IN THE SUPREME COURT OF THE STATE OF NEVADA

CEASAR SANCHEZ VALENCIA,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

No. 75282

APPELLANT'S REPLY BRIEF

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I. SUMMARY OF APPELLANT'S REPLY ARGUMENT

Appellant's Opening Brief (hereinafter "AOB"), filed on July 19, 2018, raised two primary issues on appeal: (1) the denial of Valencia's right to self-representation, and (2) the denial of Valencia' motion for a mistrial. Respondent's Answering Brief (hereinafter "RAB"), filed on August 17, 2018, fails to address Valencia's self-representation issue head on. Instead, the State attempted to redirect this Court's attention to portions of the record that are extraneous and irrelevant to the primary issue at hand. Nonetheless, Valencia will address the State's Answering Brief in detail. Additionally, the State's argument that the district court acted properly in denying the motion for mistrial is unsupported by the facts in the court record and the applicable law.

II. APPELLANT'S ARGUMENT IN REPLY TO RESPONDENT

A. The Trial Court Erred By Improperly Denying the Defendant His Right to Represent Himself

In its RAB, the State argues that Valencia's request to represent himself was untimely, equivocal, and made for the purposes of delay. Each of these claims are unsubstantiated and unsupported by applicable law, as demonstrated by a careful review of the facts in the appellate record.[1]

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[1] In a footnote to its RAB, the State accused Appellant of failing to provide several documents in its Appendix needed to present the factual and procedural

1. Timeliness – Valencia's Request Was Not Untimely

Contrary to the State's characterization of the record, it is simply not true that on February 7, 2017, Valencia asked to represent himself and "would be asking for a continuance to do so." (RAB pg. 11). Rather, Valencia had filed a Motion to Dismiss Counsel and Appoint Alternate Counsel on December 28, 2016 (1 AA0082). On the same day, Valencia Re-Noticed two previously-filed motions, a Motion for Right of Access to the Courts and a Motion to Suppress and Return Property (*See* Appellant's Reply Appendix "ARA" 009 and ARA010). All three of Valencia's motions were assigned a hearing date of January 19, 2017 (AA0082, ARA009, ARA010).

On January 19, 2017, Judge Kosach, presiding in Judge Scotti's absence, informed Valencia that he was not going to permit Valencia to discharge his counsel and then dismissively denied Valencia's three motions (1 AA0100-AA0101). It appears that following the hearing, Valencia promptly Re-Noticed

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history of the case (*see* RAB pg. 2, fn. 1). Given this claim, it is unclear why the State chose to forego its right to file a Respondent's Appendix as permitted by NRAP 30(b)(4). Instead, the State simply made several references to documents which were not part of Appellant's Appendix. Therefore, in conjunction with its Reply Brief, Appellant has respectfully submitted a Reply Appendix so that he may appropriately "reply to respondent's position on appeal." NRAP 30(b)(5).

the Motion to Dismiss Counsel and Appoint Alternate Counsel and the Motion for Right of Access to the Courts. Both Notices bear a signature date of January 19, 2017, both were ultimately filed on February 2, 2017, and both were assigned a hearing date of February 28, 2017 (ARA 011-012).

On February 7, 2017, both Valencia's re-noticed motions were still pending. A continuance of the trial was a foregone conclusion. At no time did the State lodge an objection to continuing the trial (1 AA0106-AA0111). Rather, the State conceded that a continuance was appropriate and agreed that the current state of the record could result in a reversal (1 AA0108-AA0109). The district court continued Valencia's trial to June 26, 2017, and advised Valencia that on February 28th it would address whether Valencia would be permitted to go back to representing himself or not (1 AA0110).

Then, on February 28, 2017, with a pending trial date in June (four months down the road), the district court addressed whether Valencia would be permitted to go back to representing himself (1 AA0112-AA0121). Viewed within the applicable legal framework, the February 28th hearing makes abundantly clear that Valencia's request to represent himself was not untimely,

nor was it denied on timeliness grounds.[2] Rather, the transcript of the February 28th hearing clearly indicates that the district court denied Valencia the right of self-representation on the sole grounds that Valencia had waived the right (1 AA0118-AA0121). Thus, the State's attempt to re-characterize the issue as one of timeliness is unsupported by the record or the applicable law.

