,
19 nobody was arrested for the crime of assaulting Officer Jacobitz with a
20 firearm.

21
22 The police' failure to arrest the suspect who assaulted Officer Jacobitz
23 on May 19, 2016 dovetails with their immediate laser-like focus on only a
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1 single subject, Ceasar Valencia, to the exclusion of all others. During the
2 initial police pursuit of the moped, and the ensuing foot chase, both Officers
3 Jacobitz and Houston claim to have gotten very clear views of the suspect's
4 face, clothing, and physical features (2 AA0431-AA0432, AA0451; and 3
5 AA0515, AA0600). However, the physical description of the suspect that
6 went out over the police radio was simply "HMA (Hispanic male adult), dark
7 hat, red striped shirt, dark pants, 5'7" 160 pounds" (2 AA0463-AA0464). At
8 no point did either officer mention that the suspect had any distinguishable
9 characteristics such as the noticeable presence of facial hair (3 AA0617).
10 Ceasar Valencia, when he was arrested less than forty-eight hours after the
11 May 19, 2016 incident, was sporting a massive goatee (2 AA0465; and 3
12 AA0627).

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17 Within five minutes of Officer Jacobitz' encounter with the suspect in
18 the passageway, the entire downtown area command police force involved
19 with the perimeter began collectively referring to the suspect as Ceasar
20 Valencia (3 AA0536, AA0546). This development was the result of actions
21 taken by officers who were not involved in any way in the initial encounter
22 with the suspect. The description of the suspect that went out over the radio
23 dispatch admittedly matched lots of people who live in the downtown area
24 command (3 AA0620). Notwithstanding this fact, Officer Aaron Perez heard
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1 the suspect description over the radio traffic and stated that he knows a person
2 matching that description that lives in the area where the incident occurred (3
3 AA0549-AA0550, AA0620-AA0621). Officer Perez then first uttered the
4 name 'Ceasar Valencia' to identify the person he knows in the area who fits
5 the description of an HMA, 5'7", 160 pounds (3 AA0545-AA0550). From
6 that moment forward, Officer Jacobitz and his fellow police collectively
7 began referring to the suspect as 'Ceasar Valencia' over the radio traffic (3
8 AA0621-AA0622). A few minutes later, Officer Perez texted a picture of
9 Ceasar Valencia to Officers Jacobitz and/or Houston (2 AA0457-AA0458;
10 and 3 AA0549-AA0550, AA0621-AA0622). Both officers became convinced
11 that Ceasar Valencia was the one and only suspect for the incident involving
12 the moped and firearm (2 AA0441; and 3 AA0551). The collective law
13 enforcement effort during the May 19, 2016 perimeter was so singularly-
14 focused on locating Ceasar Valencia that when police encountered a BMA
15 (black male adult) wearing a red-striped shirt and dark hat (consistent with the
16 suspect's original clothing description) in the vicinity of the crime, they
17 declined to further investigate because by then all the officers involved
18 "knew" they were looking for Ceasar Valencia (3 AA0623-AA0624).

19
20 On May 19, 2016, Ceasar Valencia actually resided on the property at
21 625 N. 10th street (3 AA0653-AA0654) – smack in the middle of the
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1 perimeter police had set up to catch the suspect who fled from Officers
2 Jacobitz and Houston. Notwithstanding this fact, and the extremely diligent
3 search efforts by law enforcement, Ceasar Valencia was not located anywhere
4 in the area on May 19, 2016. Police even went so far as to have a K9 officer
5 sniff around the perimeter of the residence at 625 N. 10th street, and no scent
6 was ever picked up by the K9 (4 AA0814-AA0816).

9 B. Secondary Incident Date: May 21, 2016 (Valencia's arrest)

11 For the reasons identified above, Ceasar Valencia was the only person
12 police ever took an interest in with respect to the May 19, 2016 incident.
13 Accordingly, police began surveilling Valencia's residence and following him
14 when he left his residence (3 AA0654). On May 21, 2016, Valencia was
15 surveilled and observed to leave his residence and become a passenger in a
16 dark colored Ford Mustang (3 AA0655). Police followed and eventually
17 conducted a felony car stop on the Mustang and took Ceasar Valencia into
18 custody without incident (3 AA0658; and 4 AA0828). Valencia did not
19 attempt to flee or resist arrest in any way whatsoever (4 AA0828-AA0829).
20 A search of Valencia's person incident to arrest revealed that he was in
21 possession of heroin, cocaine, and methamphetamine (3 AA0639-AA0640).

