IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 82740

JORGE MENDOZA,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Appeal from the Postconviction Denial of Relief for Writ of Habeas Corpus - Eighth Judicial District Court, Clark County The Honorable Judge Bita Yeager 8th Judicial District Court Judge Department 1, Presiding, Findings of Fact, Conclusions of Law and Order Issued April 2, 2021, District Court Case No. A-19-804157-W

APPELLANT'S APPENDIX VOLUME XVII

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Dated July 25, 2021
BY /s/ DIANE C. LOWE
DIANE C. LOWE, ESQ
Nevada Bar #14573

DISTRICT COURT
CLARK COUNTY, NEVADA

Writ of Habeas Corpus	**COURT MINUTES**	**February 23, 2021**

A-19-804157-W Jorge Mendoza, Plaintiff(s)
vs.
State of Nevada, Defendant(s)

February 23, 2021 01:00 PM ALL PENDING - EVIDENTIARY HEARING...MOTION FOR LEAVE TO ADD TO RECORD HOSPITAL RECORDS

HEARD BY: Yeager, Bita COURTROOM: RJC Courtroom 16A

COURT CLERK: Tucker, Michele

RECORDER: Lizotte, Lisa

REPORTER:

PARTIES PRESENT:

Diane Carol Lowe	**Attorney for Plaintiff**
Jorge Mendoza	**Plaintiff**
Marc P. Di Giacomo	**Attorney for Defendant**

JOURNAL ENTRIES

ALL PENDING - EVIDENTIARY HEARING...MOTION FOR LEAVE TO ADD TO RECORD HOSPITAL RECORDS

Brittni Griffith, Deputized Law Clerk, also present. Appearances made via BlueJeans Videoconferencing Application.

Court inquired if the defendant understood he is waiving his attorney/client privilege since he is claiming ineffective counsel. Defendant state he understood. Ms. Lowe advised there is a motion to add medical records from the hospital at the time the defendant was shot. Court STATED the documents attached to the motion were not authenticated and the Court cannot accept them unless the State stipulates. Ms. Lowe advised she had requested authentification, but did not receive it. The documents did not contain what they were looking for and probably will not be using them. Mr DiGiacomo stated no objection to the documents.

Lew Wolfbrand sworn and testified.

Ms. Lowe argued the facts are on the side of the defendant that he had ineffective counsel. Arguments by Mr. DiGiacomo.

COURT STATED ITS FINDINGS and ORDERED, Petition DENIED.

Mr. DiGiacomo to prepare the Order, distribute a copy to all parties, and submit to Chambers within 10 days.

All orders are to be submitted to DC1Inbox@ClarkCountyCourts.us

CUSTODY

Electronically Filed
3/9/2021 11:25 AM
Steven D. Grierson
CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

JORGE MENDOZA, Plaintiff, vs. STATE OF NEVADA, Defendant.	CASE NO. A-19-804157-W DEPT. NO. 1

BEFORE THE HONORABLE BITA YEAGER, DISTRICT JUDGE

TUESDAY, FEBRUARY 23, 2021 AT 1:01 P.M.

RECORDER'S TRANSCRIPT RE:
EVIDENTIARY HEARING
MOTION FOR LEAVE TO ADD TO RECORD HOSPITAL RECORDS

APPEARANCES BY VIDEOCONFERENCE:

FOR THE PLAINTIFF:	DIANE C. LOWE, ESQ.
FOR THE DEFENDANT:	MARC DIGIACOMO, ESQ. Chief Deputy District Attorney
	BRITTNI L. GRIFFITH, ESQ. Deputized Law Clerk

Recorded by: LISA A. LIZOTTE, COURT RECORDER

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(TUESDAY, FEBRUARY 23, 2021 AT 1:01 P.M.)

THE COURT: So I'm going to call Case Number A-19-804157-W, Jorge Mendoza versus State of Nevada. If we could have first counsel state their appearances for the record, please.

MS. LOWE: Attorney Diane Lowe, Bar Number 14573, appears on behalf of Mr. Jorge Mendoza.

MR. DIGIACOMO: Marc DiGiacomo and Brittni Griffith on behalf of the State.

THE COURT: Okay. And it looks like we have the presence of Mr. Mendoza in custody on BlueJeans and it also looks like Mr. Wolfbrandt, who I assume is one of the witnesses, is also present on BlueJeans. And so I don't know -- I probably should ask Mr. Mendoza that he understands that since he is alleging ineffective assistance of counsel, that at this point for the purposes of this hearing and in pursuing his contentions that he would be waiving attorney/client privilege. So you understand that by putting this at issue, Mr. Mendoza, that you are effectively waiving attorney/client privilege?

THE DEFENDANT: Yes.

THE COURT: Okay. So meaning that at a later time you wouldn't be able to say, hey, you know, Mr. Wolfbrandt, who was my attorney before, he talked about all these things that are supposed to be covered under attorney/client privilege and, you know, now I'm saying that he violated that. So you understand that that's not a claim that you would be able to bring up at a later time?

THE DEFENDANT: Yes.

THE COURT: Okay. So, I guess, are there any housekeeping matters before we start?

MS. LOWE: Your Honor, I had a brief motion for leave to add the medical records from Mr. Mendoza's time at the hospital after the shooting incident. I don't know, I think we should probably just question our witnesses first. It's very short but I know that there's time considerations for Mr. Wolfbrandt as well as for Mr. Mendoza, so if we could just proceed with questioning that would be fine from our side.

THE COURT: Sure. I just wanted to place on the record that, Ms. Lowe, the documents that you attached to that motion were unauthenticated, so I can't really consider those --

MS. LOWE: Okay. That's fine.

THE COURT: -- since they were not authenticated. If you have another witness available to lay the foundation for the authentication of those records then we can proceed on that, but as you know, I can't really take hearsay documents into consideration, I guess, unless the State is stipulating.

MS. LOWE: Well, Your Honor, I did request for authentication and was surprised that one did not come with that. I did start the ball rolling on a follow-up request, but like I said given that the records don't state or not state what we were looking for I talked to Mr. Mendoza about this at our last telephone conference and he's not strong either way on whether we should push for admission and try to do follow up, so I would just ask that we let that issue lie at this time.

THE COURT: Okay. Mr. DiGiacomo, did you want to say something?

MR. DIGIACOMO: That's fine. I trust Ms. Lowe that she provided all the records that she received and it appears to be so, so I'm not really disputing the authenticity of them.

THE COURT: Okay.

MR. DIGIACOMO: We may use some of those to ask questions anyway, so I have no problem if she wants them a part of the record.

THE COURT: Okay. That's fine.

MS. LOWE: Right. Either way is fine with me.

THE COURT: All right. That's fine. All right. So then you may proceed.

MS. LOWE: Mr. Wolfbrandt, I think I'll start with you, and is there somebody there to swear him in?

THE COURT: There is.

LEW WOLFBRANDT,

having been called as a witness, was duly sworn and testified as follows:

THE CLERK: Please state and spell your first and last name for the record.

THE WITNESS: Lew, L-e-w, Wolfbrandt, W-o-l-f-b-r-a-n-d-t.

THE CLERK: Thank you.

THE WITNESS: You're welcome.

DIRECT EXAMINATION

BY MS. LOWE:

Q Mr. Wolfbrandt, where are you employed now?

A Albertsons Grocery Store.

Q And where did you graduate from law school?

A Pepperdine University.

Q Did you always practice law in Las Vegas, Nevada?

A No.

Q Are you currently an attorney?

A No.

Q Were you disbarred?

A Yes.

Q Why were you disbarred?

A It was a trust fund issue.

Q Did it involve honesty or handling the monies correctly?

A Correct.

Q Had you been suspended prior to your disbarment?

A Yes.

Q Have you had prior ineffective actions against you as an attorney?

A Well, sure.

Q How many?

A One or two that I can think of. One for sure I remember.

Q And what were they involving? Just a brief description.

A It was the same -- similar to this. It was a -- I was trial counsel on a murder case and it went to direct appeal and then it went to post-conviction relief, and I testified as -- I didn't follow it after that. I suspect -- I think that the conviction was still confirmed.

Q As respect to the disbarment, were you given an opportunity to address the issues raised in the suspension prior to your actual disbarment that prevents it from happening?

A I guess kind of. I mean the committee gave a recommendation that I could abide by. It went on appeal to the Supreme Court and they changed the conditions of it that I could not comply with, so I agreed and voluntarily agreed to a disbarment.

Q Was this happening while you were representing Mr. Mendoza?

A No, it was after.

Q When you were practicing law what type of law did you focus on, civil or criminal?

A Well, it morphed all, you know, throughout my career. I started doing insurance defense and then moved to criminal defense and then was doing personal injury representing plaintiffs, and then towards the end it was a combination of criminal defense and juvenile defense and then representing parents in dependency court.

Q Do you recall your representation of Mr. Mendoza?

A Very well.

Q Did you tell him that he had grounds for a self-defense claim and that is how you were going to handle his case?

A I -- as I recall the conversations with him, and there were numerous conversations, I said our best tactic on this would be to raise a self-defense argument. I didn't see any defense to the burglary, attempt robbery. It was all about the death of the one individual and trying to avoid Mr. Mendoza getting convicted of a murder charge.

Q Did you ever tell him that under the law he might not actually have grounds for self-defense?

A No. I thought we had a righteous defense.

Q Were you acting at the direction of Mr. Mendoza by presenting a self-defense presentation?

A I don't recall it being at his direction, but I do recall it being mutually agreeable that that was our option.

Q So it sounds like did you actually believe you had grounds for self-defense?

A I thought I had a chance at it, and without doing that we had no chance.

Q So you didn't put on a self-defense contrary to law solely because your client said, I don't care, this is what I want you to do?

A Could you repeat that?

Q Sure. My question is, and maybe it's several parts, but -- and maybe you've already answered it because you said that you thought there might be grounds in the law for self-defense, but my question is were you kind of iffy on the self-defense presentation but went ahead with it anyway because of your client's insistence? Did you say, no, I don't think we can do this. The law doesn't support it. And he said, I don't care. Do it anyway.

A Well, I believe it was -- I wasn't sure it was going to be successful and we had numerous conversations about that as I recall, and I wasn't aware of any law that was contrary to that argument but it was the only argument we had.

Q (Phone ringing) Sorry about that.

A It could have been mine too.

Q Did you do research on whether self-defense would be a proper legal claim for someone who was the initial aggressor?

A I did not.

Q In both your opening and your closing statements you tell the jury that you were going to show them that Mr. Mendoza acted in self-defense. Why did you do this?

A Because I thought he did. I still believe that it was a self-defense case. I understand the *Echavarria* case. I don't necessarily agree with it. I thought the facts in this case showed that Mr. Mendoza had abandoned the attempt robbery. He was trying to escape the situation but for the injury to his leg. He couldn't get far enough away, but in the course of escaping and trying to retreat shots were fired and he returned fire and unfortunately somebody died, but still to this day I still think that's self-defense.

Q Did you tell him that there were jury instructions on self-defense and you were going to introduce them to the jury?

A I'm sure I did because I did.

Well, I offered them to get to the jury. The trial Judge denied that, but they were marked as proposed instructions.

Q Why did you wait until after he testified to ask the Court if the instructions would be allowed?

A Because we never offer jury instructions until after all the evidence has closed. Once both sides rest everybody meets generally in chambers to talk about them, and then we go into open court and we settle the jury instructions at that time. We don't ever do them before the trial.

Q Did you consider that perhaps it might be a wise course of path in this particular instance?

A No. Because there was no secret that my strategy on this thing and our strategy, if you will, was going to be self-defense as to the murder charge.

Q So, again, you testified that you didn't do any research on whether self-defense would be a proper legal claim for someone who is the initial aggressor for a crime?

A No, I didn't. I've used that strategy in prior trials.

Q Did Mr. Mendoza have input on or write any part of your opening or closing?

A Not that I recall.

Q Did Mr. Mendoza hear your opening statement or closing argument before you presented them to the jury?

A I don't think so.

Q Did you ever feel, as one of your cohorts told the Judge -- he opined that you had some sort of backdoor agreement with the State in exchange for his testimony?

A No. In fact, it was just the opposite.

Q Did you convince Mr. Mendoza to discuss his illegal drug use while on the stand or did he bring that up on his own or ask you to ask him about it?

A I don't specifically recall that. I want to say we did talk about it because that would lead to how he got caught up in that situation because he was just a regular guy. He just got caught up with some extended family members that had a different agenda.

Q Did you tell him you were going to move to suppress his statements he made to officers at the hospital?

A No.

Q You didn't move to suppress his statements, did you?

A No, I didn't.

Q Why didn't you?

A His statements to the police didn't matter to me because the physical evidence was --

Q Sorry. Go ahead. Sorry.

A That's all right. The physical and forensic evidence was substantial, and in my mind and in our conversations our best strategy was to, you know, take a chance on the self-defense argument. It really didn't matter to me what he told the police because he was in the hospital and was under anesthesia. I'm sure he went through surgery because he had that femur bone shattered.

Q Now, his statements to the police at the hospital were contrary to what he testified; isn't that true?

A Not that I recall.

Q But they played his statements to the jury?

A I think they might have. I don't recall that specifically, but, yeah, I know some of his statements were -- I don't recall them being played to the jury, but I know there was some testimony regarding those statements.

Q Did you conduct research to determine if there were grounds for a motion to suppress the statements made at the hospital?

A No, I didn't.

Q Joey Larsen, who lived with the murder victim, was not called to testify. At the Grand Jury hearing he didn't indicate that he knew who shot his roommate. Is there a reason why you didn't call him to testify?

A As I recall he was unavailable.

Q Is there a reason why you didn't object to his father testifying about what his son saw and said on confrontation grounds?

A Well, I thought I did object to it but if I didn't I couldn't tell you why.

Q Do you know for a fact that Mr. Mendoza's bullet caused the death of the deceased, Monty Gibson?

A I don't know it for a fact. The forensic testimony led to that conclusion.

Q Well, in fact, they didn't identify him directly; isn't it true? They identified a millimeter bullet which was used by the gun that he was using but they didn't ever come to the conclusion that he is linked to that bullet; isn't that true?

A Maybe. I mean as I recall at that time, the other Co-Defendants were gone from the scene. I think there was a car that pulled up and picked up two of them, they left and Jorge was still trying to get across the street to escape.

Q What role did you have to play in getting Mr. Mendoza to confess to him being the cause of Mr. Gibson's death?

A Well, there are a number of factors. You had the blood trail from him going out into the middle of the street, had shell casings in the street, there was no other evidence of anybody else returning fire at the time that gentleman was killed.

Q But, in fact, one of the neighbors testified, isn't it true, at the Grand Jury hearing that he looked out the window and saw Figueroa shooting several shots and none of the other neighbors saw Mr. Mendoza shooting a gun?

A That could be. I don't have a specific recollection of that.

Q Do you recall whether you walked him through these factors to consider before making the determination of whether to confess? Did you say, for instance, listen, they found your blood trail, they found your gun, you were the

only one left at the scene, it had to be you, you got to fess up, that's the only way you're going to get any sort of relief from what's going to be a harsh sentence? Anything like that or how did that come about? Was it coaxed out of him?

A Well, it was a combination of things. Again, it was a lot of the forensic evidence that was very much detrimental to us and so with that -- I mean there was no question that his weapon had been fired out in the street because there was shell casings found in the street.

So you kind of take the facts as you get them and then try to, you know, analyze and argue the circumstances that I felt were accurate that he, you know, was done, he didn't want to be there. Even though he was involved with it he was trying to extricate himself from the situation, and but for the shattered leg he would have got away. And meanwhile as he's trying to scoot back, you know, across the street and get out of harm's way there's still bullets flying out from inside the house and he -- you know, he thought they were firing at him so he returned fire. Whether --

Q Did you --

A No, go ahead.

Q Did you walk him through the factors to consider before stating that he caused the death?

A I don't quite understand the --

Q For instance, did you ask him, Mr. Mendoza, did you have eyes on all the three other Defendants while you were being shot at? Did you ask him that?

A I might have. I truly can't recall whether I did or not.

Q Did you ask him is it possible that the three other Defendants could have had more than one gun on them?

A I don't think that question ever came up because we -- we didn't think anybody else had more than one gun on them.

Q Did you ask him, listen, the neighbor, who was a former probation agent, says he saw Figueroa doing shooting. He doesn't say he saw you. Now, is it possible that -- and Figueroa testified that he didn't do any shooting at all. Is it possible that he was shooting at him at the same time you were? Did you ask him that?

A Not that I recall.

Q There was testimony by some of the State's witnesses that a .9 millimeter bullet can go in a 40 caliber gun, and so the fact that the bullet matched Mr. Mendoza's gun didn't necessarily mean that it came out of his bullet (sic); isn't that true?

A I couldn't tell you.

Q Did you do any --

A I don't know.

Q -- forensic testing on the bullet that they pulled out of Monty Gibson's head and said caused the death?

A I didn't have any testing done on it.

Q Okay. Now, there was testimony that there were some bullets lodged in the house that may have been evidence but the team decided we're not going to go forward with that. Did you bring anyone else into the house to do further examination and look for those bullets?

A No.

Q You didn't really cross-examine the witnesses very much. Was part of your decision not to cross-examine them as to their credibility based on the fact that you already had decided to have Mr. Mendoza confess on the stand, so there was no need to challenge the State's case on that aspect of who the shooter was?

A Well, that's kind of hard to answer because I don't know which witnesses you're talking about.

Q Well, Figueroa, and also calling -- with respect to calling Joey Larsen to the stand to testify. Now, it was a 19 day trial. I don't know why he wouldn't be available all those 19 days, but I'm sure something could have been accommodated for the only living victim in the case, but cross-examining him, cross-examining -- they allowed the father to testify ultimately over the objection of a Co-Defendant based on hearsay grounds.

They didn't address the confrontation issue, but based on the excited utterances that were given to the father did you question him on whether he saw anything specific about whether there could have been another shooter? He had stated that his son said that -- or at least his son said at the Grand Jury trial they barged in, I came out and shot at them and they started shooting at me, but no one seemed to follow up on that line of questioning either.

So I guess I'm referring to not only the father of Joey Larsen, bringing in Joey Larsen, Figueroa, the officers who testified about the bullets flying, none of those were asked by you -- none of those folks were asked by you questions about do you know and did you search for the guns of Doe Boy, David Murphy? Could he have had a gun with the same matching bullet? Now, they were just pulling out. Figueroa said he saw the car pulling out when bullets were

flying at them, so how can you rule out that the two fellows in the car weren't the shooters? None of the people who testified -- and all of the people had information regarding what happened at the scene. None of them were questioned about any sort of linkage to the other Defendants on shooting at the deceased, Monty Gibson. Was that trial strategy, was that an oversight or what was your reasoning behind that?

A As I prepped the case with all of the evidence I saw, I saw nothing that there was any indication that there was any other shooter, and there was no indication that -- even that Jorge was specifically firing at anybody as opposed to just firing back at the house to return fire from bullets that were flying at him.

Q There was some testimony that when the investigators went to Mr. Mendoza's house, his mother-in-law and wife let them in and that they were given the consent to search the house, that they found some guns. Did you ever talk to Mr. Mendoza about why he had guns in his house?

A I'm sure I did. I just don't recall exactly now what that conversation was. I don't remember if it was for target practice or hunting or what.

Q Did you ever ask Mr. Mendoza whether he had ever been shot at before?

A Not that I recall.

Q Did you ever ask him whether he had ever shot anyone before?

A I'm sure I didn't.

Q You had mentioned at the jury trial when they were discussing the motion to sever that you thought the case should have been severed between the Defendants. Why didn't you join in the motion to sever your case from the other Defendants?

A I thought I -- well, I don't recall specifically but I thought I did orally and if I didn't, well, I mean it was a matter -- the issue of severance was already before the Court, you know, so it's -- the Judge was going to do what she was going to do.

Q Do you recall Mr. Mendoza telling you that he didn't want you as his attorney anymore?

A No. I don't recall that at all.

MS. LOWE: No further questions.

THE COURT: State?

CROSS-EXAMINATION

BY MS. GRIFFITH:

Q Good afternoon, Mr. Wolfbrandt. Brittni Griffith on behalf of the State.

A Okay.

Q I have a couple of questions for you today. Let's just start with the theory of the defense. Your theory of defense, as you testified on direct, was a theory of self-defense; is that correct?

A As to the murder charge, yes.

Q And you had also mentioned in direct that that was mutually agreed upon -- a mutually agreed upon defense between you and the Defendant; is that correct?

A Yes.

Q And was the reason you chose that specific defense, self-defense, that theory because it was the best defense that you had?

