IN THE SUPREME COURT OF THE STATE OF NEVADA

JORGE MENDOZA,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 82740

RESPONDENT'S ANSWERING BRIEF

Appeal From Denial of Post-Conviction Petition of Writ of Habeas Corpus
Eighth Judicial District Court, Clark County

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ROUTING STATEMENT

This appeal is appropriately assigned to the Nevada Supreme Court pursuant to NRAP 17(b)(3) because it is an appeal from a post-conviction petition of writ of habeas corpus involving an offense that is a category A felony with a life sentence.

STATEMENT OF THE ISSUES

1. Whether trial counsel persuaded Appellant to testify at trial by providing inaccurate statements of self-defense law.

2. Whether trial counsel provided ineffective assistance of counsel at opening and closing statements by providing inaccurate statements of the law and conceding Appellant killed Monty Gibson.

3. Whether trial counsel provided ineffective assistance of counsel by failing to properly cross-examine witnesses.

4. Whether trial counsel provided ineffective assistance of counsel by failing to suppress Appellant's statements made to the police at the hospital.

STATEMENT OF THE CASE

On February 27, 2015, Jorge Mendoza ("Appellant") 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). I AA, 27-32.

On April 3, 2016, Appellant's Co-Defendant, David Murphy ("Murphy"), filed a Motion to Sever. On May 2, 2016, Appellant's counsel requested to join in Murphy's Motion to Sever. XVII AA, 3693. The Court denied the Motion on May 9, 2016. Id. On September 8, 2016, Appellant's Co-Defendant, David Murphy, filed a Motion to Exclude Summer Larsen. Id. The district court denied this Motion on September 9, 2016. Id.

On September 12, 2016, Appellant's jury trial commenced. I AA 60. On October 7, 2016, the jury found Appellant guilty of all counts. XIII AA 3005-3006. On November 28, 2016, the Appellant was sentenced to the Nevada Department of

Corrections ("NDC") as follows: Count 1–to a maximum of seventy-two (72) months and a minimum of twenty-four (24) months in the Nevada Department of Corrections (NDC); Count 2–to a 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–to a 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–to a maximum of one-hundred twenty (120) months and a minimum of thirty-six (36) months, plus a consecutive term of a maximum 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–to a maximum of one hundred twenty (120) months and a minimum of thirty-six (36) months, plus a consecutive term of a maximum 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–to Life With the Possibility of Parole after a term of twenty (20) years have been served, plus a consecutive term of a maximum of 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–to a maximum of two-hundred forty (240) months and a minimum of forty-eight (48) months, plus a consecutive term of a maximum 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. Appellant received eight hundred (800) days credit for time served. His aggregate total sentence was Life with the Possibility of Parole after a minimum of twenty-three (23) years in the NDC. On December 2, 2016, the district court filed the Judgment of Conviction. Id. at 3013-3015

On December 22, 2016, Appellant filed a Notice of Appeal. On October 30, 2018, the Nevada Supreme Court affirmed Appellant's conviction. Id. at 3017; XV AA 3374. On November 27, 2018, Nevada Supreme Court issued Remittitur. XVII AA 3694.

On October 18, 2019, Appellant filed a Petition for Writ of Habeas Corpus, a Motion to Amend, Motion for Appointment of Counsel, and Request for Evidentiary Hearing. XV AA 3379, 3388, 3390. On January 13, 2020, Appellant's Motion for Appointment of Counsel was granted. XVII AA 3694. On September 20, 2020, Appellant filed his Supplemental Petition for Writ of Habeas Corpus (Post-conviction). XV AA 3423. On November 19, 2020, the State filed its Response. XVI AA 3458. On December 14, 2020, Appellant filed a Reply. Id. at 3557.

On January 23, 2021, Appellant filed a Motion for Leave to Add to Record of Hospital Records. Id. at 3588. On February 23, 2021, the district court held an evidentiary hearing in which Appellant and William L. Wolfbrandt Esq. ("trial counsel"), testified. XVII AA 3628-29. After such testimony and argument by the parties, the district court denied the Petition. Id. at 3679-3681.

On April 2, 2021, the district court filed its Findings of Facts, Conclusions of Law and Order. Id. at 3692. On April 5, 2021, Appellant filed a Notice of Appeal from the district court's denial of Appellant's Petition for Writ of Habeas Corpus (Post-Conviction). Id. 3741. On September 2, 2021, Appellant filed the instant opening brief. *See* Opening Brief.

STATEMENT OF THE FACTS

On September 21, 2014, Appellant invaded the house of Joseph Larsen ("Larsen") and Monty Gibson ("Gibson"), shooting and killing Gibson. IV AA 826-827. 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. Id.

On or around July 2014, Summer broke into Larsen's house and stole $12,000 as well as approximately twelve (12) pounds of marijuana. V AA 1115. She later told co-defendant, David Murphy ("Murphy"), that she had done so, and he asked her why she did not bring him along. Id. at 1116. Summer suggested that they could burglarize Larsen's supplier's house. Id. 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. Id. at 1117-1119. Summer then showed Murphy where Larsen's supplier's house was

located. Id. at 1120. After having several more conversations about robbing Larsen's supplier, Murphy told Appellant that he knew of a place they could burglarize to help Appellant get some money. X AA 2396.