2. Unequivocal – Valencia's Request Was Not Equivocal

In its Answering Brief, the State attempted to portray Valencia's *Faretta* request as equivocal (RAB pg. 12-14). This claim also fails. While it is true that Valencia sought alternate counsel on multiple occasions, it cannot be

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[2] In Lyons v. State, 106 Nev. 438, 796 P.2d 210 (1990), this Court established the legal framework for evaluating the timeliness of a *Faretta* request. Such a request is deemed timely if comes early enough to allow the defendant to prepare for trial without need for a continuance. Id. at 445-446. If there exists reasonable cause to justify a late request, the request must be granted. Id. at 446. If there is no such reasonable cause, the court may deny a late request; there need not be a specific finding of dilatory intent. Id. "The district courts should set forth in the record the reasons for denying a defendant's request to represent himself." Id. at 446. And, this Court "encourage[s] district courts to accommodate defendants' requests where this can be done without undue disruption or delay." Id. The *Lyons* analysis was recently reaffirmed in Guerrina v. State, 134 Nev. Adv. Rep. 45, ___, 419 P.3d 705, 707 (2018).

disputed that Valencia's first *Faretta* request – made on August 23, 2016 – was unequivocal. The district court advised Valencia that he would not be permitted to have a third court-appointed attorney and that his options were to stick with current counsel or represent himself (1 AA0027-AA0030). Valencia then indicated that he would rather represent himself (1 AA0027-AA0028). When the district court offered to give Valencia a couple days to think about his decision, Valencia stated unequivocally "I'm already decided." (1 AA0028).

Two days later, on August 25, 2016, the district court inquired "Mr. Valencia, is it still your intent, I gave you a couple days to decide what you wanted to do, is it still your intent to ask this Court to allow you to represent yourself?" (1 AA0032). Valencia again responded unequivocally, "Yes, Your Honor." (1 AA0032). Further, when the district court asked Valencia if he understood that he was going against the judge's recommendation, Valencia responded "Yeah, I wish to represent myself." (1 AA0042). Valencia's request for self-representation both before and during the *Faretta* canvass were demonstrably unequivocal as evidenced by the record.

Importantly, at the end of the *Faretta* canvass, the district court informed Valencia that if, in the future, he changed his mind and decided he wanted the assistance of counsel, that he could bring that issue back before the court by way of a motion (1 AA0049). No such motion was ever filed.

On November 1, 2016, the case was on calendar for a hearing on Valencia's Pro Per Motion to Right of Access to the Courts (1 AA0063). During the hearing, Valencia requested the assistance of "co-counsel" specifically for the limited purpose of helping him obtain legal materials (1 AA0065). When the district court explained that Valencia could not have a co-counsel, Valencia then asked if he could still request legal materials through appointed counsel (1 AA0066-AA0067). The district court then asked if Valencia wanted prior counsel reappointed, to which Valencia responded simply "Yes, please." (1 AA0067).

Subsequently, on November 8, 2016, the date set for prior counsel to re-confirm, the district court noted that Valencia had "changed his mind and wants assistance of counsel; perhaps for purposes of obtaining the resources that he needs to prepare for trial." (1 AA0070). A lengthy colloquy then proceeded amongst the district court, counsel, and Valencia (1 AA0070-AA). On multiple occasions, Valencia expressed reluctance to consent to being represented by appointed counsel (1 AA0074-AA0077). At one point, Valencia formally objected to having prior counsel re-appointed (1 AA0077). Then, when asked by the district court if it was his final decision, Valencia responded affirmatively (1 AA0077). The district court then told Valencia he was making a bad decision and continued to urge Valencia to consent to being represented

by counsel. Eventually, Valencia acquiesced to the court's repeated urging (1 AA0077-AA0078).

The State's characterization of Valencia as "expressing confusion" and being "increasingly non-responsive" (RAB pg. 13) is belied by the record. To the contrary, it is clear that Valencia was extremely reluctant to accept appointed counsel and only did so at the repeated urging of the district court. The State further claims that the November 8, 2016 hearing is evidence that Valencia's *Faretta* request was equivocal. However, the State fails to acknowledge that the unequivocal *Faretta* request was made – and granted – three months prior to November 2016. Further, the State fails to explain how Valencia's November 8th acquiescence to the district court's urging the re-appointment of counsel somehow renders his subsequent *Faretta* request equivocal.

Finally, the State wholly failed to address the most important issue – Valencia's *Faretta* request that came before the district court on January 19, 2017 (1 AA0097-AA0102). The record is indisputable that the district court – without coherent explanation – flatly told Valencia that he would not be permitted to discharge his counsel (1 AA0101). On that date, the district court did not conduct any canvassing nor did it proffer any legal basis for why the previously granted right to self-representation was being denied.