A Under the facts and the circumstances that were presented to me that's what I thought.

Q So you don't believe that there was any other defense that would have been successful -- more successful than that one in this case?

A I was afraid of the felony murder rule, all right, we're all familiar with that one and I had to do something -- if I didn't put on any kind of defense against that, you know, the felony murder rule would have kicked in and it was a forgone conclusion that he was going to be convicted of it.

So the only chance we had was to create the circumstance where the felony murder rule no longer applied by saying that he had abandoned and had concluded his role in the burglary, attempt burglary, robbery and was -- you know, had abandoned that and was leaving the situation and then he got shot at and returned fire.

Q And did you discuss Petitioner's right to testify with him?

A Sure.

Q And then do you recall the Court canvassing the Defendant prior to his testimony about his right to testify and right not to testify?

A Yes.

Q And you had no control over how Petitioner could testify?

A Well, I mean, no, I couldn't control what came out of his mouth, but, you know, we had -- we had gone over what our theory was and what questions I was going to ask him and, you know, how I anticipated he was going to answer.

Q And then as far as asking the -- or admitting the -- or discussing the self-defense instructions with the Court either pretrial or prior to Mr. Mendoza's testimony, was the reason you did not discuss or admit or proffer those self-

defense instructions because you had not heard the evidence in the case at that point?

A It's -- I probably did 60 plus jury trials during my career and we've never offered jury instructions prior to the close of evidence, so, no, there was no reason to offer those jury instructions beforehand because you never know what the testimony is going to be.

Q And then as far as researching the self-defense theory, Ms. Lowe had questioned you about whether you had done any research on original aggressor law in the context of self-defense. Why was it that you didn't do any research on original aggressor law?

A To be honest with you it never occurred to me that there could possibly even be case law contrary to that. I was just going on the facts of our case and I put up a pretty good argument I thought. Even when the State, Mr. DiGiacomo, argued against that jury instruction I still thought the Judge should have given it despite the case law. I'm not so sure that that case law completely was dispositive of the situation.

Q And when you discussed with Defendant the case, did the Defendant tell you a certain version of events and he told you that those were true? In other words --

A I'm just trying to remember. We talked about the whole scenario, and, you know, some of what led up to it and how he got to be there and then, you know, his recollection as things progressed through it -- through the situation, so I was rather aware of it.

Q And the best theory of defense in your opinion was self-defense in this case under these facts?

A To be honest with you, I thought that was the only possible defense to that murder charge.

Q So now moving on to Petitioner's claim regarding the motion to suppress his voluntary statement with the detectives at the hospital, did you review those statements prior to trial?

A Yes.

Q And you're familiar with *Miranda versus Arizona* and what that case --

A Sure. Of course.

Q That in order for a defendant -- for *Miranda* rights -- in order for *Miranda* rights to be read or them to be necessary a defendant has to be in custody and subject to interrogation?

A Right.

Q Did you review whether Petitioner was in custody at the time he made that voluntary statement?

A Not specifically.

Q And why is that?

A I don't recall.

Q Did you review the totality of the circumstances with what evidence that you had that -- to determine whether Petitioner's statements were voluntary?

A Not that I recall.

Q And you didn't -- you didn't really dive too far into that voluntary statement because you didn't think that it would help your theory of defense; is that right?

A I didn't think it mattered. He's in the hospital, you know, he's got his leg shot up, he's in pain, I believe he might have already been administered some, you know, pain relief medication. You know, typically, you know, defendants will give a -- when they first come into contact with the police they'll give a version that may not -- may be skewed a little bit from the facts, but I was trying to work more off the actual forensic evidence and the physical evidence at the scene.

Q Now turning to regarding asking certain questions at trial, Petitioner claims that you should have asked certain questions at trial and cross-examined certain witnesses a certain way. Petitioner went to trial with two Co-Defendants, David Murphy and Joseph Laguna; is that correct?

A Right.

Q And Murphy and Laguna were represented by their own counsel?

A Right.

Q And were there -- do you recall instances where the Co-Defendants' attorneys would ask questions and so you decided not to repeat them?

A Well, sure.

Q And then regarding the firearms in this case, do you recall Robert Figueroa testifying regarding the firearms that each co-conspirator had the night of the murder?

A I know there was testimony about it. I couldn't tell you if it came from Figueroa or somebody else. But, yeah, there was testimony as to which -- which firearms, and as I recall I think that -- as I recall, Jorge wasn't even going to have a firearm with him and they convinced -- as I recall again, I think they convinced him to bring one.

MS. GRIFFITH: Court's indulgence.

Q (By Ms. Griffith) Would looking at the trial record refresh your recollection on what Mr. Figueroa testified at trial?

A Probably. I don't know if I can see it on my screen but I know there was some testimony about it. I want to say they picked him up and they took Jorge to his house for him to get his gun.

Q And I do have the jury trial transcript from Day 10 on Page 236. I don't know if you can read this at all, Mr. Wolfbrandt.

A I got to get this. Yeah, I can see that. Well, I did.

Q Could you read that to yourself and then I'll ask you a question after? Let me know when you're done.

A All right. Well, whose testimony is that?

Q Robert Figueroa.

A Okay. All right. You're holding it back. It's getting blurry. There we go. Now I'm back to the Judge.

Q And if you need me to move it up or down please let me know.

A No. The problem is every now and then it cuts back to the wide screen of the courtroom.

Well, I think that's what I just was talking about, that they went to his house for him to get a weapon.

Q Okay. And then based on what you read do you recall Figueroa, based on that testimony, testifying that there was a .38 caliber involved and a .40 caliber Ruger involved --

A Right.

Q -- and Petitioner had the .9 millimeter rifle on the night of the murder?

A That's my understanding.

Q And do you recall Petitioner testifying at trial that he was carrying a rifle that night?

A I think so, yeah.

Q And that Petitioner testified he did indeed shoot at the home that night -- back at the home?

A Yes.

Q And the testimony at trial regarding the forensic testing of the victim, Mr. Gibson, revealed that the cause of Mr. Gibson's death was from being shot in the head and the chest?

A I remember the -- I remember a shot to the head. I don't necessarily recall one to the chest.

Q Okay. And there was other testimony at trial that the bullet that was recovered from Mr. Gibson's body at his autopsy shared similar general characteristics with the rifle?

A That's my recollection.

Q There was also testimony at trial that Petitioner's rifle shot .9 millimeter bullets; is that correct?

A As I recall, yes.

Q Ultimately Petitioner testified he shot at the victim, Monty Gibson, and killed him at trial?

A As I recall the way it was postured it was a he shot not specifically at the victim but at the doorway to the house. I don't recall that Jorge even saw that individual, Monty Gibson, I guess; right?

Q Uh-huh. And then you did not ask further questions regarding Petitioner's rifle because of the testimony that he was the individual in possession of the rifle on the night of the murder; is that right?

A I guess so, yeah. I mean all the evidence was that he had it, the blood trail led to, if I recall, a pickup truck -- I want to say a pickup truck where the rifle was found and then the blood trail continued on to a car that Jorge got into.

Q And then as far as questioning or asking questions about whether the other suspects had caused the death of Mr. Gibson, was the reason if you didn't ask about that because of the State's theory of felony murder?

A Yeah. And part of the -- you know, part of the strategy you don't want to insult the intelligence of a jury. You know, you got to take the facts as they're -- as they're presented, and, you know, when it comes to a self-defense defense you've got to affirmatively show that the client was in fear of his life, and then to argue self-defense but some other guy did it is contradictory arguments.

Q And so it wouldn't have mattered if the other suspects had caused Gibson's death based on the State's theory of felony murder?

A No. No. I didn't say that.

Well, I guess I kind of understand where you're going with that. Had one of the other Co-Defendants caused the death --

Q Right. Would that have mattered?

A Probably. I mean I didn't have any indication that was the case and I can't be arguing facts that, you know, are -- that aren't based in evidence, but if -- I guess if a -- one of the Co-Defendants had been the shooter, you know, that actually caused the death I think that made the felony murder rule even stronger.

Q Ms. Lowe asked you about a motion to sever and whether you filed a motion to sever. Do you recall if you did in this case?

A I'm pretty sure -- I'm pretty sure I did not file one on my own, no.

Q Would you have joined Co-Defendant Murphy's motion to sever on May 2nd, 2016? Do you recall that?

A I want to say I did it oral. When it came up for argument I think I orally joined it. I think I did but I mean the record would bear it out, you know, whether I did or didn't. Again, to me with our theory of defense it really didn't matter because, one, I mean I think it was more incumbent on the Co-Defendants to sever us out because I think it was pretty clear that Jorge was going to testify and the other two weren't and that would be the purpose for a severance, one of the reasons for it.

Q And did the Defendant ever talk to you about you filing a motion to withdraw counsel on his behalf? Do you recall that?

A You know, I don't. He might have but I don't recall that. He and I got along really well.

Q And if the Defendant did give you a motion to withdraw counsel to file on his behalf and it was the tenth day of trial would you have filed it?

A Sure. I've had that happen in the past, and absolutely I would bring it up. I'd absolutely make it -- you know, bring it to the attention of the trial Judge through a motion -- either a motion or as we go, you know, before whatever the next session was I'd bring it up without a written motion, but I'd bring it up, we'd have a conversation about it.

Q And are you familiar with the Eighth Judicial District Court Rule 7.40(c) regarding rules and when you can file a motion to withdraw attorney?

A Not anymore. Sorry. You know, I know there's rules about it, but, you know, sometimes, you know, in the course of trial it's all fluid and things pop up at different times and -- as they present themselves then I would present it to the Judge.

Q But you don't recall --

A Like I said, I don't recall any conversation by him wanting me to withdraw as his attorney, and I'm sure, as my normal practice would have been in a criminal case like that, I would have brought it to the attention of the Judge and then the Judge would have a -- you know, a conversation with the client, and if we could resolve things we could and if not -- I actually got out of a trial because my theory on the case was a -- it was a robbery -- burglary/robbery case, and my theory on it, which at the end of the day was a successful theory but the client wanted to do an alibi defense and we had no basis for it whatsoever, and like six, seven days in the trial, you know, I made the motion to -- I needed to withdraw because of a conflict with the client and the Judge granted it and declared a mistrial.

So, yeah, in that situation, you know, when a conflict occurs between myself and a client even in the middle of a trial I always bring it -- I always did bring it to the attention of the Court and let them decide what's the best practice going forward.

Q And then moving on to calling Mr. Joey Larsen, the living victim in this case at the home, do you recall subpoenaing him as a witness in this case?

A I'm pretty sure I did not issue a subpoena for him.

Q Is there a reason you didn't?

A For one I don't think I knew where he was. I was actually kind of anticipating him being a witness for the State and was -- to a certain extent I think it worked to our advantage in my mind that he didn't -- refused to testify and did not make himself available because it made it look more like he had something to hide.

Q So due to the evidence in this case and all those factors you just mentioned, that would have been a reason you didn't call Joey Larsen to testify at trial?

A Right. And I thought he would have been -- even if I had found him he would have been a loose cannon. You would have no idea what he would be testifying to. It seemed to me more that had he -- you know, had he come in to testify and been, you know, adamant as to what his perception was as to what happened it wasn't going to be in our best interest, so, you know, as I recall it was better off that we did not have him be able to argue against us as to why not because he's got something to hide.

MS. GRIFFITH: Court's indulgence. Okay. The State rests -- or passes the witness.

THE COURT: All right. Ms. Lowe, any follow-up?

REDIRECT EXAMINATION

BY MS. LOWE:

Q I just have a couple follow up real quick questions, first being that, Mr. Wolfbrandt, there's been some questioning implying that you couldn't put on certain defenses or you couldn't ask certain questions of the Judge because you had no idea what evidence and no idea what the case was going to resolve out as the witnesses were presented one by one, but didn't you get a chance and did

you review the full case record of discovery that was forwarded to you prior to the trial commencing?

A Well, I had the full case file, but I don't quite understand your question.

Q Okay. So there's -- one of your answers led me to believe that you didn't address with the Judge the jury instructions or proposed jury instructions in advance because you had no idea what people -- there were statements today here in court that you really didn't know how the case was going to unfold, you didn't know what the evidence was going to show, you didn't know what the other people were going to testify to which leads me to believe, based on what you've said here today, that you didn't read the discovery. Did you read the case file prior to commencing the jury trial?

A Okay. I anticipate what witnesses are going to testify based on reading the discovery, and most -- almost all of that testimony came out exactly what I anticipated based on my review of the discovery, all right, but until they actually answer the question on the record you never know exactly what they're going to say.

Q My next question would be to your knowledge were the guns of the other Defendants ever located or turned in as evidence?

A God, I want to say one of them was, but I don't have specific recollection that they were recovered.

Q Thank you.

MS. LOWE: No further questions.

THE COURT: Thank you. May we excuse the witness at this point?

MS. LOWE: Yes.

THE COURT: Okay. All right. Thank you, Mr. Wolfbrandt.

THE WITNESS: Thank you.

THE COURT: Do you have another witness, Ms. Lowe?

MS. LOWE: Yes. I'd like to present Jorge Mendoza.

THE COURT: Okay. Would you swear Mr. Mendoza in?

JORGE MENDOZA,

having been called as a witness, was duly sworn and testified as follows:

THE CLERK: Please state and spell your first and last name for the record.

THE WITNESS: Jorge Mendoza, J-o-r-g-e, M-e-n-d-o-z-a.

THE CLERK: Thank you.

DIRECT EXAMINATION

BY MS. LOWE:

Q Mr. Mendoza, how old are you?

A I'm 38.

Q When did you purchase your first gun?

A I believe I was 21.

Q At the time law enforcement searched your house on the day that this crime occurred, how many guns did you own?

A I believe I only had four left.

Q Why did you own guns?

A Just for recreational shooting.

Q Did you carry them around with you on a daily basis?

A No, never.

Q Were you an expert with a gun?

A No.

Q Did you get certifications for or official training on how to use a gun?

A No.

Q How often did you use a gun?

A Oh, maybe once a year I would go out and just target practice, but maybe once a year.

Q Had you ever shot at anyone before?

A No.

Q Had you ever been shot at before?

A No.

Q When you were being shot at in this case did you think you were going to be killed?

A Yes.

Q Did that cause you extreme stress?

A Yes.

Q When you're under extreme stress are you always able to carefully observe things around you?

A No.

Q Did you shoot in response to being shot at?

A Yes.

Q Why was your blood showing on the ground where it was such to indicate to officers that you were the initial shooter?

A I'm sorry, what was that?

Q Why was your blood on the ground in a location which indicated to officers that you were the initial shooter?

A Because it was --

MR. DIGIACOMO: Judge, I apologize, but I'm going to object as a fact not in evidence.

THE COURT: I'm going to sustain that.

MS. LOWE: Well, there was an officer that testified to that.

Q (By Ms. Lowe) To your knowledge did it take some time for your blood -- the blood to seep through to the ground?

A Yes.

Q And, again, it was your belief that you were shot at first?

A Yes.

Q Did you have your eyes on all three of the other Defendants at the scene of the crime while you were being shot at?

A No.

Q Do you know for a fact that your bullets caused the death of Monty Gibson?

A No.

Q Is it possible that one of the three others there could have caused the death unbeknownced to you?

MR. DIGIACOMO: Objection. Speculation.

MS. LOWE: I'll withdraw the question.

Q (By Ms. Lowe) Prior to arriving at the scene did you observe the other three 24-7?

A No.

Q So you don't know whether they put another gun on their person or in the vehicle?

A No.

Q You don't know how many guns they were carrying?

A No.

Q Were you a member of a gang?

A No.

Q Did you know that the other Defendants were members of a gang?

A Yes.

Q After you were pulled out of the vehicle by law enforcement were you handcuffed?

A Yes.

Q Were you given morphine before going to the hospital?

A Yes.

Q Was that via an IV drip or some other method?

A In the ambulance I was administered a shot and at the hospital it was through IV drip.

Q Were you treated like a suspect of the crime from the beginning of your apprehension by law enforcement?

A Yes.

Q Did you feel up to snuff when law enforcement came to question you at the hospital?

A No.

Q Had you just been given a second morphine drip just minutes before they started questioning you?

A Yes.

Q Did they read you your *Miranda* rights?

A No.

Q Was your leg chained to the bed?

A Yes.

Q Prior to this crime, during your life had you ever been convicted of a crime?

A No.

Q And that was in your adult life?

A I've never been convicted until this.

Q How old were you when Monty Gibson was killed?

A 32.

Q Do you have much knowledge about the legal system or did you prior to this case?

A No, I've never had.

Q Did you rely on the advice of your attorney, Attorney Wolfbrandt, throughout the tenure of his representation?

A Yes.

Q Do you recall the first time you met him?

A Yes.

Q What did he say to you about how the case would be handled?

A He said that it was going to be a self-defense case after speaking with the investigator that he hired.

Q Did he give you an indication that the law might not support self-defense grounds?

A No.

Q Did he tell you that he was going to move to suppress your statements at the hospital?

A Yes.

Q Did he do so?

A No.

Q Did he ever tell you that the law was questionable about whether you had grounds for self-defense?

A No.

Q So he never said anything of this nature, that this defense is not going to work because you were the initial aggressor and you never said, well, I don't care, let's do it anyway?

A No.

Q Did you ever insist that you go forward with a self-defense case against --

A No.

Q -- his better advice?

A No.

Q Would you have waived your right not to testify had you known there were no grounds for self-defense?

A I'm sorry, what was that? One more time.

Q Would you have -- you waived your right not to testify because you thought there were grounds for self-defense. Had you thought there were no grounds for self-defense would you have waived your right to testify and testified anyway?

A No.

Q Would you say you were made a promise in exchange for your testimony that did not turn out to be true?

A Yes.

Q Did you direct Attorney Wolfbrandt not to call Joey Larsen as a witness?

A No.

Q Did you direct him not to cross-examine the other witnesses as to whether someone else might have been the shooter that caused Monty Gibson's death?

A No.

Q Did you ask him to ask certain questions of witnesses?

A Yes.

Q What were those questions?

A I can't recall as to all of them, but some of them had to do with a lot of the bullets and the positioning of them and just how many there were compared to how much I would have even been able to have.

Q Did he respond to your requests?

A No.

Q Did you ask him why he wouldn't ask those questions?

A Yes.

Q And did he answer?

A He did in a dismissive type of way.

Q Did you write a request to the Judge to have a new attorney appointed and give it to Attorney Wolfbrandt to forward to the Judge?

A Yes.

Q What was his response?

A He said that it was too late into the trial, that it was going to be denied anyways and that it was just irrelevant and we would just pretty much upset or irritate the Judge with delaying or procrastinating.

Q Did you have anything to do in helping him draft or giving him advice on his opening or closing argument?

A No.

Q Did you know that he did not do research on whether you had grounds for self-defense?

A No.

Q Did you believe him when he said you had grounds to assert a self-defense?

A Yes.

MS. LOWE: No further questions.

THE COURT: Okay. State?

CROSS-EXAMINATION

BY MR. DIGIACOMO:

Q Mr. Mendoza --

A Yes.

Q -- can you hear me? Do you remember me from the trial?

A Yes, I do.

Q When you testified you testified to a version of events that occurred that night? Do you remember that?

A Yes.

Q Were you telling the truth in your testimony?

A Yes.

Q So I mean you acknowledge that you were part of a conspiracy with three other people to go over and burglarize and rob Joey Larsen's house that night; correct?

A Yes.

Q You were armed with a weapon as well as some of them were armed with a weapon; correct?

A Yes.

Q That when the door gets hit Joey Larsen, who's inside, has a gun and starts shooting back at you guys? Do you remember all of that?

A Yes.

Q And you get hit in the leg?

A Yes.

Q And that leg shatters your femur to the point where you can no longer stand?

A Yes.

Q And you're dragging yourself out into the street as your two Co-Defendants run -- or your three Co-Defendants run away, two of them get into a vehicle, but everybody kind of scatters but you can't scatter; right?

A Yes.

Q And as that's happening someone comes and approaches the -- opens that door from inside of that house and you're in fear of your life?

A Yes.

Q And you fire your weapon?

A After being fired at, yes.

Q You shoot and after you shoot you realized, because you testified to this, you hit somebody in the doorway and ultimately you learned he died?

MS. LOWE: Objection. He already answered that question today, that he didn't know whether his bullet caused the death.

MR. DIGIACOMO: Well, I'm talking about he gave testimony where he acknowledged that he shot and killed.

Q (By Mr. DiGiacomo) So I'm asking him are you telling us today that you're changing your story or are we still sticking with what you testified to?

A I couldn't have been sure if it was -- I just couldn't have been sure.