At 4:00 AM on September 21, 2014, Murphy called Appellant. Id. at 2397-2398. Appellant then left his house to meet at Murphy's house in his Nissan Maxima. Id. He picked up Murphy, and the two (2) of them drove to co-defendant Joey Laguna's ("Laguna") house. Id. at 2399. Appellant then drove Laguna to Robert Figueroa's ("Figueroa") house, arriving around 7:30 AM. Id. at 2399-2400. Figueroa got into the car with a duffel bag. Id. at 2400. Appellant, Laguna, and Figueroa then drove to an AM/PM gas station to meet back up with Murphy. Id. at 2401. Murphy had an older white pick-up truck and was waiting with a Hispanic woman with tattoos. Id. at 2403. The woman drove Appellant's vehicle, and Murphy led, in his pick-up truck. Id. at 2404-2405. 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. Id. at 2407-2408. Ultimately, no burglary occurred because the woman drove Appellant's car out of the neighborhood. Id. at 2411.

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. Id. at 2411-2412. Appellant and Figueroa left shortly thereafter. Id. at 2413. Around 6:00 PM, Murphy told Appellant to pick up Figueroa. Id. at 2466.

Appellant did so, then proceeded to Laguna's house, stopping on the way at Appellant's house so that Appellant could arm himself with a Hi-point rifle ("rifle"). X AA 2447-2449. When they arrived at Laguna's house, Laguna came outside. Id. at 2450. Figueroa asked who they were going to rob, and Murphy answered. Id. at 2449-2450.

Eventually, the four of them left in Appellant's car, with Murphy driving because he knew where they were going. Id. at 2451-2452 They drove to Laguna's house. Id. at 2452-2453. On the way, the group decided to break into Larsen's house. Id. at 2453. Figueroa was to enter the house, get everyone under control, Appellant 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. Id. at 2454.

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. Id. at 2454-2455. Figueroa broke through the front door and entered the home as Appellant remained near the door with his rifle. Id. at 2456. Shortly thereafter, gunfire erupted. Id. at 2457. 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. VIII AA 1857. Figueroa ran down the street. Id. Appellant began firing his rifle into the house before he was shot in the leg and fell into the street. X AA 2464-2465. Laguna ran out into the street as well. Id. at 2465. Appellant could not walk, so he scooted

away from the house with the rifle still in his hands. Id. at 2468-2470. Appellant continued firing his rifle at the house, killing Gibson. Id. at 2471-2472; V AA 1058.

While the shooting was occurring, Murphy picked up Laguna and fled the scene, stranding Appellant and Figueroa. VIII AA 1863, 1876. Appellant scooted to an abandoned car and crawled inside, where he waited until the police followed his blood trail and apprehended him. X AA 2475. Figueroa managed to escape down the street and hide in a neighbors' backyard for several hours. VIII AA 1863-1865. Figueroa called Laguna, who did not answer; Murphy then called Figueroa and told him that he was not going to pick him up. Id. at 1865-1867, 1879. Subsequently, Figueroa called "everybody in [his] phone" over the next eight (8) or nine (9) hours until his sister agreed to pick him up. Id. at 1879-1883. By then, Appellant had been apprehended and everyone else had escaped. IV AA 927-928; VIII AA 1842. Murphy later drove Appellant's wife to Appellant's car so that she could retrieve it. VII AA 1637. Figueroa went to California and received medical care for his injuries. After he returned, he was apprehended by police on October 20, 2014. IX AA 2100.

At trial, both Figueroa and Appellant testified, generally consistently, as to the events described above. X AA 2387-2500; XI AA 2501-2538; VIII AA 1804-1848, 1851-1993, 1996-2000; IX AA 2001-2083. Additionally, the jury was presented with cell phone records that demonstrated Murphy, Appellant, Laguna, and Figueroa were talking to each other, and moving throughout the city together at

the times, and to the locations, indicated by Appellant and Figueroa. VI AA 1335-1400; VII AA 1660-1750; VIII AA 1751-1800.

SUMMARY OF THE ARGUMENT

The district court properly denied Appellant's Petition for Writ of Habeas Corpus (Post-Conviction). First, the district court correctly determined that trial counsel did not force Appellant to take the stand. Appellant was properly canvassed before taking the stand and freely and knowingly decided to testify at trial.

Second, the district court correctly determined that trial counsel did not abandon his adversarial role, as outline in U.S. v. Swanson, 943 F.2d 1070 (9th Cir. 1991). Trial counsel had a strategic reason to assert a self-defense claim, of which Appellant agreed to pursue.

Third, the district court correctly determined that trial counsel was not ineffective for failing to vigorously question the State's witnesses. Appellant's claim is insufficiently pled and that furthering questioning the State's witnesses would not have changed the outcome of the trial.

Fourth, the district court correctly determined that trial counsel was not ineffective for failing to suppress Appellant's statements. Appellant's claim is without merit and his statements were voluntarily given to law enforcement.

ARGUMENT

Appellant argues that trial counsel provided ineffective assistance of counsel in four (4) instances. Under Appellant's first ground, he claims trial counsel erroneously advised Appellant that he had legal grounds to assert self-defense at trial, which caused him to testify at trial. *See* Opening Brief. at 19-20. Because of this, Appellant was persuaded to testify at trial. *See* Id. at 21-23. Under Appellant's second ground, he claims trial counsel conceded Appellant's guilt during closing and opening statements by basing their case on an improper self-defense claim. *See* Id. at 27. Under Appellant's third ground, he claims trial counsel failed to cross-examine the witnesses adequately. *See* Id. at 30, 32-33. Under Appellant's fourth ground, he claims trial counsel failed to suppress Appellant's statements made to detectives at the hospital. *See* Id. at 34.