As previously noted *supra*, in the court record, the sole grounds for denying Valencia's request to go back to representing himself was given by Judge Scotti on February 28, 2017, when the district court erroneously determined that Valencia had "waived" his right to represent himself (1 AA0118-AA0121).

Taken as a whole, the record clearly establishes that Valencia's *Faretta* requests were unequivocal, notwithstanding the State's claims to the contrary.

3. Dilatory Intent – Valencia's Request Was Not Made For The Purpose Of Delay

The State simply asserts, without evidentiary support in the record, that Valencia's requests to represent himself were made for the purpose of delay. This claim is wholly without merit.

Valencia's first *Faretta* request was made on August 23, 2016. At that time, there was no trial date whatsoever pending (1 AA0014).[3] Even one month

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[3] The reason why there was no trial date pending at this time is because on July 19, 2016, Valencia's first court-appointed attorney informed the district court (The Honorable Joseph Bonaventure, Senior Judge Presiding) that he (Counsel, not Valencia) was requesting a continuance. Although the State claims that Valencia voluntarily waived his speedy trial at this hearing (*see* RAB pg. 2), the reality is somewhat different. The district court asked Valencia if he waived his speedy trial and Valencia responded "I don't think so." (1 AA0006-008). The court then told Valencia he "can't have his cake and eat it

before his first *Faretta* request, Valencia was demonstrating that his intentions were the exact opposite of dilatory. On July 26, 2016, having already been forced to waive his speedy trial, Valencia complained on the record: "Why did I have to waive my speedy trial at last court hearing? He [Counsel] should have been ready." (1 AA0013). The transcript of the July 26, 2016 hearing is perhaps the most compelling evidence that from the very beginning of his case, Valencia had absolutely no intention to cause a delay in the proceedings (1 AA0009-AA0020). Valencia remained without a trial date until August 25, 2016, when after passing the *Faretta* canvass, Valencia's trial date got set for February 13, 2017 (1 AA0048). The November 8, 2016 hearing where counsel was re-appointed was more than three months prior to trial. Nothing whatsoever about these events suggests any dilatory intent on the part of Mr. Valencia.

On December 28, 2016, Valencia filed a new Motion to Dismiss Counsel and Appoint Alternate Counsel and also Re-Noticed two previously-filed motions, a Motion for Right of Access to the Courts and a Motion to Suppress and Return Property (ARA009 and ARA010). All three of Valencia's motions were assigned a hearing date of January 19, 2017 (AA0082, ARA009,

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too." (1 AA0007). Valencia responded "Alright", to which the district court replied "Alright. He waives his right. . . ." (1 AA0008).

ARA010). Again, nothing about this action suggests dilatory intent. Valencia could never have predicted that a substitute judge unfamiliar with the case would end up presiding in the district court on January 19th. The unceremonious dismissal of Valencia's motions caused him to have to immediately re-notice them on a day when Judge Scotti was once again presiding over the case.

On February 7, 2017, all parties were aware that the trial would be getting continued, and neither party objected to the continuance. Again, there is no evidence of a dilatory motive from Valencia, nor has the State articulated any plausible benefit that Valencia stood to gain from delaying his case. The State's assertion of dilatory motive is therefore a bare allegation unsupported by any evidence in the court record.

In sum, none of the reasons proffered by the State are sufficient to overcome the abundance of evidence in the court record which demonstrate that Valencia was improperly denied his *Faretta* right. The State's attempted redirection of the issue to alternative and inapplicable bases to deny the important constitutional right of self-representation highlights the weakness of the State's position. Accordingly, this Court must carefully review the record which will inevitably compel this Court to conclude that Valencia's conviction does not rest on solid constitutional foundations. As such, the only appropriate remedy is to reverse and remand the case to ameliorate the prejudice of

improperly depriving Valencia his right to self-represent. An improper denial of the right of self-representation is *per se* reversible, never harmless, error. McKaskle v. Wiggins, 465 U.S. 168, 177 n.8, 104 S. Ct. 944 (1984)); Hymon v. State, 121 Nev. at 212 (2005); Gallego v. State, 117 Nev. at 356-57 (2001); Vanisi v. State, 117 Nev. at 338 (2001).

B. The Trial Court Erred By Refusing To Grant A Mistrial

The State has argued that the district court did not commit error by refusing the defense motion for mistrial. The State's argument fails for several reasons.