Q Do you remember me asking you, when you fired the weapon did you have any idea that you hit anybody. And your response being, yes. Do you remember that?

A Yeah. It might be possible.

Q And then I asked you, and after you fired your weapon did the shooting at you cease. And you indicated, yes. Do you remember that?

A Yes.

Q And after that you crawled down the street; right? You kind of slid on your butt I guess you would say?

A I slid before -- before he came out I slid away.

Q Right. You slid away to the middle of the street, the shooting happens and then you slide all the way down almost a half a block to a car; right?

A I slid off to the other side where the casings were found and then I went the other way into the car.

Q And just so that we're all clear, you had a ski mask with you that you were going to use during this robbery; right?

A Yes.

Q And that long rifle, that .9 millimeter rifle that you had, that was the weapon -- it was your weapon that you had gone to the house to pick up to do this robbery?

A Yes.

Q So there's been some discussions about, you know, what your defense is in this case; right? Do you remember your lawyer just asking Mr. Wolfbrandt about that?

A Asking about what?

Q What defenses he discussed with you.

A The only defense he ever discussed with me was self-defense.

Q Well, I mean you shot a guy during the course of a robbery. I guess I'm at a loss as what other defense did you have.

A I don't know. I was trusting on him to know the law. I don't have no idea about law.

Q There's been some questions that have been raised about your statement, so I want to talk to you just briefly about your statement. Okay? So the paramedics took you, gave you some medical attention, maybe even gave you some morphine and then you go to the hospital; correct?

A Yes.

Q You indicated in your testimony here that you believed you were in custody at that point.

A Yes.

Q Do you recall the statement you gave to the police that night?

A Yes.

Q Do you recall Detective Williams and Detective Merrick coming in the room and you reporting yourself as the victim of a crime?

A Yes.

Q And do you recall that after you report this whole story they eventually tell you they don't believe you; right?

A Yes.

Q Do you remember them saying to you, Jorge, this is your chance, you're not under arrest, you're not in handcuffs, you have not been placed in handcuffs, here's your chance to give us the version?

A Yes.

Q Now, you weren't in handcuffs; correct?

A My leg was chained to the bed.

Q I was going to get to that, right. You couldn't walk because your femur was broken; right?

A Yeah. I couldn't walk anyways.

Q And they didn't feel the need to handcuff you; correct?

A Yes.

Q And when they told you, you're not under arrest and you haven't been placed in handcuffs, you would agree with me nowhere in your statement you go, yeah, but my leg is chained to the bed; correct?

A Well, I would just naturally think of handcuffs as it being on your hands, handcuffs.

Q They indicate to you on more than one occasion you're not in custody, you're not in handcuffs and you never object to that concept. You'd agree with that; right?

A Yes.

Q Now, you -- it was your left leg that was shattered; correct?

A Yes.

Q Do you recall that when the detectives came and spoke to you they also photographed you as you were lying in that hospital bed?

A I do not recall.

Q Well, let me show you a photograph. I sent those to Ms. Lowe earlier and I will provide a copy to the Clerk of the Court as well, but I'm going to show you a photograph of you in that bed. Can you see that?

A Yes.

THE COURT: So Mr. DiGiacomo, it didn't show the whole photo. It just kind of -- it's showing more of the top. There we go.

Q (By Mr. DiGiacomo) All right. That's you laying in the hospital; right?

A Yes.

Q You'd agree with me that on this photograph as you're laying in a hospital bed there's no leg chains on you?

A The right leg is covered.

Q Yeah. The right leg is covered by a blanket, but the blanket also goes all the way past where the leg chains would be connected to on the bed. Do you see that?

A It was on -- it could have been on the rail on the bottom.

Q You'd agree with me the first time you ever said anything about having leg chains on in the entire pendency of this case is in the petition filed -- in the affidavit filed in this particular case?

A What's that?

Q You'd agree with me that the first time anywhere it appears in any record, any photograph, anything is the affidavit you provided to your lawyer as part of this petition?

A I don't -- I don't understand what you're trying to say here.

Q Well, would you agree with me that there is no evidence that you're aware of anywhere that you were wearing a leg chain until you filed an affidavit in your PCR?

A No. I don't -- no.

Q All right. You're not aware of anything else out there? You're not aware of anybody else that would say it? You're not aware of anything -- of any evidence?

A Nurses would say that -- that being chained to the bed is procedure for when somebody is brought in as a suspect.

Q But you're reporting yourself as a victim, remember?

A Yes.

Q You would agree with me that in your entire taped statement -- and there were two taped statements that same night; correct?

A Yes.

Q You never acknowledged that you're the killer or that you were involved in a robbery or anything else like that?

A Yes.

Q You maintained, I'm a victim here, I don't know why you guys don't believe me?

A Yes.

Q Sir --

MR. DIGIACOMO: I have no more questions, Judge.

THE COURT: Okay. Any follow-up, Ms. Lowe?

MS. LOWE: One.

REDIRECT EXAMINATION

BY MS. LOWE:

Q Did you feel fully with your wits about you after the two morphine drips --

A No.

Q -- when the officers came in? Actually --

A No.

Q -- it was one morphine drip then one shot you said.

A Correct.

Q And, again, you were -- you were handcuffed on the way to the hospital too; correct?

A Yes.

Q All right.

MS. LOWE: No further questions.

THE COURT: Any follow-up to that last question?

MR. DIGIACOMO: No, Judge.

THE COURT: Okay. Thank you. All right. Ms. Lowe, do you have any other witnesses?

MS. LOWE: No, Your Honor.

THE COURT: So are we ready to proceed with argument?

MS. LOWE: Yes.

THE COURT: All right. Is there anything from the State?

MR. DIGIACOMO: Witness-wise, no. Reserve for argument.

THE COURT: Okay. All right. So, Ms. Lowe, it's your burden, so you may proceed.

MS. LOWE: Your Honor, I just would like to stress first and foremost that we have a burden of preponderance of evidence to show that trial counsel was ineffective and that the facts are on our side, and I have 12 points that I am going to go over briefly that I believe should prove that this case should be overturned given the ineffectiveness of counsel, given that there was prejudice shown and also given that prejudice can be presumed on the current state of law.

First and foremost there was entire failing to test the State's case, and under *Strickland*, *Cronic*, *Swanson* and *Davis v Alaska* with respect to representation at a critical stage prejudice should be presumed. As I discussed in both my briefs, *Swanson* is almost on all fours with respect to his urging his client to take the stand to tell the jury that he's the one who did it. In his opening and his closing -- in *Swanson* it was just the closing statement where the officer basically conceded to one of the elements and in this case Mr. Wolfbrandt testified that in his opening and his closing, which he wrote on his own through no urging of his client and without as he admitted any sort of research on the state of law with respect to self-defense, urged the jury to find him not guilty because he was defending himself.

That was an incorrect statement of law. There were no grounds to do so. The State even in their argument to the Appellate Court called it a -- something to the effect that it was a ridiculous argument to claim that

there's self-defense grounds and the Court, in turn, stated that based on longstanding law in the State of Nevada that there are absolutely no grounds as the initial aggressor for him to be claiming self-defense and denied that. So that's the first point I'd like you to look at. Mr. Wolfbrandt, in addition to that, just standalone was not knowledgeable about the law and self-defense. He didn't do research, he didn't do read research, that was done for him, he made a judgment which was an (indiscernible) statement of law, he urged his client to testify based on this error of law, Mr. Mendoza trusted his counsel that he had self-defense grounds and on that promise he went ahead and testified.

And as I noted even in the plea agreement and even with police interviews, if you're improperly induced to confess to a crime or to agree to a plea agreement, inaccurate grounds of that nature, presumption of prejudice should prevail and he should not have to prove prejudice, but even if he did have to prove prejudice he was found guilty of first degree and his two Co-Defendants were found guilty of second degree, and I think that's the indication that he was prejudiced by his testimony.

Next, and I guess some of these points overlap so there may not be exactly 12, but I do think that it was ineffective of him not to seek an answer from the Judge on such a risky defense prior to his client testifying whether he -- or whether she would admit those self-defense jury instructions so that he could tell his client, listen, we're not going to be allowed the jury instruction, you need to consider this prior to testifying, but he did not do that and, in fact, stated that, well, that's the way it's always done and that he's argued self-defense before in other cases, and I would urge Your Honor not to accept that as a valid reason to overcome the presumption of prejudice for him using a

defense that's -- that's clearly contrary to law in the State of Nevada and has been for quite some time.

This is not new law that he failed to discover because it was too late, this is longstanding law that by his own admission he did not do any research to find. So in addition to his opening, his closing, his advice to counsel and the jury instruction issue we believe that he was ineffective for failing to move to suppress the statements at the hospital. The law stated -- and I think we clearly outlined our argument in the reply and the initial brief, but even one of their own officers testified -- well, he actually said Joey Laguna, when he pulled Joey Laguna out of the car but it was -- it was Mendoza who was pulled out of the car, and that officer testified when the Defendant was pulled out of the car he was handcuffed.

So clearly Mr. Mendoza was right in his assertion that they thought of him as a suspect right from the beginning. In addition to that his mother-in-law testified at the trial that when the officers came to search the house they asked if they could go visit and they said, no, he's -- he's in -- they might not have used the word custody but they said, he's under arrest and you can't -- you can't go see him now. So that's another factor that goes to show that it was the officer's belief that he was under testimony (sic). I believe that the investigators who came to the hospital came directly from the crime scene and so would have known what the other officers were talking about in terms of evidence and him being pulled out of the car and being placed in handcuffs.

So I believe that there was a duty for them to read to him his *Miranda* rights. They did not read to him his *Miranda* rights. He had just received a morphine shot in the ambulance, and then as the hospital records

show he was given a morphine drip which is quite fast-acting once in the hospital just minutes before the officers came to question him. He was awaiting surgery. I'm not sure if this -- there's nothing on this photo which indicates whether it was taken before the surgery, after the surgery, whether it was taken just before the officer -- or I guess you said maybe that the officers took it when they were there or we don't know if they took it from someone else who took the picture at a different time. We don't have the officers' testimony on when exactly this was taken.

So I don't know -- but regardless he does state that his leg at the time the officers came was chained to the bed, that he was feeling woozy from the effect of the morphine, that he was in a considerable amount of pain. I did distinguish case law. There was one case cited whereby the testimony was suppressed very similar to this case, and then in another case the difference was that the fellow was read his *Miranda* rights -- similarly situated but he was read his *Miranda* rights.

In this case, as in the case where it was suppressed, he wasn't allowed to talk to his relatives, his family wasn't allowed to go see him as testified by the mother-in-law, he had been chained going to the hospital, he had been placed in a morphine drip, he wasn't read his *Miranda* rights, he was in a considerable amount of pain having just been shot at, so all of those factors go to show that there should have been a successful motion to suppress but -- and, in fact, Mr. Mendoza testified that he was told by Mr. Wolfbrandt that there would be a motion to suppress.

There was not one, and so both of the statements -- they had two brief interviews of him at the hospital adding up to a little less than an hour,

and both of those statements were played to the jury and it made him look bad and it really violated his due process right and was another ground for showing that trial counsel was ineffective. He did fail, and I believe his -- he forfeited really -- it was a self-forfeit of any sort of questioning of any of the witnesses about whether there was a possibility that someone else could have caused the death, and really as in -- as in the requirements by *Cronic*, *Strickland* and *Swanson* hold the State to their burden of proving their case.

He did not do any of that. He didn't call Joey Larsen. There's two Joey's at issue here, but Joey Larsen, the person who is the only living victim in the case, he did not call him to testify and did not question him as he testified at the Grand Jury that he didn't see who shot his roommate and also that both people started firing, so that would have been a grounds for challenging the effectiveness of Laguna who testified that he never fired a single bullet, never brought out and highlighted the fact, although I believe that the -- one of the neighbors, the former probation agent, did testify that the person he saw do the shooting -- or shooting rather, not do the shooting, was the fellow in the black hat and that would have been Figueroa.

Did not cross-examine him about that, did not cross-examine any of the forensic witnesses about -- about the placement of the bullets, about whether they had done any investigation on finding the other guns and whether the other people could have caused the shooting, did not question Mr. Mendoza at all about whether he -- the extreme stress might have caused him to believe things that weren't actually the case and didn't present an expert on someone to testify about what people go through when they're under extreme stress being shot at and how that affects their ability to observe things.

He didn't move to sever from the other Defendants. I do address this more fully in the brief. That's really a minor point in our argument, but he had said that he thought it might be a good idea to have been separated from them but didn't follow up on that, and he failed to move forward – this is a factual dispute between the two, but Mr. Mendoza does insist that he asked his attorney to resign, asked his attorney to let the Judge know that but he wouldn't do that.

So I guess I conclude that there was an utter breakdown in attorney/client relations, that Mr. Wolfbrandt failed his client entirely, did not do any research on self-defense law, prejudice should be presumed, and also just finally I wish to note and highlight that all defendants are required and allowed under the Sixth Amendment to effective assistance of counsel, not just the ones that you think are probably innocent, and so I urge the Court not to let the evidence on the record overcome Mr. Mendoza's entitlement to due process rights, to effective assistance of counsel, to his right to remain silent. All of those things were violated. Thank you. I have nothing further.

THE COURT: Thank you. Mr. DiGiacomo?

MR. DIGIACOMO: Thank you, Judge. And I agree that every defendant is entitled to the best defense but just not everybody has a defense, and that was sort of the problem for Mr. Mendoza and for Mr. Wolfbrandt in this particular case. And we are now here at a PCR hearing where they just had an evidentiary hearing, and there wasn't a single piece of evidence that was given to you that suggested there was any better defense than what Mr. Wolfbrandt put on. And there's been some mixing of what the problem with the defense was in

this particular case, both in the briefs and argument by counsel. There isn't an initial aggressor problem in this case.

If self-defense instructions had been given the self-defense instructions would have applied. He withdrew from the initial confrontation, and, thus, when deadly force was brought to him he'd have the right to respond. The problem was is that it's a felony murder case, and when there is a felony murder case if the felony murder is still ongoing then self-defense doesn't apply. And so the argument from the State to the Judge was this is still an ongoing offense under *Leonard* and thus it's so closely connected that as a matter of law it's not self-defense. You've done enough trials to know that until the Defendant gives his version of events you're not going to be discussing whether or not the defense gets self-defense instructions or not.

I mean it was the only defense available to Mr. Wolfbrandt and he put that on, and I heard nothing here today that suggests there's any better defense for Mr. Mendoza. As it relates to some of the other issues, so, one, I wouldn't say Mr. Wolfbrandt was ineffective. It was a very effective defense until at the end of the day he couldn't get it past the Judge on jury instructions and the Court affirmed that. As it relates to some of the other issues, I don't even know how you can get to prejudice as it relates to him but there's also been sort of this, you know, kind of melding of issues here.

As it relates to the statement of the Defendant, Ms. Lowe says a motion to suppress should have been filed and she argued it like a *Miranda* violation. I've heard no evidence that was presented here today to suggest that this statement was involuntary, i.e., a violation of the Sixth Amendment. There has been some evidence suggested of a *Miranda* violation and you might ask,

well, why didn't the State try and prove up more. Well, that's because I only used the statements in rebuttal. Tod Williams testified to what Mr. Mendoza told him and we played those tapes in rebuttal after the testimony of Mr. Mendoza.

And so even if a Court had found a *Miranda* violation, I still would have been able to use the evidence in cross-examination of the Defendant and played it in rebuttal because even if there was a *Miranda* violation -- and I would suggest to you that there's overwhelming evidence that suggests that the Defendant wasn't leg chained. Why do you leg chain somebody who can't walk in the first place? He's got a broken femur and he's not handcuffed, and the cops repeatedly tell him he's not in custody and he never responds any differently.

I would also note that while I did show you that photograph there was a significant amount of testimony about Mr. Mendoza in the hospital, the CSA, when the photographs were taken and so the photos are in evidence, so I didn't feel the need to go through all of them because the trial transcript was there. Just checking some of the other issues that were raised by Ms. Lowe, I would suggest to you that there is simply no evidence whatsoever that there was any request by Mr. Mendoza to get rid of his lawyer at any point in time prior to the filing of the supplemental petition.

Mr. Wolfbrandt denies it. Certainly Mr. Wolfbrandt, who's done 60 trials here in Clark County, knows what the rules are. I would note that the Defendant claims it's a written motion but where is that written motion. That's not been placed in the evidence whatsoever. You know, at the end of the day lawyers make tactical decisions about the natures of the defenses, he discussed the case with Mr. Mendoza, Mr. Mendoza didn't have a defense to the actions he

was doing and Mr. Wolfbrandt came up with the best defense he could. At the end of the day there's no way to establish any prejudice to him.

The evidence in this case is so overwhelming of the nature of the case, and the only thing I'll say about how anyone else could be the shooter I'm sure the Court wasn't the one who tried this case, so I'm sure you haven't read all of the trial transcripts. But these four men, according to Mr. Mendoza himself and all the other witnesses for that matter, went up to a house to rob somebody and Joey Larsen and some of the people out front starts shooting back and forth to each other. Mr. Mendoza gets hit in that initial volley and then he's left in the street while everybody else flees, and Mr. Gibson goes to the door to like look out the door to see if they're still there, there's a significant gap in time and then there's a .9 millimeter bullet and the only .9 millimeter at the scene was Mr. Mendoza's.

The bullet is consistent with the rifle. The casings in the street matched the rifle. He's found with the rifle and the ski mask at the scene with the blood trail that leads from the front door to the place they found him. And so I don't know what defense Mr. Larsen – they didn't even call Mr. Larsen at this evidentiary hearing. What was he going to add to the testimony. They didn't call any other witness. They just basically put on Mr. Mendoza to say, well, I wish I had a better defense but I just don't, and so I'll submit it to the Court.

THE COURT: All right. Well, so in looking at what has been alleged here, so, Ms. Lowe, that you're putting forward that Mr. Wolfbrandt was ineffective because he entirely failed to test the State's case, that he urged his client to take the stand, that he had no research on the state of the law with respect to self-defense and had an incorrect theory, I guess I should say, as to

what the state of the law was and was not knowledgeable about the law on self-defense, so let me – let me just address a few things on those.

So as to urging his client to take the stand, I did review the part of the transcript which Judge Ellsworth went through with the Defendant regarding his right to testify on his own behalf and no one can force him to testify and that the State can't comment on him not testifying, so I don't find the allegation that Mr. Wolfbrandt made a promise in exchange for testifying persuasive.

And, you know, as to the not knowing about the law of self-defense and the first aggressor and not putting forth the jury instruction ahead of time, I will say that, you know, in looking at the Court of Appeals decision, you know, they were reviewing Judge Ellsworth's decision for abuse of discretion or judicial error, and, you know, the first thing that they say is generally the defense has the right to have the jury instructed on a theory of the case as disclosed by the evidence no matter how weak or incredible that evidence may be.

So no matter how weak or incredible his theory was regarding there was a break in between the actual felonies of robbery and burglary and his escaping, you know, I don't find it to be ineffective for him to offer that jury instruction and I don't find it to be ineffective for him to ask for that jury instruction after the close of evidence since it is based on what the evidence that is presented, and until Mr. Mendoza testifies there's not really the evidence of the self-defense.

As to failing to move to suppress the statements of Mr. Mendoza or putting forth or asking questions about someone else could have caused the death, I didn't find how suppressing the statement would have made

a difference, and, Ms. Lowe, I don't think you made it clear how that would have made a difference in the proceedings had his statement been suppressed and/or there had been questions about who could have caused the death.

As far as putting forth the letter to ask the Judge regarding the dismissal of Mr. Wolfbrandt on the tenth day of trial, so under the Eighth Judicial District Court rules, you know, you can ask for removal of counsel but not if it's going to delay a trial, so I don't find that it was ineffective if he'd been given a letter for him not to put forth that letter to Judge Ellsworth.

So even if I found that all of these matters led to ineffective assistance of counsel under *Strickland*, you still have the second prong, which is that there would be reasonable probability that the result of the proceedings would have been different, and I don't find that that second prong is met even if I were to assume that you had demonstrated by a preponderance of the evidence that counsel was ineffective, and I'm not necessarily saying that I have but even with all that, even assuming all of those contentions that you've put forth about Mr. Wolfbrandt's ineffective assistance of counsel, I do not find that the second prong is met, therefore, I'm going to deny the petition at this time. Thank you.

I guess I should ask, State, will you prepare the order? You're muted.

MR. DIGIACOMO: Can you hear me now?

THE COURT: Yes.