This Court reviews the district court's application of the law de novo and gives deference to a district court's factual findings in habeas matters. *See* State v. Huebler, 128 Nev. 192, 197, 275 P.3d 91, 95 (2012), *cert. denied*, 133 S. Ct. 988 (2013). This Court reviews a district court's denial of a habeas petition for abuse of discretion. *See* Rubio v. State, 124 Nev. 1032, 1047, 194 P.3d 1224, 1234 (2008). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001). This Court must give deference to the factual findings made by

the district court as long as they are supported by the record. *See* Little v. Warden, 117 Nev. 845, 854, 34 Pd. 3d 540, 546 (2001).

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 Strickland's two-prong test. 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. *See* Strickland 466 U.S. at 687-88, 694, 104 S. Ct. at 2065, 2068; *See also* 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 that counsel was ineffective by a preponderance of the evidence. *See* 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); *See also* 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. *See* Harrington v. Richter, 131 S.Ct. 770, 791, 578 F.3d. 944 (2011).

Even if an appellant can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice and show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *See* McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (*citing* Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). Moreover, "[a] reasonable probability is a probability sufficient to undermine confidence in the

outcome." Id. (*citing* Strickland, 466 U.S. at 687-89, 694, 104 S. Ct. at 2064–65, 2068).

Lastly, an appellant "must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence." Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). Claims of ineffective assistance of counsel must be supported with specific factual allegations, which would entitle the appellant to relief if true. *See* Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). Bare and naked allegations are not sufficient, nor are those belied and repelled by the record. *See* Id.

I. TRIAL COUNSEL PROVIDED EFFECTIVE ASSISTANCE OF COUNSEL WHEN ADVISING APPELLANT OF HIS RIGHT TO TESTIFY

Appellant claims that trial counsel coerced Appellant to testify at trial based on inaccurate statements of law regarding self-defense. *See* Opening Brief, at 21-23. Appellant's claim is without merit.

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). However, Appellant is unable to make such a showing. Indeed, only two (2) decisions are left entirely to a defendant at trial: whether to represent himself or testify at trial. *See* 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.").

District courts have "broad discretion" to settle jury instructions. *See* Cortinas v. State, 124 Nev. 1013, 1019, 195 P.3d 315, 319 (2008). District courts' decisions settling jury instructions are reviewed for an abuse of discretion. *See* Crawford v. State, 121 Nev. 746, 748, 121 P.3d 582, 585 (2003). This Court reviews whether an instruction is an accurate statement of the law de novo. Cortinas, 124 Nev. at 1019, 195 P.3d at 319. Further, instructional errors are harmless when it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error," and the error is not the type that would undermine certainty in the verdict. Wegner v. State, 116 Nev. 1149, 1155–56, 14 P.3d 25, 30 (2000) (overruled on other grounds by Rosas v. State, 122 Nev. 1258, 147 P.3d 1101 (2006)). *See also*, NRS 178.598.

Moreover, 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. *See* Davis v. State, 130 Nev. 136, 145, 321 P.3d 867, 874; *See also* Cortinas, 124 Nev. at 1019, 195 P.3d at 319. Additionally, the appropriateness of a jury instruction "depends upon the

testimony and evidence of that case." Runion v. State, 116 Nev. 1041, 1051, 13 P.3d 52, 59 (2000).

Appellant relies on Lara. However, Lara is not favorable to Appellant; if anything, Lara bolsters the State's position. There, Defendant, belonging to the 18th street gang, discharged his firearm into a 1976 Cadillac, killing a child passenger. Lara, 120 Nev. at 178, 87 P.3d at 529. On appeal from a denial of a petition for a writ of habeas corpus (post-conviction), Defendant argued that his counsel was ineffective for advising him to testify at trial. Id. at 178, 182, 87 P.3d at 528, 531.

There, the Court found counsel was not ineffective for advising Defendant to testify at trial because "the district court canvassed Lara before he took the stand, [] Lara stated that he understood his rights . . . counsel properly advised Lara of his right to testify." Id. Moreover, the Court held, "In light of the evidence against" Defendant "we cannot hold that . . . the outcome at trial would have been different." Id.

Additionally, Appellant misconstrues Runion, in her argument that the initial aggressor has no self-defense claim. There, Defendant, after initiating a verbal confrontation at a red light, discharged his firearm into the victim's car, killing one and injuring another. Runion, 116 Nev. at 1043-44, 13 P.3d at 54. At trial, Defendant testified that he discharged his firearm into the victim's car in self-defense after the victim yelled insults, made gang signs, and flashed his gun at Defendant. Id. at 1045,

13 P.3d at 55. On direct appeal, Defendant argued the district court abused its discretion in refusing to give a self-defense instruction based on apparent danger. Id. at 1045, 1050, 13 P.3d at 55, 58.