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1 C. Forensic Evidence Presented at Trial,

2 The State presented no evidence that Valencia was ever found to be in
3 possession of either a red-striped shirt or a dark hat, nor was any evidence
4 presented that such items were located at his residence. The firearm
5 recovered by Officer Jacobitz was forensically processed for DNA and
6 fingerprint analysis. A Metro forensic analyst took DNA swabs from the
7 grips, trigger, hammer, and cylinder of the gun (3 AA0677). Analysis of the
8 DNA recovered from the gun revealed a four-person mixture profile with the
9 major contributor being an unknown female (3 AA0677). Ceasar Valencia
10 was excluded as being a contributor to the partial major DNA mixture profile
11 (3 AA0683). Only one viable fingerprint was located on the firearm (3
12 AA0699). That single print belonged to Officer Jacobitz (3 AA0700,
13 AA0707). The moped ditched by the suspect on May 19, 2016 was never
14 processed for forensic analysis (3 AA0684).
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1 upon any proper grounds, and was particularly egregious where, as here,
2 Valencia had already completed a valid *Faretta* canvass. The court's decision
3 to dispose of Valencia's *Faretta* request was made pursuant to a wholly
4 inadequate fact-finding process and was an abuse of the district court's
5 discretion. This error alone mandates reversal.
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8 **(a) Relevant Procedural History**

9 On August 23, 2016, in open court, Mr. Valencia clearly and
10 unequivocally requested to exercise his constitutional right to represent
11 himself. On that date, the Honorable District Court Judge Richard Scotti was
12 presiding (1 AA0024). Valencia voiced his displeasure with his trial counsel
13 and asked that he represent himself if he could not receive new counsel (1
14 AA0026-AA0028). Judge Scotti informed Valencia that he could have a
15 couple days to think about his decision and then conduct a *Faretta* canvass in
16 two days (1 AA0028). Valencia stated that he had already decided to
17 represent himself (1 AA0028). Nonetheless, the *Faretta* canvass was
18 scheduled for August 25, 2016 (1 AA0030).
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23 On August 25, 2016, Judge Scotti conducted a thorough and
24 appropriate *Faretta* canvass of Mr. Valencia (1 AA0033-AA0043). At the
25 conclusion of the canvass, Judge Scotti found Valencia competent to represent
26 himself and granted his *Faretta* request (1 AA0043). Judge Scotti further
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28

1 informed Mr. Valencia that if, in the future, he changed his mind and decided
2 he wanted the assistance of counsel, that he could bring that issue back before
3 the court (1 AA0049).

4
5 Valencia proceeded to represent himself, including the handling of a
6 motion hearing on October 18, 2016 (1 AA0054-AA0062). During that
7 hearing, Judge Scotti specifically asked Valencia if he was still comfortable
8 representing himself, to which Valencia responded "Yes" (1 AA0060-
9 AA0061).

10
11
12 On November 1, 2016, the district court heard Valencia's motion for
13 access to the courts, wherein Valencia indicated he was having difficulty
14 accessing the detention center law library (1 AA0063-AA0068). During that
15 hearing, Valencia requested the assistance of a co-counsel to obtain necessary
16 legal materials (1 AA0065-AA0067). Judge Scotti explained to Valencia that
17 he could either represent himself or proceed with appointed counsel, but he
18 could not have a co-counsel (1 AA0066-AA0067). Valencia reluctantly
19 agreed to have prior counsel re-appointed to represent him (1 AA0067).