MR. DIGIACOMO: Okay. One procedural issue is we addressed the supplemental and I don't know – like there was a pro per petition. I assume that the supplemental took place of the pro per and we're denying it or are we

going to address the pro per stuff that wasn't addressed in the evidence this morning at all?

THE COURT: I had assumed that the supplemental had basically subsumed the pro per petition, so –

MR. DIGIACOMO: Thank you.

THE COURT: -- I would find that to be part of the supplemental since that was the one that put forth the arguments for the evidentiary hearing.

MR. DIGIACOMO: Perfect. Thank you, Judge.

THE COURT: Okay. And then, State, will you prepare the order?

MR. DIGIACOMO: We will.

THE COURT: All right. Thank you.

(Whereupon, the proceedings concluded.)

* * * * *

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

LISA A. LIZOTTE
Court Recorder

OBJ
LOWE LAW, L.L.C.
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Attorney for Petitioner
JORGE MENDOZA

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY NEVADA

JORGE MENDOZA, Petitioner, vs. CALVIN JOHNSON, WARDEN OF HIGH DESERT STATE PRISON. Respondent.	Case No.: A-19-804157-W DEPT NO I [Stemming from C-15-303991-1] OBJECTION TO PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW & ORDER

COMES NOW, Petitioner, JORGE MENDOZA, by and through his counsel of record DIANE C. LOWE, ESQ., and hereby Objects to the Proposed Findings of Fact, Conclusions of Law & Order received March 12, 2021.

Dated this 14th day of March, 2021.

Respectfully Submitted,
/s/ Diane C. Lowe
DIANE C. LOWE ESQ. Nevada Bar #14573

POINTS AND AUTHORITIES

1. On Friday March 12, 2021 this counsel received a copy of the Proposed Findings of Fact, Conclusions of Law & Order submitted to Your Honor by the State.
2. The Court must ensure that the other parties are apprised of the request to have the State prepare the proposed Findings of Fact, Conclusions of Law & Order and to give the other parties the opportunity to respond to the proposed findings and conclusions. NCJC Canon 3B(7) cmt. We were apprised of this having witnessed it at the evidentiary hearing and hereby exercise our right to comment and request revisions and or additional rulings.
3. There are several cases that support objections to verbatim adoption of findings of fact order prepared by the prevailing parting. Anderson v Bessemer City, 470 U.S. 564, 572 (1985); United States v. Marine Bancorporation, Inc., 418 U.S. 602, 615, fn13 (1974) (noting that the lower court's verbatim adoption of the pre-vailing party's proposed findings of fact "failed to heed this Court's admonition voiced several decades ago." *See also* United States v. El Paso Natural Gas Co, 376 U.S. 651, 545-7 & fn.4(1964); In re Colony Square, 819 F.2d 272, 274 (11th Cir. 1987); Cuthbertson v. Biggers Bros., Inc., 702 F.2d 454, 458 (4th Cir. 1983).

4. We believe that important issues were not addressed.

5. We ask that the Judge rule on them in her Conclusions of Law & Order.

6. We believe we sufficiently raised these issues to require a ruling.

7. But even if this Court feels they were not sufficiently raised in the Petition and Supplement and only fully discussed at the Reply and Evidentiary hearing, we ask this Court to use its authority to consider them and make a ruling on them per State v Powell: A trial court has the discretion to permit a habeas petitioner to assert new claims even as late as the evidentiary hearing on the petition. State v. Powell, 122 Nev. 751, 754, 138 P..3d 453, 455 (1998).

8. The specific issues we would like the Court to Rule on in her Order but that we do not see in the proposal are (it is quite lengthy – 48 pages - but 2 reviews gives this reader the impression they have been overlooked partially or fully):

   - Ground 1 is inaccurately depicted as having solely to do with erroneous advice by counsel to Mr. Mendoza to testify despite self-defense instructions not having been agreed to yet by the court. Ground 1 states:

     'Ineffective Assistance of Counsel: Failure to properly advise client that self-defense jury instructions had not been approved prior to his testifying; nor was caselaw on his side; leading him for all practical purposes to take the stand, waive his right to remain silent and confess to first degree murder with no conceivable benefit for doing so as well as all the other charges against him.'

As we argued throughout the briefs - and at oral argument we clearly asserted and meant also - that Mr. Mendoza was given wrong advice on the state of the caselaw which improperly induced him to testify and also throughout the trial led to ineffectiveness; the operative words being "nor was caselaw on his side" The body of the text after this heading commences in the supplement on pages 16-17 clearly supports this interpretation:

> Mr. Mendoza waived his right to remain silent not just on advice of counsel that was poor strategy – it was wrong. Wrong in a manner that exceeds the type of 'demonstrable error' contemplated in U.S. v Cronic. United States v. Cronic, 466 U.S. 648, 649, 104 S. Ct. 2039, 2041 (1984).
> It was an incorrect interpretation of self-defense caselaw and jury instructions. Like the attorney who does absolutely no testing of the facts of a case, Mr. Woflbrandt did that as well, but he also failed fully or even minimally to test the law. The same apathy of defense transferred fully to an apathy of research.
>
> Further it was ineffective for Attorney Wolfbrandt to urge Mr. Mendoza to testify prior to determining how the judge would rule on the self-defense jury instruction issue. Mr. Mendoza was made promises of a valid self-defense presentation and based on those promises he waived his rights took the stand and confessed to first degree murder and all the other crimes as well. With a plea agreement the judge makes sure and is required to ensure that no promises were made to induce the defendant to commit to a plea agreement. If it later turns out there was a false promise it can invalidate the whole plea. Mr. Wolfbrandt failed to provide meaningful adversarial testing by insisting to his client that he take the stand assuring him he had legal grounds for self-defense. Far worse than a few words at closing - he had his client pronounce to the jury that there was 'no reasonable doubt regarding the only factual issues in dispute.' The Swanson jury could have taken the closing with a grain of salt and decided we do not agree with the

> trial counsel's assessment and are not going to convict. Nothing in the Opinion states that he misstated evidence presented or told them his opinion was the law. ....

This latter interpretation is important – because the court should rule – we ask that the court rule - not just on whether the State was ineffective on failing to get a ruling on jury instructions on self-defense prior to his client taking the stand; but also - failure to advise him properly on the state of self-defense law in total. And failing to argue the law correctly at the jury trial. And failure to do any research. Additional rulings requested on:

- Failure to provide proper advice on the status of self-defense caselaw including to the jury. [Supp: page 8, 16- 27, Rply 2-29; Evid Hearing: 7, 9, 33, 34, 35, 36].
- Failure to conduct research on the status of self-defense caselaw. [Supp: page 17-27; Evid. Hearing: 8 lines 23-5, 10, 11, 19].
- Inaccurate law on self-defense - trial counsel's reliance on incorrect interpretation on self-defense for opening statement and closing argument [Supp 17-18, 27 – Rply 2-3; Evid Hearing: 8, 9, 36, 46].
- Inaccurate advice on the state of self-defense caselaw induced his client to take the stand and confess to killing the victim; This inducement was a

form of coercion that violated his right to remain silent and prohibited him from being able to properly exercise his constitutional right to decide for himself whether he should testify or not. [Supp page 8, 17-27; Rply 3-5, 6-14; Evid. Hearing: 34, 35]

- Brought up Mr. Mendoza's Heroin use when he was not charged with it nor was it on the record [Supp page 27, Evid Hearing 10]
- Complete failure to test the State's case. [Supp page 8-16, 24-27, 28-30; Rply: 14-15, Evid Hearing 8, 10, 12; Evid. Hearing 12-16, 48]
- We also ask that the court to rule on whether these are errors which if true could lead to presumed prejudice. We argue that prejudice should be presumed given the constitutional magnitude of errors and that even if prejudice is not presumed it should be found given his two co defendants gang members with criminal records and one David Murphy being the ring leader of the crime – were convicted of second degree murder and Mr. Mendoza was convicted of first degree. We believe that we showed and argued that the failure of counsel to test the state's case by focusing on the fact that Mr. Figueroa testified that he - when he was looking back - did not see Mr. Mendoza shooting at the deceased and further that he himself did not ever shoot his weapon when in fact the neighbor testified that he saw him shooting his weapon at the house would have planted

reasonable doubt in the minds as to whether Mr. Mendoza was the shooter. Further the fact that there were no questions as to the other 2 defendants – of any of the witnesses regarding whether it was possible that they had the same type of bullets in their guns and could have shot at the house and caused the death – whether their homes were searched, whether Mr Figueroa could have turned in the wrong gun when he handed it over to police or whether any or all of them could have been carrying two guns. All of this could have planted reasonable doubt in the jury's minds and led him to be convicted of second degree like the other 2 defendants instead of first degree as he was.

- Finally, it is unclear whether the hospital report submitted by Petitioner and the photo of him in the hospital submitted by the State are considered a part of the record and thus can be included in the appendices to the Supreme Court so if you could rule on that it would be helpful as well. Neither party appeared to object to admission of either and neither you will recall provided certificates of authenticity or testimony verifying such. [Transcript of Evidentiary Hearing page 4-5, 41, 42, 46-7].

CONCLUSION

We would be happy to provide further detail of the above requested additional rulings should this Court find helpful. And conclude by asking that the court rule on these issues stated above that were presented in briefing and oral argument but appear to have been overlooked in the court's concluding statements at the Evidentiary hearing and in the draft final Findings of Fact, Conclusions of Law & Order provided for comment.

DATED this 14th day of March 2021.

Respectfully Submitted,

/s/ Diane C. Lowe, Esq.
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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED, by the undersigned that on this 14th day of March 14, I served a true and correct copy of the foregoing Objection to Proposed Findings of Fact, Conclusions of Law and Order:

BY E-MAIL eFile Service: by transmitting a copy of the document in the format to be used for attachments to the electronic-mail address designated by the attorney or the party who has filed a written consent for such manner of service: motions@clarkcountyda.com

Prosecutor Taleen Pandukht Taleen.Pandukht@clarkcountyda.com

By: /s/Diane C Lowe, Esq.
DIANE C. LOWE
LOWE LAW, L.L.C.

ELECTRONICALLY SERVED
4/2/2021 10:51 AM

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DISTRICT COURT

CLARK COUNTY, NEVADA

JORGE MENDOZA, #2586625 Petitioner, vs. THE STATE OF NEVADA, Respondent.	Case No. A-19-804157-W (C-15-303991-1) Dept. No. I

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: FEBRUARY 23, 2021
TIME OF HEARING: 1:00 PM

THIS CAUSE having come on for hearing before the Honorable BITA YEAGER, District Judge, on the 23rd day of February, 2021, the Petitioner present, REPRESENTED BY DIANE CAROL LOWE, the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through MARC P. DIGIACOMO, Chief Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

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Case Number: A-19-804157-W

FINDINGS OF FACT, CONCLUSIONS OF LAW

PROCEDURAL HISTORY

On February 27, 2015, Jorge Mendoza ("Petitioner") was charged by way of Superseding Indictment with: Count 1 – Conspiracy to Commit Robbery (Category B Felony - NRS 199.480), Count 2 – Burglary While in Possession of a Deadly Weapon (Category B Felony - NRS 205.060), Count 3 – Home Invasion While in Possession of a Deadly Weapon (Category B Felony - NRS 205.060), Counts 4 and 5 – Attempt Robbery With Use of a Deadly Weapon (Category B Felony - NRS 193.330, 200.38), Count 6 – Murder with Use of a Deadly Weapon (Category A Felony - NRS 200.010), and Count 7 – Attempt Murder With Use of a Deadly Weapon (Category B Felony- NRS 200.010).

On April 3, 2016, Petitioner's Co-Defendant, David Murphy ("Murphy"), filed a Motion to Sever. On May 2, 2016, Petitioner's counsel requested to join in Murphy's Motion to Sever. The Court denied the Motion on May 9, 2016. On September 8, 2016, Petitioner's Co-Defendant, David Murphy, filed a Motion to Exclude Summer Larsen. The Court denied this Motion on September 9, 2016.

On September 12, 2016, Petitioner's jury trial commenced. On October 7, 2016, the jury found Petitioner guilty of all counts.

On December 12, 2016, the Judgment of Conviction was filed and Petitioner was sentenced as follows: COUNT 1– maximum of seventy-two (72) months and a minimum of twenty-four (24) months in the Nevada Department of Corrections (NDC); COUNT 2– maximum of one-hundred eighty (180) months and a minimum of forty-eight (48) months, Count 2 to run concurrently with Count 1; COUNT 3– maximum of one-hundred eighty (180) months and a minimum of forty-eight (48) months, Count 3 to run concurrently with Count 2; Count 4– maximum of one-hundred twenty (120) months and a minimum of thirty-six (36) months, plus a consecutive term of one-hundred twenty (120) months and a minimum of thirty-six (36) months for the Use of a Deadly Weapon, Count 4 to run concurrently with Count 3; COUNT 5– maximum of one hundred twenty (120) months and a minimum of thirty-six (36) months, plus a consecutive term of one-hundred twenty (120)

months and a minimum of thirty-six (36) months for the Use of a Deadly Weapon, Count 5 to run concurrently with Count 4; COUNT 6– life with a possibility of parole after a term of twenty (20) years have been served, plus a consecutive terms two-hundred forty (240) months and a minimum of thirty-six (36) months for the Use of a Deadly Weapon, Count 6 to run concurrently with Count 5; COUNT 7– maximum of two-hundred forty (240) months and a minimum of forty-eight (48) months, plus a consecutive term of two-hundred forty (240) months and a minimum of thirty-six (36) months for the Use of a Deadly Weapon, Count 7 to run concurrently with Count 6. Petitioner received eight hundred (800) days credit for time served. His aggregate total sentence is life with a minimum of twenty-three (23) years in the Nevada Department of Corrections. The Judgment of Conviction was filed on December 2, 2016.

On December 22, 2016, Petitioner filed a Notice of Appeal. The Nevada Supreme Court affirmed Petitioner's conviction on October 30, 2018. Remittitur issued on November 27, 2018.

On October 18, 2019, Petitioner filed a Petition for Writ of Habeas Corpus, a Motion to Amend, Motion for Appointment of Counsel, and Request for Evidentiary Hearing ("Petition"). On January 13, 2020 Petitioner's Motion for Appointment of Counsel was granted. On September 20, 2020, the instant Supplemental Brief in Support of Petitioner's Postconviction Petition for Writ of Habeas Corpus was filed ("Supplemental Petition"). The State filed its Response on November 19, 2020. On December 14, 2020, Petitioner filed a Reply.

On January 23, 2021, Petitioner filed a Motion for Leave to Add to Record of Hospital Records. On February 23, 2021, the Court held an evidentiary hearing in which Petitioner and trial counsel, William L. Wolfbrandt, testified. At the hearing, the Petitioner moved for the admission of Petitioner's medical records from September 2014, to which the State did not object. The State introduced a photo from the hospital, which the Petitioner did not object to its admission. The records and the photo were admitted as part of the record for

the hearing. After such testimony and argument by the parties, the Court denied Petitioner's Petition and found as follows.

FACTS

On September 21, 2014, Petitioner invaded the house of Joseph Larsen ("Larsen") and Monty Gibson ("Gibson"), shooting and killing Gibson. That evening, Steve Larsen, Larsen's father, called Larsen and informed him that Larsen's house was going to be robbed and that Summer Larsen ("Summer"), his estranged wife, was the reason why. Jury Trial Day 5 at 24-25.

On or around July 2014, Summer broke into Larsen's house and stole $12,000 as well as approximately twelve (12) pounds of marijuana. Jury Trial Day 6 at 98. She later told co-defendant, David Murphy ("Murphy"), that she had done so, and he asked her why she did not bring him along. Jury Trial Day 6 at 99. Summer suggested that they could burglarize Larsen's supplier's house. Jury Trial Day 6 at 99. Summer also told Murphy that Larsen's supplier obtained between one hundred (100) and two hundred (200) pounds of marijuana weekly and described the procedure whereby Larsen's supplier obtained the marijuana and whereby Larsen later purchased marijuana from his supplier. Jury Trial Day 6 at 100-02. Summer then showed Murphy where Larsen's supplier's house was located. Jury Trial Day 6 at 103. After having several more conversations about robbing Larsen's supplier, Murphy told Petitioner that he knew of a place they could burglarize to help Petitioner get some money. Jury Trial Day 14 at 88.

At 4:00 AM on September 21, 2014, Murphy called Petitioner. Jury Trial Day 14 at 89-90. Petitioner then left his house to meet at Murphy's house in his Nissan Maxima. Jury Trial Day 14 at 89-90. He picked up Murphy, and the two (2) of them drove to co-defendant Joey Laguna's ("Laguna") house. Jury Trial Day 14 at 91. Petitioner then drove Laguna to Robert Figueroa's ("Figueroa") house, arriving around 7:30 AM. Jury Trial Day 14 at 91-92. Figueroa got into the car with a duffel bag. Jury Trial Day 14 at 92. Petitioner, Laguna, and Figueroa then drove to an AMPM gas station to meet back up with Murphy. Jury Trial Day 14 at 93. Murphy had an older white pick-up truck and was waiting with a Hispanic woman

with tattoos. Jury Trial Day 14 at 95. The woman drove Petitioner's vehicle, and Murphy led in his pick-up truck. Jury Trial Day 14 at 96-97. The two cars drove to the neighborhood where Larsen's supplier lived, but a lawn maintenance crew was detailing a yard a few houses away. Jury Trial Day 14 at 99-100. Ultimately, no burglary occurred because the woman drove Petitioner's car out of the neighborhood. Jury Trial Day 14 at 103.

The group then proceeded back to Laguna's house, where they engaged in further discussions about attempting the robbery again or committing a robbery elsewhere. Jury Trial Day 14 at 103-04. Petitioner and Figueroa left shortly thereafter. Jury Trial Day 14 at 105. Around 6:00 PM, Murphy told Petitioner to pick up Figueroa. Jury Trial Day 14 at 158. Petitioner did so, then proceeded to Laguna's house, stopping on the way at Petitioner's house so that Petitioner could arm himself with a Hi-point rifle. Jury Trial Day 14 at 139-141. When they arrived at Laguna's house, Laguna came outside. Jury Trial Day 14 at 142. Figueroa asked who they were going to rob, and Murphy answered. Jury Trial Day 14 at 141-42.

Eventually, the four of them left in Petitioner's car, with Murphy driving because he knew where they were going. Jury Trial Day 14 at 143-44. They drove to Laguna's house. Jury Trial Day 14 at 144-45. On the way, the group decided to break into Larsen's house. Jury Trial Day 14 at 145. Figueroa was to enter the house, get everyone under control, Petitioner was to enter the house and grab the marijuana from upstairs, and Laguna was to stay outside and provide cover in case someone unexpectedly appeared. Jury Trial Day 14 at 146.

When they arrived, Murphy dropped them off, drove a short distance up the street, and made a U-turn to face the house in order to prepare to drive them away. Jury Trial Day 14 at 146-47. Figueroa broke through the front door and entered the home as Petitioner remained near the door with his rifle. Jury Trial Day 14 at 148. Shortly thereafter, gunfire erupted. Jury Trial Day 14 at 149. Figueroa was struck by a bullet in his face, dropped to the floor, and then was struck on his left side as he turned to flee out the door. Jury Trial Day 11 at 9. Figueroa ran down the street. Jury Trial Day 11 at 9. Petitioner began firing his rifle

into the house before he was shot in the leg and fell into the street. Jury Trial Day 14 at 156-57. Laguna ran out into the street as well. Jury Trial Day 14 at 157. Petitioner could not walk, so he scooted away from the house with the rifle still in his hands. Jury Trial Day 14 at 160-62. Petitioner continued firing his rifle at the house, killing Gibson. Jury Trial Day 14 at 163-64; Jury Trial Day 6 at 41.

While the shooting was occurring, Murphy picked up Laguna and fled the scene, stranding Petitioner and Figueroa. Jury Trial Day 11 at 15, 28. Petitioner scooted to an abandoned car and crawled inside, where he waited until the police followed his blood trail and apprehended him. Jury Trial Day 14 at 167. Figueroa managed to escape down the street and hide in a neighbors' backyard for several hours. Jury Trial Day 11 at 15-17. Figueroa called Laguna, who did not answer; Murphy then called Figueroa and told him that he was not going to pick him up. Jury Trial Day 11 at 17-19, 31. Subsequently, Figueroa called "everybody in [his] phone" over the next eight (8) or nine (9) hours until his sister agreed to pick him up. Jury Trial Day 11 at 31-35. By then, Petitioner had been apprehended and everyone else had escaped. Jury Trial Day 5 at 125-26; Jury Trial Day 10 at 245. Murphy later drove Petitioner's wife to Petitioner's car so that she could retrieve it. Jury Trial Day 10 at 40. Figueroa went to California and received medical care for his injuries. After he returned, he was apprehended by police on October 20, 2014. Jury Trial Day 12 at 107.