There, the Court found that Defendant's testimony supported a self-defense claim based on actual danger, while other evidence suggested a self-defense claim of apparent danger. Id. at 1048, 13 P.3d at 57. However, the Court found that without Defendant's proffered jury instruction or counsel's argument on apparent danger, the jury may have been misled "into concluding that Runion's actions were not justified even if they found that Runion thought Pendergraft had brandished a weapon, but Runion was mistaken in that belief." Id.

Further, the court provide list of jury instruction dealing with self-defense claims:

> The killing of another person in self-defense is justified and not unlawful when the person who does the killing actually and reasonably believes:
>
> 1. That there is imminent danger that the assailant will either kill him or cause him great bodily injury; and
>
> 2. That it is absolutely necessary under the circumstances for him to use in self-defense force or means that might cause the death of the other person, for the purpose of avoiding death or great bodily injury to himself.
>
> A bare fear of death or great bodily injury is not sufficient to justify a killing. To justify taking the life of another in self-defense, the circumstances must be sufficient to excite the fears of a reasonable person placed in a similar

situation. The person killing must act under the influence of those fears alone and not in revenge.

An honest but unreasonable belief in the necessity for self-defense does not negate malice and does not reduce the offense from murder to manslaughter.

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.

However, where a person, without voluntarily seeking, provoking, inviting, or willingly engaging in a difficulty of his own free will, is attacked by an assailant, he has the right to stand his ground and need not retreat when faced with the threat of deadly force.

Actual danger is not necessary to justify a killing in self-defense. A person has a right to defend from apparent danger to the same extent as he would from actual danger. The person killing is justified if:

1. He is confronted by the appearance of imminent danger which arouses in his mind an honest belief and fear that he is about to be killed or suffer great bodily injury; and

2. He acts solely upon these appearances and his fear and actual beliefs; and

3. A reasonable person in a similar situation would believe himself to be in like danger.

The killing is justified even if it develops afterward that the person killing was mistaken about the extent of the danger.

If evidence of self-defense is present, the State must prove beyond a reasonable doubt that the defendant did not act

> in self-defense. If you find that the State has failed to prove beyond a reasonable doubt that the defendant did not act in self-defense, you must find the defendant not guilty.

Id. at 1051-52, 13 P.3d at 59. As shown above, and contrary to Appellant's assertion, self-defense law is more complex and fact intensive in determining who may claim self-defense, when one can claim self-defense, and how one may claim self-defense. *See* Opening Brief, at 26. The inquiry does not end by simply saying the initial aggressor "has no self-defense claim." Id.

Here, like in Lara, the district court extensively canvassed Appellant, after which point Appellant decided to testify. X AA 2383-85. Specifically, the district court stated:

> THE COURT: later. All right. So, Mr. Mendoza, so under the Constitution of the United States and under the Constitution of the State of Nevada, *you cannot be compelled to testify in a trial*. Do you understand that?
> DEFENDANT MENDOZA: Yes.
> . . .
> THE COURT: Okay, thank you. But of course, you may at your own request give up this right and take the witness stand and testify. Now, if you do, you will be subject to cross-examination by the State's attorneys, and anything that you might say either on direct examination or cross-examination is the subject of fair comment to the jury in closing argument by the State. And do you understand that?
> DEFENDANT MENDOZA: Yes.
> THE COURT: Okay. Now, if you choose not to testify, the Court would not permit the district attorney to make any comment to the jury about you not testifying. In other words, they can't stand up there and say to a jury, well, he

> didn't testify, and therefore, he must be guilty . . . Do you understand that?
> DEFENDANT MENDOZA: Yes.
> . . .
> THE COURT: Do you have any question about any of those rights?
> DEFENDANT MENDOZA: No.

Id.

As shown above, trial counsel asserted no control over Appellant's decision to testify and could not control whether Appellant would provide the necessary testimony for a theory of self-defense. Like in Lara, the district court fully canvassed Appellant and informed him that he *cannot be compelled to testify in a trial*, which Appellant understood Id. at 2383. Additionally, at no time did Appellant raise any concerns to the district court regarding the allegations that trial counsel is forcing him to testify or any clarification regarding the self-defense claim before taking the stand. Id. at 2383-85.

Moreover, during the evidentiary hearing on February 23, 2021, trial counsel testified that Appellant agreed with the self-defense claim because it was the best course of action for Appellant. *See* XVII AA 3634-36. Specifically, trial counsel testified on direct examination:

> 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 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.

Id. at 3634-35.

On cross-examination, trial counsel testified that he discussed with Appellant his right to testify. *See* Id. 3645. Moreover, trial counsel goes to say:

> 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.

Id.

As shown above, at no point does trial counsel use threatening or forceful language towards Appellant to force him to testify. On the contrary, after lengthy and numerous conversations with his client, the self-defense claim became the "only argument they had." Id. at 3635. According to trial counsel, this is because he was concerned with the felony murder rule. Id. Specifically, trial counsel explains:

> [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.

Id. at 3645.

Trial counsel did not coerce Appellant into testifying. In fact, this Court will not find any statement in the record directly or indirectly alluding to trial counsel promising Appellant a successful self-defense claim if Appellant were to testify because there is none. Trial counsel worked with the facts available to him and represented Appellant to the best of his ability. Unlike in Runion, trial counsel could not predict that Appellant's testimony on the fourteenth day of trial would preclude the admission of self-defense jury instructions on the eighteenth day of the trial. *See* X AA 2387-2414; *See also* XII AA 2811-15.