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23 On November 8, 2016, Valencia's case was on calendar for counsel to
24 re-confirm as attorney of record for Mr. Valencia (1 AA0069-AA0081).
25 However, during that hearing, Valencia clearly articulated that he didn't really
26 want to have counsel appointed to represent him; rather, he wanted an
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1 investigator to assist with obtaining legal materials so that Valencia could
2 represent himself and file his own motions (1 AA0077). At the urging of the
3 district court, Valencia reluctantly agreed to be represented by appointed
4 counsel (1 AA0077-AA0081).

5
6 On December 28, 2016, Valencia filed a pro per motion to dismiss
7 counsel and appoint alternate counsel (1 AA0082-AA0096). The matter came
8 on for hearing on January 19, 2017. On that date, The Honorable Senior
9 District Court Judge Steven Kosach was presiding (1 AA0097). During the
10 hearing, Judge Kosach was informed that Valencia had previously been
11 granted the right to represent himself (1 AA0098). Nonetheless, Judge
12 Kosach flatly denied Valencia's request to go back to self-representation, as
13 demonstrated in the record:
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17 THE DEFENDANT: So, I can't discharge him then?

18 THE COURT: No, I'm not gonna let you.

19 (1 AA0101).

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21 At no time did Judge Kosach conduct a new *Faretta* canvass nor did he
22 proffer any explanation why the right to self-representation previously granted
23 by Judge Scotti was being overridden.
24

25
26 On February 7, 2017, Valencia's case was on for calendar call. Judge
27 Scotti was again presiding (1 AA0106). At that time, counsel for Valencia
28

1 advised Judge Scotti that a senior judge had previously dismissed Valencia's
2 request to go back to self-representation (1 AA0107-AA0108). Judge Scotti
3 was advised that Valencia still wanted represent himself and the improper
4 denial of that right may be grounds for appellate reversal (1 AA0107-
5 AA0108). Even counsel for the State agreed that "at this stage of the
6 proceedings it will be reversible error" to deny Valencia self-representation (1
7 AA0108). Judge Scotti continued Valencia's pending request stating: "And
8 we'll figure out on the 28th if you're gonna represent yourself or if you're
9 gonna allow Mr. Coyer to continue to represent you. We'll find out on the
10 28th, alright?" (1 AA0109-AA0110).

11
12 On February 28, 2017, counsel summarized of the procedural history of
13 the issue of Valencia's right to self-representation (1 AA0113-AA0114). The
14 district court directly addressed Valencia regarding his request to represent
15 himself (1 AA0114-AA0116). Valencia informed the court that he no longer
16 wished to be represented by counsel (1 AA0116). The district court advised
17 Valencia as follows:
18

19 THE COURT: Well, it sounds like he tried and, you
20 know, the jail has their policies on what they allow him to do
21 and what he can't do, alright? So.

22 Alright, I'm gonna deny your motion to dismiss Mr.
23 Coyer because I'm checking the minutes. We did a very
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1 thorough Faretta canvass before where I found that you were
2 competent to make the decision to represent yourself. And
3 then after further inquiry you had determined that you were
4 going to work with Mr. Coyer and you wanted Mr. Coyer to
5 represent you. You've waived your right to represent yourself;
6 alright?

7 And you cannot now, for invalid reasons, reassert that
8 right; alright? You're trying to reassert that right based upon
9 your perception that Mr. Coyer is not providing you with
10 things that he's not allowed to provide. It's an invalid reason
11 to try to reassert your right to represent yourself. I'm not
12 allowing you to change your mind. You already waived your
13 right to represent yourself; alright?

14 So, I don't want to see this motion again.

15 THE DEFENDANT: Alright.

16 (1 AA0118-AA0119).

17
18 The February 28, 2017 hearing and the exchange between Valencia and
19 the district court concluded as follows:

20
21 THE DEFENDANT: So I can't discharge my attorney
22 then?

23 THE COURT: You cannot discharge your attorney.
24 Nope. Not at this point; alright? Thank you, sir.

25 THE DEFENDANT: Alright. Thank you.

26 (1 AA0121).

1 **(b) Standard of Review**

2 The issue before this Court is whether the district court erroneously
3 denied Valencia's subsequent request to resume self-representation where, as
4 here, the district court had previously granted the request.