First, the State ignored what is perhaps the most important fact relevant to this analysis – the fact that prior to commencement of trial, the district court had *already* made the determination that the Ex-Felon in Possession of Firearm charge should be bifurcated from the other charges (1 AA0127-AA0128). The district court's recognition of the need to bifurcate implicitly recognized the substantial risk of prejudice to Valencia by taking precautionary steps to remove any reference to Valencia's felon status, which would inevitably prejudice the jury against Valencia.

Second, the State acknowledged that the test for determining whether a statement is a reference to criminal history is whether the jury could reasonably infer from the facts presented that the accused had engaged in prior criminal

activity. Rice v. State, 108 Nev. 43, 44, 824 P.2d 281, 281-82 (1992) (*citing* Manning v. Warden, 99 Nev. 82, 659 P.2d 847 (1983)). However, the State left out the following crucially important language from the *Rice* Court. "**Because it affects the presumption of innocence, a reference to criminal history, absent special conditions of admissibility, is a violation of due process**. Id. *citing* Courtney v. State, 104 Nev. 267, 756 P.2d 1182 (1988) (emphasis added). "Although a **reasonable juror could conclude** from the references at issue that appellant had engaged in prior criminal activity, we conclude that the error was harmless beyond a reasonable doubt. Rice v. State, 108 Nev. at 44, 824 P.2d at 282 (emphasis added).

In *Rice*, this Court concluded that the error was harmless beyond a reasonable doubt because the statements were unsolicited, the references were inadvertent, and defense counsel declined the judge's offer to give the jury a limiting instruction. Id. "Under these circumstances, the error was not prejudicial." Id., *comparing* Stickney v. State, 93 Nev. 285, 564 P.2d 604 (1977).[4]

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[4] In *Stickney*, the Court characterized the references to prior criminal activity as "vague" and "inadvertent." Stickney v. State, 93 Nev. at 286-287, 564 P.2d at 605.

The instant case is very distinguishable from *Rice* and *Stickney*, both of which dealt with mere vague references to criminal activity. In the case at hand, the State's key witness and victim, Officer Jacobitz, did not make mere references to specific or even vague criminal activity. Rather, Officer Jacobitz clearly and unambiguously informed the jury that Valencia was an "ex-felon" when read the notation from an exhibit (3 AA0568). Therefore, the instant case is a far cry from *Rice*, wherein a witness made references to the department of parole and probation in violation of a motion in limine. *See* Rice v. State, 108 Nev. at 44, 824 P.2d at 282. It is even further distinguishable from *Stickney*, wherein the "vague" and "inadvertent" references to criminal activity included testimony from the defendant's own alibi witness that the defendant was 'in jail for something else' and another reference from a State's rebuttal witness to a non-existent 'arson trial' with no mention of whether the defendant had been convicted of anything. *See* Stickney v. State, 93 Nev. at 286-287, 564 P.2d at 605.

In Valencia's case, very much unlike *Rice* and *Stickney*, there is no need to evaluate whether a reasonable juror could conclude from the references that Valencia had engaged in prior criminal activity. Rather, because the State asked Officer Jacobitz to read from the exhibit label, any and every reasonable juror knew beyond all doubt that Valencia had been previously convicted of a felony.

Only an unreasonable and incompetent juror would doubt Valencia's ex-felon status after hearing Officer Jacobitz reading of the exhibit label. In fact, the error was so plain and obvious that the district court actually immediately intervened *sua sponte*, before defense counsel could object, and before the prosecutor could even finish his next question (3 AA0568-AA0579).

Contrary to the State's mis-characterization of the record, the prosecutor did NOT "request a recess" (as claimed at RAB pg. 19). Rather, the State requested a bench conference (3 AA0569). The district court determined – again *sua sponte* – that a recess was necessitated (3 AA0569). An accurate review of this portion of the record is essential because it clearly demonstrates: **(1)** The district court **immediately** recognized the magnitude of the prejudice caused by Officer Jacobitz' testimony (3 AA0568); **(2)** The district court **immediately** recognized similarity between Valencia's case and the *Courtney*[5] case, accurately noting that *Courtney* was a reversal (3 AA0571); and **(3)** The district court's **immediate initial reaction** to the incident was to consider a mistrial, and quickly admonished the prosecutor that "[t]he question is do I declare a mistrial." (3 AA0571).

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[5] Courtney v. State, 104 Nev. 267, 756 P.2d 1182 (1988).

The *Courtney* case should have been dispositive of the mistrial issue and its guidance should have led to a mistrial; however, as discussed below, the district court failed to rely on the most important facts, over-emphasized irrelevant facts, and generally misapplied the legal analysis.