Moreover, like in Lara and Runion, Appellant cannot demonstrate that the outcome of his trial would have been different because the State presented overwhelming evidence to demonstrate Appellant's guilt. Independently from Appellant's testimony, the State presented evidence that placed Appellant at the crime scene with the murder weapon (rifle) in hand. *See* IV AA 876-878; *See also* V AA 1066-72; *See also* VI AA 1290-99, 1301-03, 1307-08, 1320-26, 1329, 1409-12, 1430-34. Appellant's cell phone also places him at the crime scene during the time of the shooting. *See* VII AA 1690, 1705-1712.

Additionally, law enforcement found Appellant near the crime scene hiding in a nearby black sedan, with a rifle and an orange ski mask nearby *See* IV AA 912-16; *See also* V AA 1066-73. Moreover, blood found at the crime scene and on the rifle matched Appellant, *See* IV AA 938, 984-87, VII AA 1548, 1550-51.

Lastly, Mr. Figueroa testified that his fellow Co-Defendants and Appellant planned to rob around thirty (30) to fifty (50) pounds of marijuana from Larsen and Gibson's home. VIII AA 1826-1830. The night of the robbery, Appellant picked up Mr. Figueroa and drove to Larsen and Gibson's home. Id. at 1832-35. Once there, Mr. Figueroa and Appellant entered the home, at which point a gunfight ensued Id. 1836-40.

Thus, Appellant cannot demonstrate that the outcome of his trial would have been different because, even if he had not testified, there was enough evidence that Appellant was guilty under a theory of felony murder. Indeed, the jury could have logically concluded Appellant conspired with his Co-Defendants to rob Larsen and Gibson, and in the pursuit of the robbery, shot and killed Gibson, thus satisfying first-degree murder via felony murder. *Generally see* 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, the district court did not err in denying this claim in Appellant's Petition for Writ of Habeas Corpus (Post-Conviction).

II. TRIAL COUNSEL PROVIDED EFFECTIVE ASSISTANCE OF COUNSEL DURING OPENING STATEMENTS AND DID NOT CONCEDE APPELLANT'S GUILT

Appellant is requesting this Court to extend the ruling in U.S. v. Swanson, 943 F.2d 1070 (9th Cir. 1991) to include opening and closing statements that includes improper self-defense claims. *See* Opening Brief, at 27. Additionally, Appellant claims trial counsel admits Appellant's guilt during opening statements. Id. However, Appellant's claim is belied by the record.

In McCoy, the Supreme Court held that "counsel's admission of guilt over the client's express objection is error structural in kind." McCoy v. Louisiana, 138 S. Ct. 1500, 1511, 200 L. Ed. 2d 821 (2018) (emphasis added). The key in this language is the qualifier "over the client's *express objection*." In McCoy, the defendant "vociferously insisted he did not engage in the charged acts and adamantly objected to any admission of guilt." Id. at 1505. Further, the defendant "testified in his own defense, maintaining his innocence." Id. at 1507.

The Supreme Court's ruling was clearly limited to instances where a defendant expressly objects to his counsel's concessions. In fact, the Supreme Court expressly stated that McCoy did not overrule its holding in Florida v. Nixon, 543 U.S. 175, 125 S. Ct. 551 (2004). *See* McCoy, 138 S. Ct. at 1509, 200 L. Ed. 2d 821

(2018). The Court carefully distinguished the two cases by noting that "Nixon's attorney did not negate Nixon's autonomy by overriding Nixon's desired defense objective, for Nixon never asserted any such objective. Nixon 'was generally unresponsive' during discussions of trial strategy, and 'never verbally approved or protested' counsel's proposed approach.'" Id. at 1509.

Trial counsel and Appellant discussed what their trial strategies would be on many occasions. XVII AA 3634-36. After which, Appellant agreed to proceed with the self-defense claim. Id. at 3634-36, 3644. At no time before or during trial did Appellant *express any objection* in pursuing the self-defense claim, nor did Mr. Wolfbrandt procced over Appellant's objection. *See* X AA 2383-85; *See also* XVII AA 3634-36, 3644, 3666.

Moreover, trial counsel did not admit to Appellant's guilt during opening statements. In full context, trial counsel stated:

> I'll just reiterate, that what you just heard from the *statement is not evidence*. That's what they think the evidence is going to show.
> . . .
> Now, throughout the course of this case, there's going to be a lot of facts and you'll find that many of the facts, as they come out are not really -- they're not in dispute, okay? What you'll find from our perspective, certainly on behalf of Mr. Mendoza, is the significance of the various facts and events.
> . . .
> I don't know if all of you heard that, the term "homicide" in and of itself is not a crime. The fact that Mr. Gibson, he died at the hands of another. At the end it's

> going to be your determination as to whether or not he die as a result of a crime.
>
> We're going to try to convince you that he died as a result of self-defense, Mr. Mendoza's self-defense.

IV AA 855-56.

At no point did trial counsel express to the Jury that Appellant was guilty of Murder with Use of a Deadly Weapon. Trial counsel made a general opening statement indicating that some facts are not in dispute, never indicating what facts are not disputed, and ended by asserting Appellant's innocence via a theory of self-defense. *See* Id.