5 A district court's denial of a motion for self-representation is reviewed
6 for an abuse of discretion. Watson v. State, 130 Nev. 764, 783, 335 P.3d 157,
7 171 (2014). The United States and Nevada Constitutions both guarantee a
8 defendant the right to self-representation. *See* Faretta v. California, 422 U.S.
9 806, 95 S. Ct. 2525, (1975); Wayne v. State, 100 Nev. 582, 584, 691 P.2d
10 414, 415 (1984). An improper denial of the right of self-representation is *per*
11 *se* reversible, never harmless, error. McKaskle v. Wiggins, 465 U.S. 168, 177
12 n.8, 104 S. Ct. 944 (1984)); Hymon v. State, 121 Nev. at 212 (2005); Gallego
13 v. State, 117 Nev. at 356-57 (2001); Vanisi v. State, 117 Nev. at 338. Thus, if
14 the district court abused its discretion, then reversal of Valencia's conviction
15 is mandatory.

16 **(c) Law and Argument**

17 As noted by this Court in Blandino v. State, 112 Nev. 352, 354, 914
18 P.2d 624, 626 (1996), in Faretta v. California, 422 U.S. 806, 818-19, 95 S. Ct.
19 2525 (1975), the United States Supreme Court ruled that the right to trial
20 counsel as guaranteed under the Sixth Amendment provided criminal
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1 defendants the inverse right to self-representation, concluding that “forcing a
2 lawyer upon an unwilling defendant is contrary to his basic right to defend
3 himself if he truly wants to do so.” Faretta, 422 U.S. at 817. This court has
4 held that criminal defendants have an “unqualified right” to self-
5 representation, so long as there is a voluntary and intelligent waiver of the
6 right to counsel. Baker v. State, 97 Nev. 634, 636, 637 P.2d 1217, 1218
7 (1981) (citing Faretta v. California, 422 U.S. 806 (1975)).

8
9 When confronted with a motion to dismiss counsel, the district court is
10 required to conduct a *Faretta* canvass in order to apprise “the defendant fully
11 of the risks of self-representation and of the nature of the charged crime so
12 that the defendant's decision is made with a ‘clear comprehension of the
13 attendant risks.’” Hooks v. State, 124 Nev. 48, 54, 176 P.3d 1081, 1084
14 (2008) (quoting Johnson v. State, 117 Nev. 153, 164, 17 P.3d 1008, 1016
15 (2001)).

16
17 Here, the district court did exactly what was required of it. It conducted
18 a proper and thorough *Faretta* canvass and clearly demonstrated in the record
19 that Valencia understood the implications and risks. Following the *Faretta*
20 canvass, the district court concluded that Valencia was competent to represent
21 himself. Nothing in the record suggests that Valencia, after being granted the
22 right to represent himself, became incompetent to represent himself. To the
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1 contrary, for a relatively short period of time, Valencia reluctantly agreed – at
2 the urging of the district court – to accept the aid of counsel to obtain legal
3 materials and assist with research. By finding Valencia competent to
4 represent himself, and granting self-representation, the district court had a
5 duty not to improperly revoke that right at a subsequent time.
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7