At trial, both Figueroa and Petitioner testified, generally consistently, as to the events described above. Jury Trial Day 14 at 79-230; Jury Trial Day 10 at 207-251; Jury Trial Day 11 at 3-145; Jury Trial Day 12 at 3-90. Additionally, the jury was presented with cell phone records that demonstrated Murphy, Petitioner, Laguna, and Figueroa were talking to each other, and moving throughout the city together at the times, and to the locations, indicated by Petitioner and Figueroa. Jury Trial Day 8 at 21-86; Jury Trial Day 10 at 63-203.

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ANALYSIS

I. INEFFECTIVE ASSISTANCE OF COUNSEL STANDARD

The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." The United States Supreme Court has long recognized that "the right to counsel is the right to the effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993).To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063-64; see also Love, 109 Nev. at 1138, 865 P.2d at 323. Under the Strickland test, a defendant must show first that his counsel's representation fell below an objective standard of reasonableness and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. Strickland, 466 U.S. at 687-88, 694, 104 S. Ct. at 2065, 2068; Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-part test). "[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

The court begins with the presumption of effectiveness and then must determine whether the defendant has demonstrated by a preponderance of the evidence that counsel was ineffective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). "Effective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v. Warden, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975).

Moreover, counsel cannot be ineffective for failing to make futile objections or arguments. See Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). To be effective, the constitution "does not require that counsel do what is impossible or unethical.

If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade." United States v. Cronic, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

"There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689, 104 S. Ct. at 689. "Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). In essence, the court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.

The decision not to call witnesses is within the discretion of trial counsel and will not be questioned unless it was a plainly unreasonable decision. See Rhyne v. State, 118 Nev. 1, 38 P.3d 163 (2002); Dawson v. State, 108 Nev. 112, 825 P.2d 593 (1992). Strickland does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense. In many instances cross-examination will be sufficient to expose defects in an expert's presentation. When defense counsel does not have a solid case, the best strategy can be to say that there is too much doubt about the State's theory for a jury to convict. Harrington v. Richter, 131 S.Ct. 770, 791, 578 F.3d. 944 (2011). "Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992).

II. PETITIONER'S PRO PER CLAIMS FAIL

In Petitioner's Pro Per Petition, Petitioner seemingly argued the following: (1) his "co defendant Summer Larsen was incorrectly allowed to testify at trial in violations of Const 1-14," (2) the "State improperly permitted cell phone records in violation of Const 1-14," (3) the "court abused its discretion by allowing Figueroa's agreement to testify in violation of Const 1-14," (4) the "court erred by refusing Appellant to instruct jury on self defense," (5)

"cumulative error warranted reversal U.S.C.A. 1-14," and (6) "trial counsel was ineffective." First, Claims One (1) through Five (5) are barred by the doctrine of res judicata as having already been raised in Petitioner's direct appeal. Second, Claims One (1) through Five (5) are waived. Third, such claims lack merit. Fourth, Petitioner has failed to provide legal or factual support for his final claim of ineffective assistance of trial counsel.

A. Petitioner's Claims 1-5 Are Procedurally Barred

1. Petitioner's claims 1-5 are barred by the doctrine of res judicata

"The law of a first appeal is law of the case on all subsequent appeals in which the facts are substantially the same." Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (quoting Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969)). "The doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." Id. at 316, 535 P.2d at 799. Under the law of the case doctrine, issues previously decided on direct appeal may not be reargued in a habeas petition. Pellegrini v. State, 117 Nev. 860, 879, 34 P.3d 519, 532 (2001) (citing McNelton v. State, 115 Nev. 396, 414-15, 990 P.2d 1263, 1275 (1999)). Furthermore, this Court cannot overrule the Nevada Supreme Court. NEV. CONST. Art. VI § 6. See Mason v. State, 206 S.W.3d 869, 875 (Ark. 2005) (recognizing the doctrine's applicability in the criminal context); see also York v. State, 342 S.W. 528, 553 (Tex. Crim. Appl. 2011). Accordingly, by simply continuing to file motions with the same arguments, his motion is barred by the doctrines of the law of the case and res judicata. Id.; Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975).

In the instant matter, Petitioner previously raised Claims one (1) through (5), in that order, in his direct appeal. Order of Affirmance, Docket No. 72056, filed Oct. 30, 2018. The Nevada Court of Appeals denied all five (5) of these claims and affirmed Petitioner's Judgment of Conviction. Thus, such claims are barred by the doctrine of res judicata.

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2. Petitioner's claims 1-5 are also waived

Pursuant to NRS 34.810:

1. The court shall dismiss a petition if the court determines that:
(a) The petitioner's conviction was upon a plea of guilty or guilty but mentally ill and the petition is not based upon an allegation that the plea was involuntarily or unknowingly entered or that the plea was entered without effective assistance of counsel.

(b) The petitioner's conviction was the result of a trial and the grounds for the petition could have been:
(1) Presented to the trial court;
(2) Raised in a direct appeal or a prior petition for a writ of habeas corpus or postconviction relief; or
(3) Raised in any other proceeding that the petitioner has taken to secure relief from the petitioner's conviction and sentence, unless the court finds both cause for the failure to present the grounds and actual prejudice to the petitioner.
2. A second or successive petition must be dismissed if the judge or justice determines that it fails to allege new or different grounds for relief and that the prior determination was on the merits or, if new and different grounds are alleged, the judge or justice finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.
3. Pursuant to subsections 1 and 2, the petitioner has the burden of pleading and proving specific facts that demonstrate:
(a) Good cause for the petitioner's failure to present the claim or for presenting the claim again; and
(b) Actual prejudice to the petitioner.
The petitioner shall include in the petition all prior proceedings in which the petitioner challenged the same conviction or sentence.
4. The court may dismiss a petition that fails to include any prior proceedings of which the court has knowledge through the record of the court or through the pleadings submitted by the respondent.

The Nevada Supreme Court has held that "challenges to the validity of a guilty plea and claims of ineffective assistance of trial and appellate counsel must first be pursued in post-conviction proceedings.... [A]ll other claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be *considered waived in subsequent*

proceedings." Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added) (*disapproved on other grounds by* Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)). "A court must dismiss a habeas petition if it presents claims that either were or could have been presented in an earlier proceeding, unless the court finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner." Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001).

Furthermore, substantive claims are beyond the scope of habeas and waived. NRS 34.724(2)(a); Evans v. State, 117 Nev. 609, 646–47, 29 P.3d 498, 523 (2001); Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), disapproved on other grounds, Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999). Under NRS 34.810(3), a defendant may only escape these procedural bars if they meet the burden of establishing good cause and prejudice. Where a defendant does not show good cause for failure to raise claims of error upon direct appeal, the district court is not obliged to consider them in post-conviction proceedings. Jones v. State, 91 Nev. 416, 536 P.2d 1025 (1975).

In the instant matter, not only are Petitioner's Claims One (1) through Five (5) barred by the doctrine of res judicata, but a petition is not the appropriate mechanism for this Court to review such substantive claims. Petitioner had the opportunity to raise his claims in his direct appeal and did so. Thus, dismissal would be appropriate absent a showing of good cause and prejudice.

3. Petitioner has not shown good cause or prejudice to overcome the procedural defaults

i. Summer Larsen's testimony

First, assuming Petitioner is asserting the same argument he raised in his direct appeal, Petitioner alleges that the Court erred in allowing Summer to testify at trial because the State acted in bad faith by untimely disclosing her as a witness. The Nevada Court of Appeals concluded that Petitioner failed to object to Summer's testimony on the grounds of bad faith below, so the issue could not be reviewed. Order of Affirmance, Docket No. 72056, filed Oct. 30, 2018. It further stated that even if upon review the district court abused its

discretion, such error would be harmless based on the underlying facts. Id. Appellant cannot demonstrate that the Court erred by allowing the testimony at trial. NRS 174.234 states in relevant part:

> 1. Except as otherwise provided in this section, not less than 5 judicial days before trial or at such other time as the court directs:
>
> (a) If the defendant will be tried for one or more offenses that are punishable as a gross misdemeanor or felony:
>
> (1) The defendant shall file and serve upon the prosecuting attorney a written notice containing the names and last known addresses of all witnesses the defendant intends to call during the case in chief of the defendant; and
>
> (2) The prosecuting attorney shall file and serve upon the defendant a written notice containing the names and last known addresses of all witnesses the prosecuting attorney intends to call during the case in chief of the State.
>
> 2. If the defendant will be tried for one or more offenses that are punishable as a gross misdemeanor or felony and a witness that a party intends to call during the case in chief of the State or during the case in chief of the defendant is expected to offer testimony as an expert witness, the party who intends to call that witness shall file and serve upon the opposing party, not less than 21 days before trial or at such other time as the court directs, a written notice containing:
>
> (a) A brief statement regarding the subject matter on which the expert witness is expected to testify and the substance of the testimony;
>
> (b) A copy of the curriculum vitae of the expert witness; and
>
> (c) A copy of all reports made by or at the direction of the expert witness.
>
> 3. After complying with the provisions of subsections 1 and 2, each party has a continuing duty to file and serve upon the opposing party:
>
> (a) Written notice of the names and last known addresses of any additional witnesses that the party intends to call during the case in chief of the State or during the case in chief of the defendant. A party shall file and serve written notice pursuant to this paragraph as soon as practicable after the party determines that the party intends to call an additional witness during the case in chief of the State or during the case in chief of the defendant. The court shall prohibit an additional witness from testifying if the court determines that the party acted in bad faith by not including the witness on the written notice required pursuant to subsection 1.

As is clear from the statute, the State must file a notice of witnesses it intends to call in its case in chief. On September 6, 2016, Summer Larsen entered a plea of guilty in the instant case and agreed to waive her Fifth Amendment privilege against self-incrimination.

Until she entered her plea, was canvassed by the Court, and the Court accepted her plea, the State had no ability to call her as a witness. Upon the Court accepting her plea, Petitioner and the other co-defendants were notified immediately and provided the Guilty Plea Agreement, Amended Indictment, and Agreement to Testify on September 6, 2016. As it was late in the day, the State filed the formal notice of witnesses the morning of September 7, 2016. The State complied with both the requirements and spirit of the statute. Moreover, the Nevada Supreme Court has noted, "there is a strong presumption to allow the testimony of even late-disclosed witnesses, and evidence should be admitted when it goes to the heart of the case." Sampson v. State, 121 Nev. 820, 122 P.3d 1255 (2005).

Petitioner also made an allegation of bad faith by the State in his direct appeal, however, bad faith requires an intent to act for an improper purpose. See Fink v. Gomez, 239 F.3d 989, 992 (9th Cir. 2001). The record is devoid of any facts implying that the State had an intent to act for an improper purpose. The Court did in fact delve into whether the State acted in bad faith and made factual determinations central to the issue of admitting Summer's testimony. On September 9, 2016, the Court held a hearing on co-defendant Murphy's motion to exclude. At the hearing, the following was stated:

> COURT: In this case, Summer Larsen signed a guilty plea agreement and an agreement to testify on September 6th. And this Court took her plea pursuant to that agreement on the 6th. The hearing commenced a little after 2 o'clock in the afternoon. It took about half an hour cause I take a pretty thorough plea. And you received your formal notice the following day. So I don't -- there is no bright line rule that says there's a particular time. It's as soon as practicable. I think that the notice being given by 11 o'clock in the morning the next day which is less than 24 hours is sufficient. So I don't think that there was a late notice.
>
> But even assuming arguendo that someone would later say that it was, I don't think that you can show that you were prejudiced by this notice because you say a couple of things in your papers. First of all on page 3 you talk about how Murphy -- you say, Murphy cannot cross examine Larsen about the testimony
> inducing plea negotiation she made with the State unless she wants the jury to learn of uncharged crimes he's alleged to have committed. Okay. So how would this have been any different had you received notice a year ago?

MR. LANDIS: That's a separate issue from notice to be honest with you.
COURT: Okay. All right. In other words, you're not prejudiced in this. Your whole argument here is that you're prejudiced by this late notice. So obviously the fact that you got this late notice doesn't change the fact that you have to make tactical decisions on how you cross examine someone.

...

COURT: -- I don't know anything beyond that. So you're --So you're asking me to say that the State intentionally in bad faith, you now, conspired to not let you know about this until the last moment and I don't have any -- who does that.

MR. LANDIS: I don't want -- I don't want the Court to speculate. I want the Court to determine and make a decision based on it. I want the Court to ask the State and if necessary ask Summer's attorney. I don't want you to speculate. I want you to determine if there was a reason for this to be as late as it was. I think that's a fair request because I think it's relevant to the position of this case.

Recorder's Transcript of Hearing Re: Defendant's Motion to Exclude Summer Larsen on Order Shortening Time Hearing, pages 2–16, filed September 9, 2016. After hearing argument on the matter the Court then determined that the notice was not untimely, nor was the defense prejudiced. Id. at 22.

Notably, Summer Larsen was a joined co-defendant who was likely to testify in her own defense. Petitioner had to be prepared to cross-examine her whether or not she pled guilty. Further, Petitioner was on notice of her as a witness from the inception of the case, the only difference being that the State was calling her instead of her testifying in her own defense. Thus, Petitioner was not prejudiced.

Further, it is clear that the Court did consider the arguments of untimeliness and bad faith presented by Murphy and Laguna and correctly denied the motion to exclude only after making such factual determinations. Because the record is devoid of any facts implying that the State had an intent to act for an improper purpose, and the State complied with the requirements of the statute, Petitioner's claim fails to demonstrate good cause or prejudice.

ii. Cell phone records

Second, Petitioner alleges that the Court improperly permitted cell phone records at trial. Like Petitioner's first claim, he failed to preserve this claim below. Notwithstanding this procedural error, and assuming Petitioner is making the same argument he made in his direct appeal, the Nevada Court of Appeals concluded that Petitioner's argument "that the State failed to timely disclose the cell phone records or [to] timely notice the expert" was belied by the record. Order of Affirmance, Docket No. 72056, filed Oct. 30, 2018.

On September 19, 2016, co-defendants Murphy and Laguna made an oral motion to exclude phone records that the State had provided that morning. Recorder's Transcript of Hearing Re: Jury Trial Day 6, pages 8–9, filed April 7, 2017. The State responded that they had just obtained those phone records that morning and that the records were "immediately" emailed to counsel. Id. at 9–10. Texts from Murphy to Petitioner and Laguna that appeared on Petitioner and Laguna's phone had previously been disclosed, but appeared to be missing from the records provided from Murphy's phone. The State contacted the custodian of records, who reviewed their records and provided the missing records to the State, which were then forwarded to the defense. Id.

Additionally, the State argued that the expert witnesses were noticed well in advance of trial. On March 26, 2015, the State filed a Notice of Expert Witnesses that included custodians of record from AT&T, T-Mobile, Cricket, Metro PCS, Verizon, and Neustar phone companies, including identical statements that they "will testify as experts regarding how cellular phones work, how phones interact with towers, and the interpretation of that information." On April 3, 2015, the State filed a Supplemental Notice of Expert Witnesses, which again included those experts. On August 15, 2016, the State filed a Second Supplemental Notice of Expert Witnesses, which included the above experts. On August 22, 2016, the State filed a Third Supplemental Notice of Expert Witnesses, which again included the above experts, as well as E. "Gino" Bastilotta from the Las Vegas Metropolitan Police Department ("LVMPD") who "will testify as an expert regarding how cellular phones work, how phones interact with towers, and the interpretation of that information" and Christopher

Candy, also from LVMPD, who was to testify as to the same. The Notice included the required CVs. Twenty-one (21) days later, on September 12, 2016, Voir Dire began. Recorder's Transcript Re: Jury Trial Day 1, dated April 7, 2017.

If Petitioner is raising the same claim as his direct appeal, he argues that the "substance" of the records disclosed on September 19, 2016, was not timely disclosed. However, Petitioner fails to recognize that the State provided those records under its continuing duty to disclose pursuant to NRS 174.234(3)(b) in much the same manner as it disclosed that Larsen would testify. The multiple Notices of Expert Witnesses put Petitioner on notice that experts would testify as to cell phone records well in advance of trial, and the State obviously could not provide notice that the experts would testify as to those specific records prior to the State receiving them. Importantly, these records were not in the possession or control of the State—they were owned and kept by the cell phone companies that produced the records. When the State noticed the records were incomplete, the State asked for, and received, more complete records which were then immediately forwarded to Petitioner and to the other defendants. Recorder's Transcript of Hearing Re: Jury Trial Day 6, pages 9–10, dated April 7, 2017. Because the records were kept by cell phone companies, Petitioner could have, of course, noticed that the records were incomplete sooner and subpoenaed those records himself. Equally important, most of the text messages appeared on Petitioner and co-defendant Laguna's phones and were previously disclosed in those records; the records disclosed on September 19, 2016, merely showed the same messages from Murphy's phone. Id. at 10. The State further responded that these particular records were being admitted through the custodian of records, and not as expert witness testimony; that is, these records were raw data and not a report generated by an expert or an expert opinion based on other data. Id. at 10–11. Beyond that, the State had *already* disclosed phone tower information for co-defendant Murphy's phone, and the additional text messages comprised six-hundred eighty-six (686) kilobytes of information, or about two-hundred fifty (250) text messages. Id. at 15–16. The Court indicated that it would consider a brief continuance for co-defendant Murphy's expert to review the records, and Murphy

represented that he would consult with his expert to see how long that would take. Id. at 14–17.

The next day, on Tuesday, September 20, 2016, Murphy told the Court his expert would need two days, including that day. Recorder's Transcript of Hearing Re: Jury Trial Day 7, page 173, dated April 7, 2017. The State replied that it did not expect its expert to testify until the end of the week, so Murphy's expert ought to have an additional day or two to review the records. Id. at 175. The Custodians of Record would be called the next day, to which Murphy replied, "I don't think that is a problem." Id.

On September 21, 2016, the State called Joseph Sierra, the T-Mobile Custodian of Records, which included the Metro PCS records as the companies had merged. Recorder's Transcript of Hearing Re: Jury Trial Day 8, page 21, dated April 7, 2017. Petitioner complained, at length, in his direct appeal about Sierra's alleged "expert" testimony, which included how cell phones are used, how towers are utilized, how to interpret cell phone records. Id. at 21–64. Sierra's testimony regarding Petitioner's phone records was within the scope of what was allowed by the Court. Additionally, the information presented was ministerial in explaining how to read the records, and offered the jury information about how cell phone technology worked and the technologies involved—precisely as the Notice of Expert Witnesses stated four times previously. Sierra did confirm that Exhibit 303, which is the basis of this claim, was generated the previous Friday, which would have been September 16, 2016, and that it was produced to the Clark County investigator that Monday, September 19th—exactly as the State represented to the Court. Id. at 40–41. The records had been previously requested by the State, but not produced by T-Mobile until that date. Recorder's Transcript of Hearing Re: Jury Trial Day 6, pages 9–10, dated April 7, 2017.

Petitioner previously cited to NRS 174.235, which requires the State to disclose documents "which the prosecuting attorney intends to introduce during the case in chief of the State and which are within the possession, custody, or control of the State..." (emphasis added). For the reasons discussed above, and confirmed by Sierra's testimony, the records were not in the possession of the State until September 19, 2016, at which point they were

immediately forwarded to the defense. Id. As such, NRS 174.235 is inapplicable. Regardless, Petitioner could have exercised due diligence by obtaining the complete records well before trial.

Further, on September 20, 2016, Murphy represented that his expert would need until September 21, 2016 to review the records. Recorder's Transcript of Hearing Re: Jury Trial Day 7, page 173, dated April 7, 2017. To the extent Petitioner is under the impression that he was prejudiced, he along with Murphy's expert received twice as much time as was requested by Murphy. Petitioner had the same time to prepare, and therefore was not prejudiced. As mentioned *supra*, Petitioner abstained from objecting to or cross-examining Sierra on the cell phone records. Accordingly, the Court did not err in admitting the cell phone records, as the State disclosed the records as soon as they were available. The records would have been available sooner if Petitioner had exercised his own due diligence. Therefore, Petitioner has not demonstrated good cause or prejudice.

iii. Figueroa's agreement to testify

Third, Petitioner complains that the Court abused its discretion by allowing Figueroa's agreement to testify. The Nevada Court of Appeals rejected this argument concluding that pursuant to NRS 175.282(1) and Sessions v. State, the Court properly allowed discussion of Figueroa's agreement to testify truthfully after his credibility was attacked on cross-examination. 111 Nev. 328, 890 P.2d 792 (1995); Order of Affirmance, Docket No. 72056, filed Oct. 30, 2018.