Moreover, as discussed *supra*, trial counsel has no control over Appellant's testimony. Even if he had, his decision to argue self-defense on Appellant's behalf was tactical, not an abandonment of his adversarial role as discussed in Swanson, 943 F. 2d at 1074. *See* Dawson, 108 Nev. at 117, 825 P.2d at 596 ("Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable"). At trial, trial counsel stated that the crux of his theory of defense was that Appellant had withdrawn from the charged crimes when he shot back at Larsen's home. *See* XII AA 2811-13. Self-defense was just one way to demonstrate that Appellant 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 all 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.

XII AA 2811-13

Additionally, Appellant's reliance on Swanson is misplaced. In Swanson, the defendant challenged his conviction from a bank robbery based on his counsel's ineffectiveness during his trial. *See* U.S. v. Swanson, 943 F.2d 1070, 1072 (9th Cir. 1991). There, 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 United States 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, Appellant has not demonstrated the necessity of expanding Swanson. Even so, such an expansion would chill defense attorney's advocacy for their clients. In many instances, the fruit of a self-defense claim comes to fruition during trial. Many factors affect a successful self-defense claim. However, in large part, it rests upon the testimony of the accused. Furthermore, in instances like this, there is a clear cause of action available to appellants, and of which Appellant has already taken, an ineffective assistance of counsel claim via Strickland.

However, even if this Court decides to expand the Swanson ruling, the outcome would not be any different. Unlike in Swanson, trial counsel did not admit to his client's guilt and did not bolster the State's evidence presented against Appellant. trial counsel directly contested the State's charge of murder. *See* XII AA 2874. Specifically, trial counsel said during closing statement:

> I just want to focus you on really the events that occurred at 1661 Broadmere that evening because that's what's -- that's what brought us all here is that particular night. Ms. Lexis was right, and I told you from the opening that Jorge was going to admit and he testified he admitted to certain of the crimes that did occur at that location. He did commit a burglary. He did commit a home invasion, and he did commit an attempt robbery.
> . . .
> But we are absolutely contesting here and the reason why we're here is that it's our position that no attempt murder happened, and that no murder happened.

XII AA 2874.

Moreover, after Appellant's testimony, trial counsel made a strategic decision to argue "for no more than second degree" murder." *See* XII AA 2874-87. Specifically, trial counsel argued that:

> And as soon as that door breaches open, they start hearing gunshots. And Robert takes a shot right in the mouth and be turns and falls and turns and starts to run away. Jorge immediately turns and tries to exit the scene.
> Now, there's been a lot of contention, I'm sure the State's try to suggest to you that Jorge wasn't killed at the -- I'm sorry, Jorge wasn't shot there on the doorstep or there in the front part of the house. I'm going to submit to

> you and I'll get to that in a minute that he was shot out into -- in the area of the yard, as he testified.
> . . .
> Now, there's no question had Monty been killed then, the Felony Murder Rule would have applied. But it's our contention that that's not what happened. Jorge told you that he didn't see anybody in the house. Clearly, he knew people were in the house because he was getting shot at, they were getting shot at as that door opened.
> . . .
> Jorge never saw anybody. He was just -- he was firing in there, absolutely. Was he trying to hit anybody? He told you, no, he didn't see anybody, and you can see clearly from the photographs and the crime scene diagrams and the trajectory discussion that was had by one witness, all those shorts were either going downward into the carpet or one of them even went upstairs.
> . . .
> And it's important because attempt murder is a specific intent crime where the purpose -- the shooter has to have the intent of actually killing somebody and just not accomplishing that. That's not the case here.

XII AA 2876-2878.

As shown above, trial counsel did not concede Appellant's guilt of Murder with Use of a Deadly Weapon and Attempt Murder with Use of a Deadly Weapon. Trial counsel argued that Appellant did not have the required intent to commit murder. This is in stark contrast to Swanson, where counsel clearly conceded his client's guilt before the jury. *See* Swanson, 943 F.2d at 1071. Therefore, the district court did not err in denying this claim in Appellant's Petition for Writ of Habeas Corpus (Post-Conviction).

III. TRIAL COUNSEL PROVIDED EFFECTIVE ASSISTANCE OF COUNSEL DURING THE CROSS-EXAMINATION

Appellant claims trial counsel provided ineffective assistance of counsel when he failed to "vigorously cross-examine[] all the witnesses." *See* Opening Brief, at 32.[1] However, Appellant's claim is not sufficiently pled pursuant to Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

As a threshold matter, how counsel questions a witness at a jury trial is virtually an unchallengeable strategic decision. *See* Vergara-Martinez v. State, 126 Nev. 737, 367 P.3d 798 (Table) (2016) (unpublished deposition) ("Counsel's decision regarding how to question witnesses is a strategic decision entitled to deference.").

Here, Appellant asserts that trial counsel "should have vigorously cross-examined all the witnesses" but provides no factual support to prove Appellant's assertion that trial counsel failed to examine all the State's witnesses properly. *See* Opening Brief, at 32. Appellant does not provide what trial counsel should have asked the witnesses, what witnesses trial counsel failed to examine vigorously, or how the outcome of trial would have changed.