8 The district court's discretion to deny self-representation is constrained
9 by the law, particularly where, as here, the district court has already granted
10 the defendant's request to self-represent. A district court may determine that a
11 defendant who is representing himself has waived this right through his
12 actions. McKaskle v. Wiggins, 465 U.S. 168, 183, 104 S. Ct. 944 (1984);
13 Faretta, 422 U.S. at 834 n.46. The district court also has some discretion to
14 deny the defendant's right to self-representation. Gallego v. State, 117 Nev.
15 348, 356-57, 23 P.3d 227, 233 (2001) (holding that the district court may deny
16 the right of self-representation if the defendant is incompetent to waive the
17 right to counsel, the request is untimely, equivocal, or made for purposes of
18 delay, or the defendant disrupts the judicial process) (*abrogated on other*
19 *grounds* by Nunnery v. State, 127 Nev. 749, 775 n.12, 263 P.3d 235, 253 n.12
20 (2011)).
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26 None of the bases to deny Valencia self-representation are present in
27 the instant case. Valencia's subsequent request to go back to representing
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1 himself was timely. At the time of the request (February 28, 2017),
2 Valencia's pending trial date was June 26, 2017, four months away. Nor was
3 Valencia's request equivocal; rather, he clearly stated that he no longer
4 wished to be represented by counsel (1 AA0116). Nothing in the record
5 suggests that Valencia's request was made for the purpose of delay and
6 Valencia did not request a continuance. Equally true is the undeniable fact
7 that Valencia did nothing at any court hearings to disrupt the judicial process.
8 The record in this case is totally devoid of any lawful basis that would justify
9 the district court's denial of Valencia's request to self-represent. Accordingly,
10 the only reasonable conclusion is that the district court abused its discretion in
11 denying Valencia the right to self-represent. The district court's advisement
12 to Valencia that he had waived his right to self-representation had no valid
13 basis in law, clearly erroneous, and cannot be deemed harmless. As such,
14 Valencia's judgment of conviction must be reversed.
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1 **II. THE TRIAL COURT ERRED BY REFUSING TO GRANT A**
2 **MISTRIAL**

3 On the third day of trial, during the testimony of Officer Jeremy Jacobitz,
4 the witness disclosed to the jury that Valencia was a convicted felon. The
5 district court intervened and took a lengthy recess, drawing substantial
6 attention to the issue. However, the district court refused to grant a mistrial.
7 This decision was erroneous, harmful, and warrants reversal of Valencia's
8 convictions.
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11 **(a) Relevant Procedural History**
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13 The Honorable District Court Judge Mark Bailus presided over
14 Valencia's jury trial. Prior to the commencement of trial, Valencia's charges
15 were specifically bifurcated to remove the obviously prejudicial taint of the
16 charged offense of being an ex-felon in possession of a firearm (1 AA0127-
17 AA0128). On day three of trial, November 29, 2017, during the State's direct
18 examination of Officer Jacobitz, the prosecutor asked the witness a series of
19 questions that would ultimately lead to the admission into evidence of the gun
20 which was recovered on May 19, 2016. The gun was contained inside a
21 Metro evidence bag (3 AA0564).
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25 Officer Jacobitz had already testified that he personally impounded and
26 packaged the gun (3 AA0564-AA0565), thus sufficiently establishing chain of
27 custody. Yet inexplicably, the prosecutor then asked Officer Jacobitz to
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1 “explain to the ladies and gentlemen of the jury how it is this bag is marked
2 and what we’re seeing here?” (3 AA0568). Officer Jacobitz then proceeded to
3 read the anticipated charges listed on the label, which included “ex-felon in
4 possession of firearm” (3 AA0568). Immediately after Jacobitz uttered the
5 phrase ‘ex-felon,’ the district court – recognizing the substantial prejudice of
6 such testimony – interjected *sua sponte* and stated that a five-minute recess
7 was needed (3 AA0569). The jury recessed at 2:40 p.m. (3 AA0569) and
8 reconvened at 3:33 p.m. (3 AA0592) – nearly a full hour later.

12 During the lengthy break, the district court’s initial reaction to what
13 had occurred was that a mistrial may be warranted, specifically noting that the
14 parties and the court had gone to great lengths to bifurcate the charges so the
15 jury would not know about the ex-felon charge (3 AA0571). The parties had
16 also previously gone through the efforts to carefully redact the audio of the
17 radio traffic and the paper CAD document to specifically avoid any references
18 to Valencia’s criminal history (3 AA0497-AA0500).

22 Valencia and his trial counsel discussed the matter and determined that
23 a motion for mistrial was appropriate given the circumstances, the nature of
24 the prejudice, the jury’s inevitable attention to the taint, and the inability to
25 cure the prejudice (3 AA0575-AA0585).