Petitioner previously argued in his direct appeal that the door was not open as to the admission of the truthfulness language within Figueroa's guilty plea agreement. In arguing so, he relied on Sessions v. State, 111 Nev. 328, 333, 890 P.2d 792 (1995), to support his position but, in fact, it demonstrated why his claim is meritless. In Sessions, the Nevada Supreme Court stated that "district courts have both the discretion and the obligation to excise such provisions *unless admitted in response to attacks on the witness's credibility attributed to the plea agreement.*" Id. at 334, 890 P.2d at 796. (emphasis added). The Sessions Court further upheld the defendant's conviction, even though the Court permitted

the jury to inspect the co-defendant's plea agreement, including the truthfulness provision, before the defendant ever testified. Id. It reasoned that cautionary jury instructions regarding the skepticism the jury ought to place on testimony from co-defendants-turned-State's-witnesses render the failure to excise the truthfulness provision harmless. Id.

The instant case is easier to resolve than Sessions because the plea agreement, including the truthfulness provision, was not entered into evidence until after Figueroa testified. Recorder's Transcript of Hearing Re: Jury Trial Day 12, pages 80–82, dated April 10, 2017. Further, the un-redacted plea agreement was provided to the jury because Petitioner, Murphy, and Laguna did precisely what the Sessions Court cautioned could lead to a truthfulness provision remaining un-redacted: they attacked the "witness's credibility attributed to the plea agreement." Laguna's attorney went first. Recorder's Transcript of Hearing Re: Jury Trial Day 11, pages 37–62, dated April 7, 2017. She questioned Figueroa about his decision to talk with police and enter into a plea agreement and elicited answers suggesting that Figueroa entered into the plea agreement to escape liability for a murder charge. Id. at 40–43, 61–62. Petitioner's trial counsel followed, and to his credit managed to cross-examine Figueroa without mentioning the plea agreement. Id. at 63–84. Murphy's counsel followed. Id. at 90–143. He first asked a series of questions demonstrating that Figueroa had lied on numerous occasions. Id. at 92–98. Later, he proffered questions regarding a second interview that Figueroa had with police and suggested that Figueroa's testimony had changed, leading the police to view him more favorably and provide him with favors. Id. at 127–130. Murphy's questions then turned to potential sentencing implications, contextually inferring that Figueroa was willing to tell police what he had to because he was not "looking to spend hella years in prison." Id. at 130–32.

Murphy then went further, directly stating that Figueroa cooperated and entered into the guilty plea agreement in exchange for leniency at sentencing:

> Q: Do you recall when you signed the actual Guilty Plea Agreement with the State? Not when you were in court, but when you signed it? Does January 2015 sound correct?

A: Yes, sir, around -- around that time area.
Q: In --
A: Time frame.
Q: -- February 2015, does that sound about the time that you actually came to this court and pled guilty in open court pursuant to that agreement?
A: That sounds about right.
Q: As of July 2015, you believe that Mr. Brown, your previous attorney, provided misrepresentation about your situation in this case, right?
A: Yes, sir.
Q: You believed he misinformed you, correct?
A: Yes, sir.
Q: And he failed to discuss options with you before you sat down with the State that morning?
A: Yes, sir.
Q: When you were originally arrested and charged with murder, are you aware of what sentencing risk you faced? What was the potential sentences you could deal with?
A: Murder, that's -- that's life.
Q: Beyond that, were you also concerned potential sentences because you could have an enhanced sentence because of habitual criminal sentencing enhancements?
A: Yes, sir.
Q: So just so it's clear that means that if you were convicted of a felony, doesn't matter if it was murder or not, your sentence could be substantially enhanced because you had prior felonies?
A: Yes, sir.
Q: And now turning to what your negotiation is based on your Guilty Plea Agreement with the State, we talked some about what you expect the sentence to be or what you anticipate it to be, but having said that, let me -- let me question this; you at least have a possibility of walking out of that sentencing with a sentence of three to eight years?
A: Yes, sir. I mean, that's the bare minimum, the highest up there.
Q: Understood. But that is a possible sentence that you could hope to get?
A: Yes, sir.

Recorder's Transcript of Hearing Re: Jury Trial Day 12, pages 35–37, dated April 10, 2017.

On redirect, the State elicited testimony that both Figueroa's counsel and the police expected him to be truthful during his interview, and that Figueroa was aware that any potential deal was going to involve prison time. Id. at 37–44. The State then highlighted portions of previous statements and testimony that were consistent with his testimony at trial.

Id. at 44–58. The Court took a recess, and the State indicated that it was going to move to admit the Agreement to Testify, including the truthfulness provision. Id. at 62–64. The Court stated:

> I think that independently [Murphy] did attack the credibility of the witness on cross-examination as -- so -- clearly. And Ms. McNeill did, unlike Ms. Larsen. I thought nobody really directly attacked her credibility concerning any plea negotiation. But you have here. You've talked about his discussions with his lawyer, what he understood – I mean, it's just very clear to me that you have suggested to the Jury that he's lying to get the benefit of his lies and to, you know, get a better deal. And the case law on that is it doesn't – it wouldn't come in except if you do that, if you attack his credibility in regards to the Agreement to Testify. I think that does come in, unlike Ms. Larsen's.

Id. at 63–64. The Court's last statement reflects the fact that Summer's Agreement to Testify was redacted because counsel cross-examined her without suggesting that she entered into a plea agreement and lied to receive a benefit at sentencing. Recorder's Transcript of Hearing Re: Jury Trial Day 9, page 3, dated April 7, 2017; Recorder's Transcript of Hearing Re: Jury Trial Day 10, page 3, dated April 7, 2017. Importantly, counsel and the Court had already had a lengthy discussion about when an Agreement to Testify could be admitted un-redacted pursuant to Sessions when Summer testified. Recorder's Transcript of Hearing Re: Jury Trial Day 6, pages 3–6, dated April 7, 2017. This was well before Figueroa testified. The Court even recessed and reviewed Sessions prior to making a ruling. Id. at 6–8.

Returning to Figueroa's Agreement to Testify, the Court indicated that, while it was allowing his un-redacted Agreement to Testify to be admitted based on the cross-examination of the witness, a curative instruction was still going to be given to the jury. Recorder's Transcript of Hearing Re: Jury Trial Day 12, pages 64–65, dated April 7, 2017. The Guilty Plea Agreement and un-redacted Agreement to Testify were then admitted. Id. at 77. The jury instructions included the promised curative instruction.

Further, even if the Court erred in finding that Figueroa's cross-examination attacked his credibility on the basis of his agreement to testify, because the Court issued a curative instruction, any error was harmless as in Sessions. Similarly, because Petitioner's testimony

in his trial was substantially consistent with the testimony of Figueroa, Figueroa corroborated Petitioner, therefore benefitting from the jury considering Figueroa as truthful. Thus, any resulting error was harmless.

In ruling on this argument, the Nevada Court of Appeals cited NRS 175.282(1) and Sessions specifically stating that

> the court must allow the jury to inspect a plea agreement of a testifying former codefendant and should excise the truthfulness provision from the document provided to the jury unless [that provision is] admitted in response to attacks on the witness's credibility attributed to the plea agreement. Because here [Petitioner's] co-defendant attacked Figueroa's credibility, we conclude that the district court did not err by admitting Figueroa's unredacted plea agreement.

Order of Affirmance, Docket No. 72056, filed Oct. 30, 2018. Thus, Petitioner has not demonstrated good cause or prejudice.

iv. Instruction on self-defense

Fourth, Petitioner's argument that the Court erred in precluding jury instructions on self-defense is also without merit. Petitioner previously complained in his direct appeal that the Court improperly refused to have the jury instructed on self-defense, and therefore infringed on his theory of defense. Petitioner's argument fails.

Because Petitioner was the original aggressor, the ability to have the jury instructed on self-defense was foreclosed to him. This Court has held that, "the right of self-defense is not available to an original aggressor, that is a person who has sought a quarrel with the design to force a deadly issue and thus through his fraud, contrivance or fault, to create a real or apparent necessity for making a felonious assault." Runion v. State, 116 Nev. 1041, 1051, 13 P .3d 52, 59 (2000).

The record clearly supports the fact that Petitioner voluntarily went to Larsen and Gibson's home with a deadly weapon intending to commit burglary and/or robbery. There is no conflicting testimony regarding who the initial aggressor was; it was undeniably Petitioner. Petitioner's testimony on cross-examination was: he took a gun he knew did not

have a safety to Larsen and Gibson's home with the intent to commit a robbery, he fired at least six (6) shots into the house, and he believed he had a right to fire his weapon. Recorder's Transcript of Hearing Re: Jury Trial Day 14, pages 174–75, 222, dated April 10, 2017. Thus, it is clear that Petitioner was not acting in self-defense. Therefore, the Court did not err in refusing to allow jury instructions regarding such.

Indeed, the Nevada Court of Appeals was unpersuaded in Petitioner's argument that he was entitled to claim self-defense because Petitioner's own trial testimony demonstrated that the felonies and the killing were in one continuous transaction. Order of Affirmance, Docket No. 72056, filed Oct. 30, 2018. Thus, it concluded that the district court correctly ruled that Petitioner was not entitled to an instruction that he acted in self-defense. Id. Thus, Petitioner has not demonstrated good cause or prejudice.

v. Cumulative error

Fifth, Petitioner complains of cumulative error as he did previously in his direct appeal.

The Nevada Supreme Court has never held that instances of ineffective assistance of counsel can be cumulated; it is the State's position that they cannot. However, even if they could be, it would be of no moment as there was no single instance of ineffective assistance in Petitioner's case. See United States v. Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990) ("[A] cumulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors."). Furthermore, Petitioner's claim is without merit. "Relevant factors to consider in evaluating a claim of cumulative error are (1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 855 (2000). Furthermore, any errors that occurred at trial were minimal in quantity and character, and a defendant "is not entitled to a perfect trial, but only a fair trial." Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975).

Although the State recognizes the severity of the offense, the issue of guilt was not close. Petitioner was found guilty of all charges. Additionally, there was no single instance

of error by the Court. As confirmed by the Nevada Court of Appeals in Petitioner's direct appeal, Petitioner's cumulative error claim is meritless. Order of Affirmance, Docket No. 72056, filed Oct. 30, 2018. Thus, Petitioner has failed to demonstrate good cause or prejudice.

B. Petitioner's Petition is Also Summarily Dismissed as It Fails to Offer Meaningful Argument

All of the claims raised in the instant Petition are conclusory, bare, and naked assertions that should be summarily dismissed due to Petitioner's failure to prosecute his claims. Rule 13(2) of the Nevada District Court Rules (DCR) requires that "[a] party filing a motion shall also serve and file with it a memorandum of points and authorities in support of each ground thereof. The absence of such a memorandum may be construed as an admission that the motion is not meritorious and cause for its denial or as a waiver of all grounds not so supported." Rule 3.20 of the Rules of Practice for the Eighth Judicial District Court (EDCR) imposes a mirror obligation.

"A petitioner for post-conviction relief cannot rely on conclusory claims for relief but must make specific factual allegations that if true would entitle him to relief. The petitioner is not entitled to an evidentiary hearing if the record belies or repels the allegations." Colwell v. State, 118 Nev. Adv. Op. 80, 59 P.3d 463, 467 (2002), *citing* Evans v. State, 117 Nev. 609, 621, 28 P.3d 498, 507 (2001).

In the analogous setting of an appeal, the Nevada Supreme Court has repeatedly held that failure to offer meaningful arguments supported by analysis of relevant precedent is fatal. See, State, Dept. of Motor Vehicles and Public Safety v. Rowland, 107 Nev. 475, 479, 814 P.2d 80, 83 (1991) (generally, unsupported arguments are summarily rejected on appeal); Randall v. Salvation Army, 100 Nev. 466, 470-71, 686 P.2d 241, 244 (1984) (court may decline consideration of issues lacking citation to relevant legal authority); Smith v. Timm, 96 Nev. 197, 606 P.2d 530 (1980) (mere citation to legal encyclopedia does not fulfill the obligation to cite to relevant legal precedent); Holland Livestock v. B & C Enterprises,

92 Nev. 473, 533 P.2d 950 (1976) (failure to offer citation to relevant legal precedent justifies affirmation of the judgment below).

Summary dismissal of all of the unsupported arguments in Petitioner's Petition is warranted because in the words of Justice Cardozo:

> Every system of laws has within it artificial devices which are deemed to promote ... forms of public good. These devices take the shape of rules or standards to which the individual though he be careless or ignorant, must at his peril conform. If they are to be abandoned by the law whenever they had been disregarded by the litigant affected, there would be no sense in making them.

Benjamin N. Cardozo, The Paradoxes of Legal Service, 68 (1928); Scott E. A Minor v. State, 113 Nev. 234, 239, 931 P.2d 1370, 1373 (1997).

In the instant matter, Petitioner offers no factual explanation or argument for each of his claims. Consequently, this Court has been left with a list of conclusory claims to review. Petitioner appears to have attempted to mitigate his conclusory statements with the phrase, "to be amended," after each conclusory statement. However, such futile attempt should be disregarded, as Petitioner could have written out some factual explanation or argument to support his claims. Petitioner's failure to do so warrants summary dismissal of his claims.

C. Trial Counsel was Not Ineffective

Petitioner's pro per claims of ineffective assistance of counsel fail as he has provided zero legal or factual support. However, as discussed *infra*, any claim of ineffective assistance of counsel is meritless.

III. PETITIONER'S SUPPLEMENTAL PETITION CLAIMS FAIL

In his Supplemental Petition, Petitioner argues that trial counsel was ineffective for several reasons. Under Petitioner's first ground, he claims that counsel erroneously advised Petitioner to testify prior to the district court's ruling on his proposed self-defense jury instruction and, at the very least, should have filed a Motion in Limine or a pretrial motion beforehand. Supplemental Petition at 16-28. Under his second ground, he claims that counsel

should have moved to suppress the statements he made to law enforcement while he was in the hospital because they were involuntary. Supplemental Petition at 28-29. Second, Petitioner complains that counsel was ineffective because he failed to ask certain questions at the jury trial and was silent "most of the time." Supplemental Petition at 29-30. Third, counsel allegedly failed to deliver Petitioner's Motion to Withdraw Counsel to the Court. Supplemental Petition at 30. Fourth, he asserts counsel failed to object based on the Confrontation Clause and failed to subpoena the living victim, "JL." Supplemental Petition at 30. However, each of Petitioner's claims fail.

A. Trial Counsel was Not Ineffective When Advising Petitioner of His Right to Testify and Failing to File a Motion on the Issue

Under Petitioner's first ground, he argues that counsel was ineffective for advising him to testify and confess to the charges against him when counsel should have known that Petitioner's proposed self-defense jury instruction would be denied. Supplemental Petition at 16-28. However, Petitioner's claim fails.

As set forth in Davis, the district court may refuse a jury instruction on the defendant's theory of the case which is substantially covered by other instructions; further, district courts have "broad discretion" to settle jury instructions. Davis, 130 Nev. 136, 145, 321 P.3d at 874; Cortinas, 124 Nev. at 1019, 195 P.3d at 319.

The Nevada Supreme Court has concluded that to succeed on a claim that counsel was ineffective in preparing a witness to testify, a defendant must show that a witness's testimony is the result of counsel's poor performance. See Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). Petitioner is unable to make such a showing. Indeed, only two (2) decisions are left entirely up to a defendant at trial: whether to represent himself or whether to testify at trial. Lara v. State, 120 Nev. 177, 182 87 P.3d 528, 531 (2004) ("The United States Supreme Court has recognized that an accused has the ultimate authority to make certain fundamental decisions regarding the case, including the decision to testify.").

In this case, after extensive canvassing by the Court regarding Petitioner's right not to testify, Petitioner elected to do so. Jury Trial Day 14 at 75-77. Counsel had no control over

Petitioner's testimony and certainly could not suborn perjury or coach Petitioner during his testimony as witnesses are expected to testify to the truth. In other words, counsel could not control whether Petitioner would provide the necessary testimony for a theory of self-defense. He certainly did not have a crystal ball to see that Petitioner's testimony on the fourteenth day of trial would preclude the admission of self-defense jury instructions on the eighteenth day of the trial. Jury Trial Day 14 at 79; Jury Trial Day 18 at 9. Defendants like all other witnesses are expected to tell the truth and Petitioner was informed of his duty to tell the truth when he was sworn in. It also bears noting that Petitioner did not admit to the murder charge during his testimony. Jury Trial Day 14 at 163-64. Accordingly, counsel could not have been ineffective.

Petitioner's citation to U.S. v. Swanson, 943 F.2d 1070, 1072-73 (9th Cir. 1991), does not lead to a different conclusion. In Swanson, 943 F.2d at 1072, the defendant challenged his conviction from a bank robbery based on his counsel's ineffectiveness during his trial. The defendant complained that the ineffectiveness arose during counsel's closing argument:

> [Counsel] began his argument by stating that it is a defense attorney's "job" to make the Government prove its case beyond a reasonable doubt. [Counsel] told the jurors that in this country a person has a right to stand by his plea of not guilty. [Counsel] then stated that the evidence against Swanson was overwhelming and that he was not going to insult the jurors' intelligence.
>
> Prior to discussing the inconsistencies in the testimony of the Government's identification witnesses, [Counsel] stated, "[a]gain in this case, I don't think it really overall comes to the level of raising reasonable doubt." After pointing out that the witnesses had varied in their recollection of the length of time the perpetrator was in the bank, [Counsel] told the jury, "the only reason I point this out, not because I am trying to raise reasonable doubt now, because again I don't want to insult your intelligence...." He concluded his argument by telling the jurors that if they found Swanson guilty they should not "ever look back" and agonize regarding whether they had done the right thing.

Id. at 1071. While examining whether such comments amounted to ineffective assistance of counsel, the Court relied upon the U.S. Supreme Court's rationale in U.S. v. Cronic, 466

U.S. 648, 656-57, 104 S. Ct. 2039, 2045-46 (1984), that effective assistance of counsel requires that counsel act as an advocate for his client, which includes requiring that the prosecution's case survive "meaningful adversarial testing." Swanson, 943 F.2d at 1702-03. Further, "if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated." Id. at 1703 (citing Cronic, 466 U.S. at 656-57, 104 S. Ct. at 2045-46). With this rationale in mind, the Swanson Court concluded that counsel's comments resulted in a breakdown of the adversarial system. Swanson, 943 F. 2d at 1074. Indeed, the Court noted that counsel's comments did not amount to negligence, but instead constituted an abandonment of his client's defense. Id. Nevertheless, the Court highlighted that there could be certain situations in which defense counsel might determine it advantageous to concede elements on a defendant's behalf, such as by conceding guilt for the purposes of an insanity defense. In Swanson's case, however, there was no tactical explanation for defense counsel's concessions. Id. at 1075 (citing Duffy v. Foltz, 804 F.2d 50, 52 (6th Cir. 1986)).

Here, Petitioner cannot demonstrate that counsel was ineffective. As discussed *supra*, counsel had no control over Petitioner's testimony, but, even if he had, his decision to argue self-defense on Petitioner's behalf was a tactical, strategic decision, not an abandonment of his adversarial role as discussed in Swanson, 943 F. 2d at 1074. Dawson, 108 Nev. at 117, 825 P.2d at 596 ("Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable"). Likewise, counsel had a strategic reason for not filing a pretrial motion regarding the theory of self-defense. Indeed, at trial, counsel stated that the crux of his theory of defense was that Petitioner withdrew from the crimes at the time he shot back at Joseph Larsen's home and self-defense was just one way to demonstrate that Petitioner was not guilty of first-degree murder:

> MR. WOLFBRANDT: Yes. I think these were required in this case. The way I elicited the testimony and the whole theory of my defense was that the killing in this case was not a product of the Felony Murder Rule, and that the underlying felonies qualified for the Felony Murder Rule, specifically the *burglary, the home*

invasion and the attempt robbery had been completed by the time Mr. Mendoza had turned from the door and was escaping the area.

And that, you know, through his testimony, as he was leaving the area, in his mind, he was posing no threat to anybody. He was just trying to get away. He heard some other shots, and a lot of the lay witnesses, the neighbors that called 911, they call described two distinct sets of shots. There was the first set and then there was a time gap and then there was another set of shots. And it was our contention that the second set of shots occurred when Mr. Mendoza was -- was well into the street, you know, where his blood trail started. And that as he testified, he then saw -- he heard a shot, he looked back at the house, and then he saw Monty Gibson and Joey Larsen at that front doorway area leaning around that pillar that's in front of the doorway, and he saw Joey Larsen had a gun with him.