In any event, Murphy and Figueroa's attorneys provided extensive cross-examination at trial when trial counsel elected not to cross-examine a State's

[1] Appellant makes additional claims. However, said claims are addressed in other sections of the argument.

witness. *See* IV AA 889-896; V AA 1097-1098. 1141-1220, 1231-1233; VI AA 1330-1333, 1379-1384, 1398-1400; X AA 2424-2433.

Moreover, asking further questions regarding whether Appellant's Co-Defendants had firearms that matched Appellant's rifle would have been futile. *See* Ennis, 122 Nev. at 706, 137 P.3d at 1103. Figueroa and a resident of the neighborhood testified that Appellant was the individual carrying the rifle that night. *See* VI AA 1412; VIII AA 1831-1833. Additionally, Appellant testified that he was the only individual with such a firearm. *See* X AA 2457-59. Thus, there was no need to ask further questions about firearms.

Additionally, any questions regarding whether the other or Co-Defendant's could have been the cause of Gibson's death equally fails. Here, a 9-millimeter bullet was recovered from Gibson's body. *See* VI AA 1307-1309. Forensic evidence revealed the cause of Gibson's death was due to being shot in the head and chest with a 9-millimeter bullet. *See* Id. at 1294, 1307-1309; 1325-1326, 1329. However, even if this Court were to agree with Appellant, Appellant would have been found guilty, as discussed *supra*, regardless of who shot the rifle based on a theory of felony murder. Therefore, the district court did not err in denying this claim in Appellant's Petition for Writ of Habeas Corpus (Post-Conviction).

IV. TRIAL COUNSEL DID NOT PROVIDE INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO FILE A MOTION TO SUPPRESS APPELLANT'S STATEMENTS TO LAW ENFORCEMENT OFFICERS

Appellant claims trial counsel provided ineffective assistance of counsel by failing to seek the suppression of Appellant's statements given to law enforcement in violation of his Fifth Amendment rights. *See* Opening Brief, at 34, 36. However, Appellant's claim is belied by the record.

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, (6) and the use of physical punishment such as deprivation of food or sleep. *See* 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. *See* 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. *See* Passama, 103 Nev. at 215, 735 P.2d at 323; *See also* 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 is a permissible tactic. *See* Passama 103 Nev. at 215, 735 P.2d at 324; *See also* United States v. Tingle, 658 F.2d 1332, 1336, n. 4 (9th Cir.1981). There, he also told Passama he would go to the D.A. and see that Passama went to prison if he was not entirely truthful. Passama 103 Nev. at 215, 735 P.2d at 324. However, it is not permissible to tell a defendant that his failure to cooperate will be communicated to the prosecutor. *See* 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." Passama 103 Nev. at 215, 735 P.2d at 324. 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." Id.

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

Similarly, the Nevada Supreme Court held that the defendant's confession was not involuntary or coerced. *See* Elvik v. State, 114 Nev. 883, 965 P.2d 281 (1998). There, 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. *See* Id. at 892, 965 P.2d at 287. Law enforcement 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. *See* Id.

Further, 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. *See* United States v. Harrison, 34 F.3d 886, 891 (1994); *See also* United States v. Leon Guerrero, 847 F.2d 1363, 1366 (1988); *See also* 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.

Moreover, the United States 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." Schneckloth, 412 U.S. at 224-25, 93 S.Ct. at 2046.

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. *See* Id. The district court observed the videotape of the confession and heard testimony at a hearing on the matter. *See* 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. *See* Id.

There, the district court further found that the defendant knowingly and voluntarily signed the Miranda waiver presented to him. *See* Id. The Nevada Supreme Court held that the district court did not err in admitting the defendant's confession to police. *See* 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); *See also* 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. *See* 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. *See* 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. *See* 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 statements but declines written statement).

Moreover, the Bessey Court recognized that under Passama it is a totality of the circumstances test to determine whether a confession was voluntary. *See* Sheriff, Washoe County v. Bessey, 112 Nev. 324-25, 914 P.2d 618, 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 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.

Bessey, 112 Nev. at 328, 914 P.2d at 621-22

Additionally, "The shield of Miranda is not a license for perjury." Allan v. State, 103 Nev. 512, 515, 746 P.2d 138, 140 (1987) (adopting Harris v. New York, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971)). As such, a defendant's statement elicited by law enforcement in violation of Miranda may still be used for the "limited purpose of impeachment." Id.

Here, a review of the totality of the circumstances reveals that moving to suppress Appellant's statements to detectives while he was in the hospital would have been futile because his statements were voluntary; even if they were not, his statements could have been used to impeach him at trial. *See* XVI AA 3488-3539; *See also* Ennis, 122 Nev. at 706, 137 P.3d at 1103. Moreover, Appellant was not in custody when the detectives interviewed him at UMC. *See* XVI AA 3488-3539; *See generally* Miranda, 384 U.S. at 444, 86 S.Ct. at 1612. Indeed, the detectives interviewed Appellant while he was lying on a gurney inside the emergency room of UMC trauma. *See* XVI AA 3488-89. Appellant presented no evidence to indicate Appellant was chained to his bed, or handcuffed during his discussion with the detectives. XII AA 2779-80, 2785, 2792-94. Specifically, during the evidentiary hearing the State elicited from Appellant:

> 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.

XVII AA 3667-3668; *See also* I RA 1.