In *Courtney*, this Court evaluated the prejudice of the jury being "inadvertently exposed" to a notation on the back of an exhibit listing Courtney's name, address, personal data, and the following: "8/12/78, consp. to cheat at gaming . . . cheat at gambling." Courtney v. State, 104 Nev. at 268, 756 P.2d at 1182 (1988). In striking similarity to the instant case, during Courtney's trial, **the prosecutor and defense attorney had both examined the exhibit without noticing the notation on the back**. Id. (emphasis added).[6] Courtney's jury discovered the note during its deliberations and asked the court whether it should be considered. Id.

Courtney's trial judge struck the notation and admonished the jury to disregard it. The note concerned Courtney's prior conviction of cheating at

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[6] Emphasis is drawn to this crucial factual similarity because in the instant case, both the prosecutor and defense counsel had examined the exhibit and neither saw the notation indicating Valencia's ex-felon status (3 AA0575, 3 AA0577). Therefore, in *Courtney*, as in the instant case, there was no objection lodged against the admission of the exhibit.

gambling. The trial court recognized that the jury could consider it as such, and attempted to undo the damage by explaining that the note referred to accusations or charges against Courtney, not convictions. Id. at 268, 1182-1183.

This Court's analysis, reasoning, and holding in *Courtney* is precisely applicable to Valencia's case:

> In our view . . . the damage could not be undone. We have previously explained that "**[i]t is without question that, absent special conditions of admissibility, reference to past criminal history is reversible error.**" Porter v. State, 94 Nev. 142, 149, 576 P.2d 275, 279 (1978) (*citing* Walker v. Fogliani, 83 Nev. 154, 425 P.2d 794 (1967)); Marshall v. United States, 360 U.S. 310 (1959). **The reference need not be explicit, it is enough that "a juror could reasonably infer from the facts presented that the accused had engaged in prior criminal activity."** Manning v. Warden, 99 Nev. 82, 86, 659 P.2d 847, 850 (1983) (*quoting* Commonwealth v. Allen, 292 A.2d 373, 375 (Pa. 1972)). NRS 48.045(2) provides that "[e]vidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." **Even considering the trial court's explanation that the note referred to previous charges, not convictions, it is impossible to discount an inference by the jurors that Courtney was a cheat. Such an inference is a violation of due process because it affects the presumption of innocence.** *See* Manning, 99 Nev. at 87, 659 P.2d at 850.
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> . . .
>
> Under the statute, the evidence against Courtney required the jury to exercise a relatively large amount of deduction and judgment. *Cf.* Coffman v. State, 93 Nev. 32, 559 P.2d 828 (1977) (defendant was observed pulling slot machine handle irregularly and 'walking' the reels). Thus, it seems likely that the jury's knowledge or inference of Courtney's past cheating affected its deliberations and verdict.
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> We cannot find, beyond a reasonable doubt, that the note concerning Courtney's prior conviction for cheating had no effect on the jury. Manning, 99 Nev. at 87-88, 659 P.2d at 850; Chapman v. California, 386 U.S. 18, 24 (1967). Therefore, the jury's exposure to the note concerning Courtney's prior conviction was not harmless error. Accordingly, the district court's judgment is reversed and Courtney's conviction is vacated.
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> Courtney v. State, 104 Nev. at 268-269, 756 P.2d at 1183 (1988) (emphasis added).

The State's argument that *Courtney* is distinguishable from the instant case is without merit and misrepresents the Court's holding.

The State claims: "Because the jurors question during deliberation, beyond a reasonable doubt, had an effect on deliberations, this Court held that the note concerning the defendant's prior conviction was not harmless error. Id. Here, in contrast, the jury did not ask any questions about the label and the exhibit label was not sent to the jury for deliberations." (RAB pg. 20).

This blatant misrepresentation of the *Courtney* holding is obvious from a casual review of the opinion's true and correct language. This Court did not consider the jury's *question* about the exhibit as dispositive in any way. Rather, this Court found that "it seems likely that the jury's **knowledge** or **inference** of Courtney's past cheating affected its deliberations and verdict." Courtney v. State, 104 Nev. at 269 (emphasis added). In its conclusion, this Court stated that "the jury's **exposure** to the note" –(not the jury's *question* about the note)–

"concerning Courtney's prior conviction was not harmless error. Accordingly, the district court's judgment is reversed and Courtney's conviction is vacated." Id. (emphasis added).[7]

Finally, the State made a bare assertion that the reference to Valencia as an ex-felon "did not ultimately lead the jury to convict Appellant. Instead, it was the abundance of evidence that the State presented that convicted Appellant . . . ." (RAB pg. 20). However, this assertion has no basis in the existing court record, which contains no reference or evidence indicating whether or how the jury's exposure to Valencia's felon-status impacted its deliberations and ultimate verdicts.