Having already heard a shot, he then in self-defense returned fire and that would be the time that Monty Gibson got shot in the head and died. And that that shooting was – was -- at least to Mr. Mendoza, was in an act of self-defense. The State's argued that the -- I recognize that the instruction I don't know offhand which one it is the instruction on conspiracy is that the conspiracy's not complete until all of the perpetrators escape the area or just effectuate their escape.

My contention is that -- is that Mendoza had escaped because he was away from the house. He was no longer a threat to that house and he was on his way down the street and but for him not having a good leg, he would have been run – gone out of the neighborhood just like the other individuals. So I think that we still should be entitled to our theory of defense and that the self-defense instruction should have been given.

Jury Trial Day 18, at 5-7. Indeed, Mr. Wolfbrandt testified at the evidentiary hearing on the Petition that he pursued the self-defense theory because it was the best defense under the facts and the circumstances and stated:

A. I was afraid of the felony murder rule, all right, we're all familiar with that one and I had to do something – if I didn't put on any kind of defense against that, you know, the felony murder rule would have kicked in and it was a foregone conclusion that he was going to be convicted of it.

So the only chance we had was to create the circumstance where the felony murder rule no longer applied by saying that he had abandoned and had concluded his role in the burglary, attempt burglary, robbery and was – you know, had abandoned that and was leaving the situation and then he got shot at and returned fire.

Recorder's Transcript RE: Evidentiary Hearing Motion for Leave to Add to Record Hospital Records, filed Mar. 9, 2021, at 18. In fact, Mr. Wolfbrandt testified that he believed it was

the only possible defense to the murder charge and without employing that defense, there would have been no chance of Petitioner being found not guilty of the murder charge. Id. at 20.

As for the timing of submitting the self-defense jury instruction, Mr. Wolfbrandt testified that he strategically did not proffer the jury instruction before Petitioner testified because, based on conducting over sixty (60) jury trials, it was not standard practice to offer jury instructions before the close of evidence. Id. at 9, 19. Indeed, there was really no evidence of self-defense until Petitioner testified. Id. at 53. Accordingly, counsel's strategic actions demonstrate that he did not fall below a reasonable standard of care. Dawson, 108 Nev. at 117, 825 P.2d at 596; see also Ford, 105 Nev. at 853, 784 P.2d at 953.

Furthermore, Petitioner cannot demonstrate that the outcome of his trial would have been different because even if he had not testified, there was enough evidence that Petitioner was guilty under a theory of felony murder. Indeed, a jury could have logically concluded that Petitioner's conspiracy with his co-defendants was not over at the time he shot Gibson and that he had the requisite intent to commit first-degree murder. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979) (stating it is further the jury's role "[to fairly] resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts."); Wilkins, 96 Nev. at 374, 609 P.2d at 313 (concluding a jury is free to rely on circumstantial evidence); Hernandez v. State, 118 Nev. 513, 531, 50 P.3d 1100, 1112 (2002) ("circumstantial evidence alone may support a conviction."); Adler v. State, 95 Nev. 339, 344, 594 P.2d 725, 729 (1979) ("[t]he jury has the prerogative to make logical inferences which flow from the evidence."). Therefore, Petitioner's claim is denied.

B. Trial Counsel was Not Ineffective for Failing to Test the State's Case

Under Petitioner's second ground, Petitioner raises various ineffective assistance of counsel claims related to counsel's actions to test the State's case. Supplemental Petition at 28-30. Not only are these claims meritless, but also they are not sufficiently pled pursuant to Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984), and Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). Indeed, a party seeking review bears the responsibility

"to cogently argue, and present relevant authority" to support his assertions. Edwards v. Emperor's Garden Restaurant, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006); Dept. of Motor Vehicles and Public Safety v. Rowland, 107 Nev. 475, 479, 814 P.2d 80, 83 (1991) (defendant's failure to present legal authority resulted in no reason for the district court to consider defendant's claim); Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (an arguing party must support his arguments with relevant authority and cogent argument; "issues not so presented need not be addressed"); Randall v. Salvation Army, 100 Nev. 466, 470-71, 686 P.2d 241, 244 (1984) (court may decline consideration of issues lacking citation to relevant legal authority); Holland Livestock v. B & C Enterprises, 92 Nev. 473, 533 P.2d 950 (1976) (issues lacking citation to relevant legal authority do not warrant review on the merits). Claims for relief devoid of specific factual allegations are "bare" and "naked," and are insufficient to warrant relief, as are those claims belied and repelled by the record. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "[Petitioner] *must* allege specific facts supporting the claims in the petition[.]...Failure to allege specific facts rather than just conclusions may cause [the] petition to be dismissed." NRS 34.735(6) (emphasis added).

1. Trial counsel was not ineffective for failing to file a motion to suppress Petitioner's statements to law enforcement officers

Petitioner claims that counsel should have moved to suppress Petitioner's statements to police at the hospital because they were involuntary. Supplemental Petition at 28-29. However, his claim is meritless.

As an initial matter, in order for a statement to be deemed voluntary, it must be the product of a "rational intellect and free will" as determined by the totality of the circumstances. Passama v. State, 103 Nev. 212, 213-214, 735 P.2d 934, 940 (1987); see also, Schneckloth v. Bustamonte, 412 U.S. 218, 226-27, 93 S.Ct. 2041, 2047-48 (1973). Factors to be considered in determining the voluntariness of a confession include: (1) youth of the accused, (2) lack of education or low intelligence, (3) lack of any advice of constitutional rights, (4) the length of detention, (5) the repeated and prolonged nature of the questioning,

(5) and the use of physical punishment such as deprivation of food or sleep. Passama, 103 Nev. at 214, 735 P.2d at 323.

"The ultimate issue in the case of an alleged involuntary confession must be whether the will was overborne by government agents." Chambers v. State, 113 Nev. 974, 981, 944 P.2d 805, 809 (1997); Passama, 103 Nev. at 213-14, 735 P.2d at 323, citing Colorado v. Connelly, 479 U.S. 157 (1986). "The question of the admissibility of a confession is primarily a factual confession addressed to the district court: where that determination is supported by substantial evidence, it should not be disturbed on appeal." Chambers, 113 Nev. at 981, 944 P.2d at 809; Echavarria v. State, 108 Nev. 734, 743, 839 P.2d 589, 595.

A confession is admissible only if it is made freely and voluntarily, without compulsion or inducement. Passama, 103 Nev. at 213, 735 P.2d at 321, citing Franklin v. State, 96 Nev. 417, 421, 610 P.2d 732, 734-735 (1980). In order to be voluntary, a confession must be the product of a "rational intellect and a free will." Blackburn v. Alabama, 361 U.S. 199, 208, 80 S. Ct. 274 (1960). Indeed, "[a] confession is involuntary whether coerced by physical intimidation or psychological pressure." Passama, 103 Nev. at 214, 735 P.2d at 322-23, citing Townsend v. Sain, 372 U.S. 293, 307, 83 S. Ct. 745 (1963). A confession may also be rendered inadmissible if it is the result of promises which impermissibly induce the confession. Passama, 103 Nev. at 215, 735 P.2d at 323; Franklin v. State, 96 Nev. 417, 421, 610 P.2d 732 (1980).

In Passama, Sheriff Miller told Passama that he would tell the prosecutor if Passama cooperated. This can be a permissible tactic. United States v. Tingle, 658 F.2d 1332, 1336, n. 4 (9th Cir.1981). He also told Passama he would go to the D.A. and see that Passama went to prison if he was not entirely truthful. It is not permissible to tell a defendant that his failure to cooperate will be communicated to the prosecutor. Tingle, 658 F.2d at 1336, n. 5. Specifically, Sheriff Miller told Passama, "...don't sit there and lie to me, 'cause if you're lying to me I'll push it and I'll see that you go to prison." He further told Passama: "...if you don't lie to me, I'll help you, but if you lie I'll tell the D.A. to go all the way." Passama 103 Nev. at 215, 735 P.2d at 324.

On the other hand, in Franklin v. State, 96 Nev. 417, 610 P.2d 732 (1980), the Nevada Supreme Court held that promises by a detective to release a defendant on his own recognizance if he cooperated with authorities in another state and to recommend a lighter sentence did not render the defendant's confession involuntary. Id.

Similarly, in Elvik v. State, 114 Nev. 883, 965 P.2d 281 (1998), the Nevada Supreme Court held that the defendant's confession was not involuntary or coerced. Throughout the interrogation, Elvik claimed that he did not remember shooting the victim, and despite Elvik's insistence, the officers repeatedly stated that Elvik did remember and attempted to persuade Elvik to discuss the incident. Id. at 892, 965 P.2d at 287. They even suggested that his girlfriend and his mother would want him to tell the truth and told him that things would be better for him in the future if he would tell the truth. Id.

A police officer may speculate as to whether cooperation will benefit a suspect or help in granting leniency, including leniency granted by a prosecutorial authority. However, a law enforcement agent may not threaten to inform a prosecutor of a suspect's refusal to cooperate. United States v. Harrison, 34 F.3d 886, 891 (1994); United States v. Leon Guerrero, 847 F.2d 1363, 1366 (1988); Martin v. Wainwright, 770 F.2d 918, 924-27 (11th Cir. 1985). In United States v. Brandon, 633 F.2d 773, 777 (1980), the Court held that a law enforcement agent may bring attention to the United States Attorney of the Defendant's willingness to cooperate in hopes that leniency would be granted.

In Schneckloth, 412 U.S. at 224-25, 93 S.Ct. at 2046, the U.S. Supreme Court recognized that "if the test was whether a statement would not have been made but for the law enforcement conduct, virtually no statement would be deemed voluntary because few people give incriminating statements in the absence of some kind of official action."

In Chambers, 113 Nev. at 980, 944 P.2d at 809, the defendant filed a motion to suppress his post-Miranda statements to police, claiming that his statements were not voluntarily given in light of the fact that he was questioned for four hours after having been stabbed, that he was not well rested, and that he was intoxicated—a breathalyzer revealed a blood alcohol content of 0.27. The district court observed the videotape of the confession and heard testimony at a

hearing on the matter. Id. The district court found that at the time the defendant made his statements to police, he did not appear to be under the influence of either alcohol or drugs to such a point that he was unable to understand the questions directed to him and unable to formulate intelligent, logical answers. Id. The district court further found that the defendant knowingly and voluntarily signed the Miranda waiver presented to him. Id. The Nevada Supreme Court held that the district court did not err in admitting the defendant's confession to police. Id.

Further, when a defendant is fully advised of his Miranda rights and makes a free, knowing, and voluntary statement to the police, such statements are admissible at trial. See Miranda v. Arizona, 384 U.S. 436, 478, 86 S.Ct. 1602, 1630 (1966); Stringer v. State, 108 Nev. 413, 417, 836 P.2d 609, 611–612 (1992).

Miranda v. Arizona, 384 U.S. at 444-45, 86 S.Ct. at 1612, established requirements to assure protection of the Fifth Amendment right against self-incrimination under "inherently coercive" circumstances. Pursuant to Miranda, a suspect may not be subjected to an interrogation in official custody unless that person has previously been advised of, and has knowingly and intelligently waived, the following: the right to silence, the right to the presence of an attorney, and the right to appointed counsel if that person is indigent. Id. at 444, 86 S.Ct. at 1612. Failure by law enforcement to make such an admonishment violates the subject's Fifth Amendment guarantee against compelled self-incrimination. Id. The validity of an accused's waiver of Miranda rights must be evaluated in each case "upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." Edwards v. Arizona, 451 U.S. 477, 481, 101 S.Ct. 1880, 1884 (1981), quoting Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023 (1938); See also Rowbottom v. State, 105 Nev. 472, 779 P.2d 934 (1989). "The voluntariness of a confession depends upon the facts that surround it, and the judge's decision regarding voluntariness is final unless such finding is plainly untenable." McRoy v. State, 92 Nev. 758, 759, 557 P.2d 1151, 1152 (1976).

The prosecutor has the burden to prove that the waiver of a suspect's Fifth Amendment Miranda rights was voluntarily, knowingly and intelligently made. This burden is on the prosecution by a preponderance of the evidence. Falcon v. State, 110 Nev. 530, 874 P.2d 772 (1994). This is generally accomplished by demonstrating to the Court that the officer advised the defendant of his Miranda rights and at the conclusion of the advisement asked the suspect if he understood his rights. An affirmative response by the suspect normally satisfies the knowing and intelligent portion of the waiver.

The voluntariness prong is normally judged under a totality of the circumstances existing at the time that the rights were read to the defendant. A waiver of rights need not be expressed, *i.e.*, the suspect need not say "I waive my Miranda rights" nor need the officer ask the suspect "do you waive your Miranda rights". It is sufficient if the officer obtains an affirmative response to the question whether the suspect understands the rights that were just read to him. See generally Tomarchio v. State, 99 Nev. 572, 665 P.2d 804 (1983); North Carolina v. Butler, 441 U.S. 369, 99 S.Ct. 1755 (1979) (defendant refused to sign the waiver but agreed to talk to the officers. This was an adequate waiver according to the United States Supreme Court); See also Taque v. Louisiana, 444 U.S. 469, 100 S.Ct. 652 (1980); See also Connecticut v. Barrett, 479 U.S. 523, 107 S.Ct. 828 (1987) (defendant agreed to make oral, but declines written statement).

Here, a review of the totality of the circumstances reveals that moving to suppress Petitioner's two (2) statements to Detectives while he was in the hospital would have been futile because his statements were voluntary. See Ennis, 122 Nev. at 706, 137 P.3d at 1103. Petitioner's reliance on a self-serving Affidavit does not negate that there was testimony presented at trial, including from Petitioner himself, that demonstrated the voluntariness of Petitioner's statements.

As a preliminary matter, despite Petitioner's argument, Petitioner's Miranda rights were not violated when he interviewed with Detective Williams and Detective Merrick at UMC because he was not in custody. Miranda, 384 U.S. at 444, 86 S.Ct. at 1612. Indeed, the detectives interviewed Petitioner while he was lying on a gurney inside the emergency room

of UMC trauma. There was no testimony presented at trial to indicate that Petitioner was chained to his bed, as he now alleges, during this time period and the voluntary statement transcript reveals that Petitioner was not handcuffed. Recorder's Transcript of Hearing: Jury Trial Day 17 at 5, 11; Exhibit A at 16-17. Additionally, Detective Williams testified that Petitioner would have initially been free to stop the interview and reiterated to Petitioner throughout the interviews that he was not under arrest. Recorder's Transcript of Hearing: Jury Trial Day 17 at 19-20; State's Exhibit A at 14-15, 17. At no point during the interview or after the interview did Detective Williams or Detective Merrick arrest Petitioner. Recorder's Transcript of Hearing: Jury Trial Day 17 at 6. Accordingly, Petitioner was not in custody.

Additionally, although Petitioner has failed to argue the Passama factors, each were met. As for the first and second factors, Petitioner has not and cannot demonstrate that his age, education, or intelligence caused his statements to be involuntary. To the extent Petitioner claims that this factor was not met because Petitioner was in and out of consciousness, that is belied by record. Although Petitioner self-servingly testified that he believed he was given a shot of medication before he was transported to the hospital and was in and out of consciousness during the interviews with the detectives, he also admitted during trial that he was cognitive enough to provide telephone numbers to the detectives. Recorder's Transcript of Hearing: Jury Trial Day 14 at 170-71, 210. In fact, Petitioner even recalled that during the interviews, he was trying to protect himself by lying to the detectives. Recorder's Transcript of Hearing: Jury Trial Day 14 at 215-16. Moreover, Detective Williams testified that at the time of the interviews, he had no idea if Petitioner was sedated, but Petitioner appeared to be conscious and knew that Petitioner had not been given anesthesia yet. Recorder's Transcript of Hearing: Jury Trial Day 17 at 6, 12. Most importantly, the voluntary transcript itself reveals that the detectives and Petitioner were able to have a full conversation for just under an hour without any indications that Petitioner was having any comprehension issues. Exhibit A. Thus, the fact that Petitioner did not have any apparent issues with comprehension, that he was not under anesthesia, and was able to provide telephone

numbers as well as feign his culpability leads to a determination that his statements were voluntary.

Third, as discussed *supra*, it was unnecessary for the detectives to advise Petitioner of his constitutional rights as he was not in custody. It also bears noting that Petitioner was advised multiple times that he was not under arrest throughout the interviews.

Fourth, Petitioner does not and cannot demonstrate that Petitioner was subjected to a prolonged interview and subject to inappropriate tactics. Petitioner participated in two (2) interviews from his hospital bed for a total duration of just under one (1) hour. Recorder's Transcript of Hearing: Jury Trial Day 17 at 22-23. His first interview lasted about eighteen (18) minutes while his second interview spanned about thirty-seven (37) minutes. Id. Not only was this timing far less than the five (5) hours of detention the defendant in Passama experienced, but also, unlike in Passama as will be discussed infra, the one (1) hour was not coupled with any inappropriate coercion. 103 Nev. at 214–15, 735 P.2d at 323; Chambers, 113 Nev. at 980, 944 P.2d at 809 (concluding that the defendant's statements to police were voluntary after a four-hour interview with police coupled with not appearing to be intoxicated and knowingly and intelligently waiving his Miranda rights).

Additionally, Detective Williams and Detective Merrick did not employ inappropriate questioning tactics. The Nevada Supreme Court has ruled that a defendant's statement is not deemed involuntary when made as a result of police misrepresentations. In Sheriff v. Bessey, 112 Nev. 322, 324, 914 P.2d 618, 619 (1996), the Supreme Court reversed a pre-trial petition for a writ of habeas corpus where the district court found that the Detective had improperly fabricated evidence and ruled that the defendant's inculpatory statements should have been suppressed and dismissed the information. The district court objected to the fact that during questioning, the defendant denied engaging in any sexual acts with the victim. Id. The police officer asked the defendant if he could explain why scientific testing determined that the defendant's semen was present on the couch of the apartment where the sexual acts allegedly occurred. Id. "The actual analysis was negative, but the officer presented Bessey

with a false crime lab report, which the officer had prepared. Bessey then made a number of inculpatory statements." Id.

The Bessey Court recognized that under Passama it is a totality of the circumstances test to determine whether a confession was voluntary. Id. at 324-25, 914 P.2d at 619. Police deception was a relevant factor in determining whether the confession was voluntary; "however, an officer's lie about the strength of the evidence against the defendant, in itself, is insufficient to make the confession involuntary." Id. at 325, 914 P.2d at 619, citing Holland v. McGinnis, 963 F.2d 1044, 1051 (7th Cir. 1992), cert. denied, 113 S.Ct. 1053 (1993). Further, "cases throughout the country support the general rule that confessions obtained through the use of subterfuge are not vitiated so long as the methods used are not of a type reasonably likely to procure an untrue statement." Id. at 325, 914 P.2d at 620.

The Bessey Court noted that lying to a suspect about a co-defendant's statement is insufficient to render a suspect's subsequent statement involuntary. Id., citing Frazier v. Kupp, 394 U.S. 731 (1969). Moreover, lying to a suspect regarding the suspect's connection to the crime is "the least likely to render a confession involuntary." Id., citing Holland, *supra*.

Such misrepresentations, of course, may cause a suspect to confess, but causation alone does not constitute coercion; if it did, all confessions following interrogations would be involuntary because "it can almost be said that the interrogation caused the confession." Miller v. Fenton, 796 F.2d 598, 605 (3rd Cir.), cert. denied, 107 S.Ct. 585 (1986). Thus, the issue is not causation, but the degree of improper coercion, and in this instance the degree was slight. Id. The Bessey Court, 112 Nev. at 328, 914 P.2d at 621-22, recognized that many of the investigatory techniques designed to elicit incriminating statements often involve some degree of deception:

> Several techniques which involve deception include under-cover police officers, sting operations, and interrogation techniques such as offering false sympathy, blaming the victim, minimizing the seriousness of the charge, using a good cop/bad cop routine, or suggesting that there is sufficient evidence when there is not. As long as the

techniques do not tend to produce inherently unreliable statements or revolt our sense of justice, they should not be declared violative of the United States or Nevada Constitutions.