1 During argument on the motion for mistrial, the district court noted that
2 the witness' testimony was not due to him; rather, the witness was simply
3 responding to the State's questioning (3 AA0572). The State argued that bag
4 containing the gun was already admitted into evidence without objection (3
5 AA0571). However, lead defense counsel (Coyer) responded that the
6 presumptive belief was that the gun, not the bag, was going to be admitted
7 into evidence (3 AA0573), co-defense counsel (Plunkett) had never even been
8 shown the bag (3 AA0574), and that neither defense counsel had even
9 reviewed the label on the bag (3 AA0575, AA0577). The district court noted
10 the practical reality that the exhibit should be the gun, not the bag, and that the
11 bag is only used to demonstrate chain of custody (3 AA0573-AA0574).

12 Ultimately, the district court denied the motion for mistrial, citing the
13 lack of contemporaneous objection and suggesting that the witness' testimony
14 was simply a passing comment (3 AA0577-AA0579). The district court's
15 denial of a mistrial under the circumstances present in this case was erroneous
16 and warrants reversal.
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1 **(b) Standard of Review**

2 The issue to be determined by this Court is whether the district court
3 erroneously denied Valencia's motion for a mistrial. This Court reviews a
4 trial court's decision to deny a motion for mistrial under an abuse of discretion
5 standard. Ledbetter v. State, 122 Nev. 252, 264, 129 P.3d 671, 680 (2006).
6

7 **(c) Law and Argument**

8 It should be noted that during the recess the district court immediately
9 drew the parties' attention to the case of Courtney v. State, 104 Nev. 267, 756
10 P.2d 1182 (1988) (3 AA0571). Because it affects the presumption of
11 innocence, a reference to a defendant's criminal history, absent special
12 conditions of admissibility, is a violation of due process. Rice v. State, 108
13 Nev. 43, 44, 824 P.2d 281, 282 (1992), *citing* Courtney v. State, 104 Nev.
14 267, 756 P.2d 1182 (1988). The test for determining whether a statement is a
15 reference to criminal history is whether the jury could reasonably infer that
16 the accused had engaged in prior criminal activity.
17

18 In the instant case, the complaining witness and victim, a Metro police
19 officer, referred to Valencia as an 'ex-felon.' It is truly difficult to imagine a
20 clearer indication that a defendant has engaged in prior criminal activity than
21 by affixing such an obvious label to him. Any reasonable juror would know
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1 beyond a doubt that Valencia was a felon after hearing the testimony of
2 Officer Jacobitz.

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4 Moreover, there was simply no way for the district court to cure the
5 inevitable taint which infected Valencia's trial. "A witness's spontaneous or
6 inadvertent references to inadmissible material, **not solicited by the**
7 **prosecution**, can be cured by an immediate admonishment directing the jury
8 to disregard the statement." Ledbetter v. State, 122 Nev. at 264-65, 129 P.3d
9 at 680 (2006) (*quoting* Carter v. State, 121 Nev. 759, 770, 121 P.3d 592, 599
10 (2005) (emphasis added). In Valencia's case, contrary to *Ledbetter*, the
11 inadmissible material was directly solicited by the prosecution by asking
12 Officer Jacobitz to read a label on an evidence bag. The testimony resulting
13 from the State's line of questioning had no discernible evidentiary purpose,
14 given that Officer Jacobitz had already established chain of custody by
15 testifying that he personally impounded and packaged the gun at issue (3
16 AA0564-AA0565).

17
18 The probative value of Officer Jacobitz reading an evidence bag label
19 was virtually non-existent, and therefore far outweighed by the resulting
20 unfair prejudice to Valencia. *See* NRS 48.035(1). This crucial error deprived
21 Valencia of due process and a fair trial and cannot be deemed harmless
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1 beyond a reasonable doubt. The district court's decision to deny Valencia's
2 motion for a mistrial was clearly an abuse of the court's discretion.
3

4 **CONCLUSION**

5 For the reasons stated herein, Appellant respectfully requests that this
6 Court grant the relief sought, a reversal of the Judgment of Conviction and a
7 remand of this case back to district court for a new trial.
8

9 DATED this 19th day of July, 2018.
10

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1 accompanying brief is not in conformity with the requirements of the Nevada
2 Rules of Appellate Procedure.
3

4 DATED this 19th day of July, 2018.

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