In sum, the totality of evidence in the record persuasively demonstrates that the district court abused its discretion by refusing to grant a mistrial, including, but not limited to the following:

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[7] A lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer. Nev. Rules of Prof'l Conduct 3.3 (Candor Toward the Tribunal). Counsel for Valencia suggests that the State has an ethical obligation to submit an Errata to its Answering Brief correcting the blatant misrepresentation of this Court's legal holding in *Courtney*.

(a) The specific purpose of bifurcating out the Ex-Felon in Possession of Firearm charge was to avoid this kind of due process violation (3 AA0571);

(b) The parties' efforts to carefully redact portions of audio radio traffic, and the Computer Aided Dispatch "CAD" specifically to avoid references to Valencia's criminal history (3 AA0497-AA0500);

(c) The district court's initial impression that a mistrial should be considered (3 AA0571);

(d) The attention drawn to the ex-felon disclosure caused by the lengthy recess which followed (3 AA0569-592);

(e) Defense counsel's reasonable belief that the gun, not the evidence bag, would be the actual exhibit entered into evidence (3 AA0573-575);

(f) The unique and extreme prejudice presented by the fact that the State's key witness and alleged victim police officer is the source of the jury's exposure to Valencia's ex-felon status (3 AA0585-586);

(g) The district court's heavy reliance on the absence of a contemporaneous objection (3 AA0572, AA0577-578, AA0581, AA0583, AA0586-587) is irrelevant under Courtney v. State, 104 Nev. at 268, 756 P.2d at 1182 (1988) (no objection was made to the admission of the exhibit which resulted in the reversal);

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(h) The district court was clearly aware of, and even specifically referenced, the *Courtney* case (3 AA0571), yet still mis-applied the analysis;

(i) The district court's determination that the disclosure of Valencia's felon status was a 'passing comment' (3 AA0579) is irrelevant where it cannot be said beyond a reasonable doubt that the jury's exposure to the prejudicial fact had no bearing on their deliberations or verdict. Courtney v. State, 104 Nev. at 268-269, 756 P.2d at 1183 (1988) (*citing* Manning v. Warden, 99 Nev. 82, 86-88, 659 P.2d 847, 850 (1983) and Chapman v. California, 386 U.S. 18, 24 (1967)).

(j) The district court's 'passing comment' analysis failed to recognize this Court's prior jurisprudence explaining that "[i]t is without question that, absent special conditions of admissibility, reference to past criminal history is reversible error." Courtney v. State, 104 Nev. at 268-269, 756 P.2d at 1183 (1988); Porter v. State, 94 Nev. 142, 149, 576 P.2d 275, 279 (1978) (*citing* Walker v. Fogliani, 83 Nev. 154, 425 P.2d 794 (1967); Marshall v. United States, 360 U.S. 310 (1959).

(k) The district court's recognition that the so-called 'passing comment' was not the witnesses' fault because he was simply responding to a question elicited by the prosecution (3 AA0572);

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(l) Passing comments referencing inadmissible material can only be cured where the comment was not solicited by the prosecution. Ledbetter v. State, 122 Nev. 252, 264-65, 129 P.3d 671, 680 (2006) (*quoting* Carter v. State, 121 Nev. 759, 770, 121 P.3d 592, 599 (2005).

III. CONCLUSION

For the reasons stated in Appellant's Opening Brief and here within Appellant's Reply Brief, along with the court record supplied in Appellant's Appendix and Appellant's Reply Appendix, Ceasar S. Valencia respectfully requests that this Court grant the relief sought, a reversal of the Judgment of Conviction and a remand of this case back to district court.

DATED this 17th day of September, 2018.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this reply brief complies with the formatting requirements of NRAP 32(a)(4) and the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this reply brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font style.

2. I further certify that this reply brief complies with the page- or type-volume limitations of 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

[X] Proportionately spaced, has a typeface of 14 points or more, and contains 4,652 words; or

[ ] Does not exceed __ pages.

3. 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 and volume number, if any, of the transcript or appendix where the matter relief 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 17th day of September, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 17th day of September, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

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