In the instant case, Petitioner has not alleged and cannot demonstrate that Detective Williams and Detective Merrick employed investigative techniques that would transform Petitioner's voluntary statement into an involuntary one. At most Detective Williams may have feigned the weight of the evidence against Petitioner, an issue Petitioner did not raise, but that itself "is insufficient to make the confession involuntary." Bessey, at 325, 914 P.2d at 619. Moreover, it was not coercive for the detectives to continue to speak with Petitioner after he stated he was done speaking and then continued to speak with the detectives:

Q: Okay Jorge, we're not gonna listen to lies any longer, not gonna waste your time.
A: Okay then I'm done.
Q: You...
A: We're done.
Q: We're done?
A: Yep.
Q: Your buddy is bleeding out.
Q1: What's he gonna tell us when he comes in here?
A: Who?
Q1: Your buddy.
A: How...
Q1: He's also shot.
A: I don't know – I don't know what he – know what his problem was.

State's Exhibit A at 15-16. By voluntarily continuing to speak with the detectives, Petitioner made it clear he was not done speaking with them. Accordingly, the duration and nature of the interviews does not indicate that Petitioner's statements were involuntary.

As for the final factor, Petitioner did not suffer physical punishment during his interviews. In Falcon v. State, 110 Nev. at 533, 874 P.2d at 774, the defendant claimed that his statements were not voluntary because he was under the influence of a controlled substance at the time he gave his statement. The Nevada Supreme Court found that the defendant's statement was voluntary where he was interviewed eleven (11) hours after the crime was reported, the

officers who came into contact with him observed that he was capable of understanding, the officers testified that the defendant did not exhibit the signs of a person under the influence of a controlled substance, and that the defendant willingly spoke to the officers. Id. at 534, 874 P.2d at 775.

Based on Petitioner's responses to the officers during his voluntary interview, it appears that he was able to understand the meaning of his statements and it does not appear that the officers thought that he was showing signs of impairment. Stewart, 92 Nev. at 170–71, 547 P.2d at 321; Chambers, 113 Nev. at 980, 944 P.2d at 809. Additionally, to the extent Petitioner argues he was forced to participate in the interview in pain, his claim is belied by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225. While Petitioner now appears to self-servingly claim that he was in pain during the interviews, there is no indication that such fact would have made his statement involuntary. Indeed, Petitioner testified at trial that he was given pain medication prior to being transported to the hospital. Recorder's Transcript of Hearing: Jury Trial Day 14 at 170-71, 210. Moreover, he never once told the officers that he was in pain throughout the interview, let alone that he needed a break of any kind. State's Exhibit A.

In sum, trial counsel was not ineffective for failing to move to suppress Petitioner's statement to police after his arrest because, after an examination of a totality of the circumstances, Petitioner's statement to police was voluntary. See Ennis, 122 Nev. at 706, 137 P.3d at 1103 (explaining that counsel cannot be ineffective for failing to make futile objections or arguments). It also bears noting that counsel joined in and filed significant meritorious motions in this case, such as joining Co-Defendant Murphy's Motion to Sever.

Additionally, at the evidentiary hearing, Mr. Wolfbrandt testified that he reviewed Petitioner's voluntary statement with detectives at the hospital prior to trial, but he did not challenge them because he did not think they mattered as he wanted to focus on the forensic and physical evidence which he found to be substantial. Recorder's Transcript RE: Evidentiary Hearing Motion for Leave to Add to Record Hospital Records, filed Mar. 9, 2021, at 11, 21. Accordingly, not only was counsel not ineffective, but also Petitioner has not

and cannot demonstrate that he was prejudiced by these statements because the result of his trial would not have been different without these statements as there was overwhelming evidence of Petitioner's guilt, including: (1) Petitioner being found at the scene of the shooting after being shot by one of the occupants of the home; (2) a man wearing an orange ski mask was seen fleeing the scene and that same mask was found inside of the vehicle in which Petitioner was found; (3) although not definitively conclusive, the bullet recovered from Petitioner's leg had the general characteristics of the Glock .40 millimeter that Joseph Larsen was found holding shortly after the shooting and was determined to not have been fired by any of the other weapons examined; (4) Figueroa testified about the conspiracy, including that he, Montone, and Petitioner were dropped off at Joseph Larsen's home, Figueroa broke through the door, and gunfire erupted; (5) although the bullet found in Gibson could not conclusively be identified as coming from the rifle, it had general characteristics with the rifle and was not fired by any of the other weapons examined; (6) Petitioner claimed he used the rifle to shoot at the occupants of the home; and (7) Petitioner admitted to each of the charges, except for murder. Jury Trial Day 5 at 18, 74, 83; Jury Trial Day 7 at 169-170; Jury Trial Day 9 at 22-24; Jury Trial Day 10 at 236-247; Jury Trial Day 14 at 139-154, 162-64, 179, 218. Therefore, Petitioner's claim fails.

2. Trial counsel was not ineffective for failing to ask certain questions at Petitioner's jury trial

Petitioner claims counsel was also ineffective for "being silent most of the time" and failing to question the following matters further: (1) whether Murphy, Laguna, and Figueroa had firearms that matched the rifle Mendoza used, (2) bullets that were allegedly never retained as discussed by the investigators at trial, and (3) whether the other suspects could have caused the death of Gibson. Supplemental Petition at 19-20. Not only is this claim insufficiently pled, but it also does not demonstrate ineffective assistance of counsel under the Strickland standard. Hargrove, 100 Nev. at 502, 686 P.2d at 225; Maresca, 103 Nev. at 673, 748 P.2d at 6; NRS 34.735(6).

As a threshold matter, the questions counsel asked at Petitioner's jury trial was a virtually unchallengeable strategic decision. Vergara-Martinez v. State, 2016 WL 5399757, Docket No. 67837, unpublished disposition (September 2016) ("Counsel's decision regarding how to question witnesses is a strategic decision entitled to deference."). Regardless, Murphy and Figueroa's attorneys also asked questions at that trial, so there may have been no need for counsel to repeat questions.

Moreover, there would have been no need for counsel to ask further questions about the aforementioned three (3) subject matters. As far as asking further questions regarding whether Murphy, Laguna, and Figueroa had firearms that matched Petitioner's rifle, such questions would have been futile. See Ennis, 122 Nev. at 706, 137 P.3d at 1103. Figueroa as well as a resident of the neighborhood testified that Petitioner was the individual carrying the rifle that night. Jury Trial Day 8 at 98; Jury Trial Day 10 at 236. More importantly, Petitioner himself testified that he was the individual with such firearm. Jury Trial Day 14 at 150. Furthermore, Mr. Wolfbrandt testified at the evidentiary hearing that all of the evidence, including Petitioner's blood trail to the pickup truck where the rifle and Petitioner were found, suggested that Petitioner possess the rifle on the night of the murder. Recorder's Transcript RE: Evidentiary Hearing Motion for Leave to Add to Record Hospital Records, filed Mar. 9, 2021, at 24. Thus, there was no need to ask further questions about the firearms.

Likewise, Petitioner has not and cannot demonstrate that counsel was ineffective for failing to ask further questions about bullets that were never retained or how asking such questions would have led to a better outcome at trial. Petitioner has failed to cogently argue his point as he has failed to identify the bullets to which he is referring, let alone which investigator he believes should have been asked further questions for the State to meaningfully respond. Notwithstanding such failure, asking further questions would have been futile and the outcome of the trial would not have changed as Petitioner not only admitted to shooting at the home with the rifle containing the 9-millimeter bullets that were later recovered from Gibson's body, but also there was other evidence adduced that

Petitioner was in possession of the rifle at the time the shooting erupted. Jury Trial Day 7 at 170; Jury Trial Day 10 at 236-247; See Ennis, 122 Nev. at 706, 137 P.3d at 1103.

Additionally, Petitioner's argument that counsel should have asked whether the other suspects could have been the cause of Gibson's death equally fails. The forensic evidence revealed that the cause of Gibson's death was being shot in the head and chest with a 9-millimeter bullet for which there was testimony that Petitioner was the individual in possession of the rifle that held such sized bullets. Jury Trial Day 6 at 15; Jury Trial Day 7 at 156, 169-170. Indeed, Mr. Wolfbrandt testified at the evidentiary hearing that the reason he did not ask further questions about whether the other suspects could have caused Gibson's death was because he believed that in order to be successful with Petitioner's theory of self-defense he needed to establish that Petitioner was in fear of his life and blaming another suspect for Gibson's death would have contradicted that argument. Recorder's Transcript RE: Evidentiary Hearing Motion for Leave to Add to Record Hospital Records, filed Mar. 9, 2021, at 24. Regardless, Petitioner and his co-defendants would have been guilty of the murder regardless of who shot the rifle based on a theory of felony murder. Therefore, Petitioner cannot demonstrate how he would have received a better outcome had additional questions been asked.

3. Trial counsel was not ineffective for failing to deliver Petitioner's motion to withdraw counsel

Petitioner argues that counsel was ineffective for failing to file a Motion to Withdraw Counsel on Petitioner's behalf. Supplemental Petition at 30. This claim also fails.

Not only is Petitioner's claim insufficiently pled, but the only support Petitioner has provided for his argument is a self-serving affidavit to which he failed to cite in his argument. Exhibit 1 Affidavit of Jorge Mendoza. In such affidavit, Petitioner claims that he gave counsel a Motion to Withdraw Counsel on day ten (10) of his trial and requested counsel file it with the Court. Exhibit 1 Affidavit of Jorge Mendoza at 2. Petitioner claims that the basis for his motion was that counsel was ineffective for failing to ask his questions as well as questions in general and test the State's case. Id. at 2. Moreover, he claims that

counsel should have joined in motions and was not honest about his background. Id. Even if this Court were to overlook the insufficiencies in his pleading, the alleged facts in Petitioner's affidavit do not demonstrate that counsel was ineffective. Indeed, the record demonstrates that counsel objected and asked questions to test the State's case during trial. See e.g. Jury Trial Day 5 at 84; Jury Trial Day 9 at 72-85, 109-113; Jury Trial Day 16 at 95, 99. Further, Petitioner's co-defendant's counsel made objections and asked questions. Most importantly, Mr. Wolfbrandt testified at the evidentiary hearing that Petitioner did not ask him to file a Motion to Withdraw Attorney and it would have been Mr. Wolfbrandt's normal practice to alert the Court of such request. Recorder's Transcript RE: Evidentiary Hearing Motion for Leave to Add to Record Hospital Records, filed Mar. 9, 2021, at 26.

Regardless, if one is to assume that Petitioner did in fact ask counsel to file the Motion on the tenth day of trial, which was not the case, it would have been futile to file the Motion because it likely would have been denied based on the delay it would cause. EDCR 7.40(c) ("No application for withdrawal or substitution may be granted if a delay of the trial or of the hearing of any other matter in the case would result."). For this same reason, Petitioner cannot demonstrate prejudice because even if this Motion had been field, it is unlikely the Court would have granted it on the tenth day of trial. Further, Petitioner cannot demonstrate that representing himself or having another attorney represent him would have led to a different outcome at trial. Therefore, Petitioner's claim fails.

4. Trial counsel was not ineffective for failing to object on Confrontation Clause grounds and to subpoena the living victim

Petitioner claims that counsel was ineffective for failing to "object on Confrontation grounds and failed to subpoena the living victim JL." Supplemental Petition at 30. Just like his other claims, Petitioner has failed to sufficiently plead this claim to the point that the State cannot effectively respond. To the extent Petitioner is complaining about the admission of Joseph Larsen's 911 call recording through his father's testimony, Petitioner's claim is meritless.

Generally, out of court statements offered for their truth are not permitted. NRS 51.065. However, NRS Chapter 51 also provides exceptions to the general rule. For example, NRS 51.095 provides the excited utterance exception:

> A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition is not inadmissible under the hearsay rule.

Additionally, the Sixth Amendment states that, "[i]n all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him," and gives the accused the opportunity to cross-examine all those who "bear testimony" against him. Crawford v. Washington, 541 U.S. 36, 51, 124 S. Ct. 1354, 1364 (2004); see also White v. Illinois, 502 U.S. 346, 359, 112 S. Ct. 736, 744 (1992) (Thomas, J., concurring in part and concurring in judgment) ("critical phrase within the Clause is 'witnesses against him'"). Thus, testimonial hearsay—i.e. extrajudicial statements used as the "functional equivalent" of in-court testimony—may only be admitted at trial if the declarant is "unavailable to testify, and the defendant had had a prior opportunity for cross-examination." Crawford, 541 U.S. at 53-54, 124 S. Ct. at 1365. To run afoul of the Confrontation Clause, therefore, out-of-court statements introduced at trial must not only be "testimonial" but must also be hearsay, for the Clause does not bar the use of even "testimonial statements for purposes other than establishing the truth of the matter asserted." Id. at 51-52, 60 n.9, 124 S.Ct. at 1369 n.9 (citing Tennessee v. Street, 471 U.S. 409, 414, 105 S. Ct. 2078, 2081-82 (1985)). Moreover, in Davis v. Washington, 547 U.S. 813, 822, 126 S. Ct. 2266, 2273-74 (2006), the U.S. Supreme Court clarified:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

In this case, Joseph Larsen's father, Steven Larsen, testified about receiving a phone call from Joseph the night of the robbery. Jury Trial Day 9 at 17-18. Joseph, sounding upset and distressed, told Steven that someone had kicked in the front door of his residence and a gunfight ensued. Jury Trial Day 9 at 18-19. After speaking with Joseph on the phone for about five (5) minutes, Steven instructed Joseph to call the police. Jury Trial Day 9 at 20. At this point, Steven proceeded to drive to Joseph's residence. Jury Trial Day 9 at 20. Steven arrived at Joseph's residence ten (10) minutes after the call. Jury Trial Day 9 at 21.

Once Steven arrived at the residence, he parked his car in front of Joseph's house and saw Joseph inside with Gibson lying by the front door. Jury Trial Day 9 at 22. Steven ran inside of the home where Joseph was standing still holding a firearm. Jury Trial Day 9 at 23. At that point, Joseph was talking to the 911 dispatcher on his phone. Jury Trial Day 9 at 23. After testifying about Joseph's demeanor and what Joseph said during the 911 call, Steven explained that he was instructed by the 911 dispatcher to conduct chest compressions on Gibson. Jury Trial Day 9 at 23-24. The State then moved to admit the 911 call recording and published it for the jury. Jury Trial Day 9 at 25-26. Subsequently, the State asked Steven to describe what Joseph told him occurred in the residence, to which Petitioner's co-defendant's counsel objected. Jury Trial Day 9 at 26-27. The Court overruled the objection and later placed on the record its rationale:

> THE COURT: And I did that because on the 911 call, it appeared that Larsen -- Joey Larsen -- was basically hysterical on the telephone when he was making the -- well, actually, he really lost it after his father arrived at the scene. He was fairly together when he was first on the phone with the police dispatch, you know, 911 operator, but then once his dad got there, he just completely fell apart and was screaming, crying, yelling, obviously, very distraught. And so it did seem to me that he was still -- would have still been operating under the excitement and thereby making his testimony reliable and that's why I allowed it.

Jury Trial Day 9 at 87.

Although it does not appear that a Confrontation Clause objection was made, the 911 recording would have been admissible under such grounds for similar reasons to why the

contents of the call were properly admissible as excited utterances. Petitioner's statements to the 911 operator were nontestimonial as he was responding to an ongoing emergency. Indeed, Petitioner was shaking, still holding his firearm while he was on the call and Steven was even instructed at that time to begin chest compressions on the victim as first responders had not yet reached the residence. Jury Trial Day 9 at 23-24. Therefore, it would have been futile for counsel to have made an objection. See Ennis, 122 Nev. at 706, 137 P.3d at 1103.

Additionally, counsel made a reasonable strategic decision when he decided not to subpoena Joey Larsen. See Rhyne, 118 Nev. 1, 38 P.3d 163; Dawson, 108 Nev. 112, 825 P.2d 593. Indeed, Mr. Wolfbrandt testified at the evidentiary hearing that the reason he did not call Joseph Larsen as a witness was because he was unavailable. Recorder's Transcript RE: Evidentiary Hearing Motion for Leave to Add to Record Hospital Records, filed Mar. 9, 2021, at 11. More specifically, he testified that the reason he did not subpoena Larsen was because he was anticipating the State calling him as a witness and he refused to testify. Id. at 27. Moreover, Mr. Wolfbrandt stated that he believed that had Larsen testified he would have been a "loose cannon" and his testimony would not have been in Petitioner's best interest. Id. Instead, Mr. Wolfbrandt believed that Petitioner would gain more from Larsen not testifying so he could argue that Larsen was not testifying because he had something to hide. Id. Regardless, Petitioner cannot and has not demonstrated he was prejudiced as there was other evidence of his culpability presented at trial as discussed *supra*.

IV. PETITIONER FAILED TO SHOW PREJUDICE DUE TO DEFICIENT ATTORNEY PERFORMANCE

The second prong of Strickland requires that the petitioner "must show that the deficient performance prejudiced the defense." Strickland, 466 U.S. at 687, 104 S. Ct. at 2064. In order to meet this prong, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," Strickland, 466 U.S. at 694, 104 S. Ct. at 2068, and " . . . whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." Strickland, 466 U.S. at 695, 104 S. Ct. at 2068-2069. In fact, there

is no requirement that the court must make the findings regarding effective assistance of counsel and resulting prejudice in any particular order. "In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies . . . [i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

In the instant case, even if the Court were to assume that all of Petitioner's claims of his counsel's ineffective assistance were true, the Petitioner has still failed to show that, but for Mr. Wolfbrandt's error, the resulting proceeding would have been different. Petitioner failed to show that if Mr. Wolfbrandt had done everything that the Petitioner claims he failed to do, including: successfully suppressing Mr. Mendoza's statement; not presenting any evidence of self-defense; and convincing Mr. Mendoza not to testify (although that would still be Mr. Mendoza's choice, in any case); that the outcome of the trial would have been different. Given the totality of the evidence presented to the jury, under the State's theory of felony murder, there was still ample evidence for the jury to convict, as discussed *supra*. Therefore, Petitioner has failed to demonstrate that the second prong of Strickland has been sufficiently met.

ORDER

THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief shall be, and it is, hereby denied.

DATED this _____ day of April, 2021.

Dated this 2nd day of April, 2021

Bita Yeager

DISTRICT JUDGE

E59 E88 9BE5 2796
Bita Yeager
District Court Judge

Bita Yeager
Eighth Judicial District Court
Clark County, Nevada
Department I

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Jorge Mendoza, Plaintiff(s)	CASE NO: A-19-804157-W
vs.	DEPT. NO. Department 1
State of Nevada, Defendant(s)	

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Finding of Fact and Conclusions of Law was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 4/2/2021

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If indicated below, a copy of the above mentioned filings were also served by mail via United States Postal Service, postage prepaid, to the parties listed below at their last known addresses on 4/5/2021

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

	Supreme Court Case:_____
JORGE MENDOZA, ID 1169537 Petitioner, vs. WILLIAM GITTERE- WARDEN, Respondent.	Case No.: A-19-804157-W [Companion case: C-15-303991-1] DEPT NO: I

NOTICE OF APPEAL

NOTICE is hereby given that JORGE MENDOZA, Petitioner above named, hereby appeals to the Supreme Court of Nevada from the Findings of Fact,

Conclusions of Law and Order entered April 2, 2021 and noticed by the Honorable District Court Judge Bita Yeager and from the final Judgment of Conviction entered December 12, 2016 after a 19-day jury trial September 12 2016 – October 7, 2016 and November 28, 2016 Sentencing.

At the post-conviction hearing January 25, 2021, an evidentiary hearing was granted without argument. The 2-hour Evidentiary hearing was held February 23, 2021.

DATED this 5th day of April 2021.

Respectfully Submitted,
/s/ Diane C. Lowe, Esq.

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CERTIFICATE OF SERVICE VIA ELECTRONIC FILING EMAIL Service and Email

I hereby certify that service of the above and foregoing was made this 5th day of April 2021, by Electronic Filing email service to: District Attorney's Office Email Address:

Motions@clarkcountyda.com

And to the Nevada Attorney General's Office at wiznetfilings@ag.nv.gov

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

Jorge Mendoza Inmate 1169537

High Desert State Prison

PO Box 650

Indian Springs, NV 89070-0650

/s/ Diane C Lowe, Esq

Attorney for Jorge Mendoza

A-19-804157-W Jorge Mendoza, Plaintiff(s)
vs.
State of Nevada, Defendant(s)

April 08, 2021 03:00 AM MINUTE ORDER RE: COURT'S EXHIBITS

HEARD BY: Yeager, Bita COURTROOM: Chambers

COURT CLERK: Castle, Alan

RECORDER:

REPORTER:

PARTIES PRESENT:

JOURNAL ENTRIES

Per the COURT'S ORDER, the medical records attached to the Motion for Leave to Submit Hospital Recorders for Consideration and photograph of Jorge Mendoza in the hospital have been ADMITTED as COURT'S EXHIBITS 1 & 2.