Additionally, Detective Williams testified that Appellant would have initially been free to stop the interview and reiterated to Appellant throughout the interviews that he was not under arrest. *See* Id. at 2793-94; 16 AA 3501-3502, 3504. Moreover, Appellant admits he was not handcuffed and there is no evidence to suggest Appellant's leg was chained to the hospital bed. XVII AA 3667-68; *see also* I RA 1. At no point during the interview or after the interview did Detective Williams or Detective Merrick arrest Appellant. *See* XII AA 2780. Accordingly, Appellant was not in custody.

Additionally, Appellant fails to satisfy the Passama factors. for the first and second factors Appellant has not demonstrated that his age, education, or intelligence caused his statements to be involuntary. Appellant claims that this factor was not met because Appellant was in and out of consciousness, which is belied by the record. Although Appellant testified that he believed he was given a shot of medication before being 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. *See* X AA 2478-79; *See also* XI AA 2518. Appellant can even recall trying to protect himself by lying to the detectives during the interviews. *See* XI AA 2523-24.

Moreover, Detective Williams testified that he had no idea if Appellant was sedated at the time of the interviews, but Appellant appeared to be conscious and knew that Appellant had not been given anesthesia yet. *See* XII AA 2780, 2786. Additionally, the voluntary transcript reveals that the detectives and Appellant had an entire conversation for just under an hour without any indications that Appellant was having any comprehension issues. *See* XVI AA 3488-3539. Thus, the fact that Appellant did not have any apparent issues with comprehension, that he was not under anesthesia, and he was able to provide telephone numbers as well as feign his culpability leads to a determination that his statements were voluntary. *See* Id.; *See also* XII AA 2780, 2786.

For the third factor, as discussed *supra*, it was unnecessary for the detectives to advise Appellant of his constitutional rights as he was not in custody. It also bears noting that Appellant was advised multiple times that he was not under arrest throughout the interviews. *See* XVI AA 3501-3502, 3504.

For the fourth factor, Appellant does not and cannot demonstrate that he was subjected to a prolonged interview. Appellant participated in two (2) interviews from his hospital bed for a total duration of just under one (1) hour. *See* XII AA 2796-97. Appellant's first interview lasted about eighteen (18) minutes, while his second interview spanned about thirty-seven (37) minutes. *See* Id. This timing was far less than the five (5) hours of detention the defendant in Passama experienced. but unlike in Passama as will be discussed *infra*, the one (1) hour was not coupled with any inappropriate coercion. *See* Passama 103 Nev. at 214–15, 735 P.2d at 323; *See also* 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).

For the fifth factor, Appellant does not and cannot demonstrate that he was subjected to inappropriate tactics. *See* XII AA 2796-97. Detectives did not employ inappropriate questioning tactics. At most, Detective Williams may have feigned the weight of the evidence against Appellant, but that itself "is insufficient to make the

confession involuntary." Bessey, at 325, 914 P.2d at 619; *See* XVI AA 3488-3539. Moreover, it was not coercive for the detectives to continue to speak with Appellant 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.

Id. at 3502. By voluntarily continuing to speak with the detectives, Appellant made it clear he was not done speaking with them. Accordingly, the duration and nature of the interviews do not indicate that Petitioner's statements were involuntary.

For the sixth factor, Appellant did not suffer physical punishment during his interviews. In Falcon v. State, 110 Nev. at 533, 874 P.2d at 774 (1994), 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, given law enforcement interviewed him 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.

Here, based on Appellant's responses to the officers during his interview, it appears that he was able to understand the meaning of his statements, and it does not appear that the detectives thought that he was showing signs of impairment. *See generally* Chambers, 113 Nev. at 980, 944 P.2d at 809; Stewart v. State, 92 Nev. 168, 170–71, 547 P.2d 320, 321 (1976); *See* XVI AA 3488-3539.

Additionally, to the extent Appellant argues he was forced to participate in the interview because he was in pain, the record belies this claim. *See* Hargrove, 100 Nev. at 502, 686 P.2d at 225. While Appellant now appears to claim that he was in pain during the interviews, there is no indication that such fact would have made his statement involuntary. *See* Opening Brief, at 34. However, Appellant testified at trial that he was given pain medication prior to being transported to the hospital. X AA 2478-79. Also, Appellant never told the detectives that he was in pain during the interview, let alone that he needed a break of any kind. *See* XVI AA 3488-3539.

Further, during the February 23, 2021, evidentiary hearing, trial counsel indicated that due to the voluminous amount of physical evidence, he did not see the

benefit of pursuing the suppression of Appellant's statement. *See* XVII AA 3628, 3637-3738. Specifically, trial counsel testified that:

> 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.

Id. Further on cross-examination, trial counsel reiterates:

> 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.*

Id. at 3647-3648. This clearly showed it was a strategic decision on part of trial counsel, which is virtually unchallengeable. *See* 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).

As shown above, Appellant is not prejudiced by his statements because the result of his trial would have still ended in a guilty verdict. Here, the State presented overwhelming evidence of Appellant's guilt, including: (1) Appellant 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 Appellant was found; (3) although not definitively conclusive, the bullet recovered from Appellant'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 Appellant 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) Appellant claimed he used the rifle to shoot at the occupants of the home; and (7) Appellant admitted to each of the charges, except for murder. *See* IV AA 820, 876-877, 885; *See also* XVI AA 1307-1308, 1469-1471; *See also* VIII AA 1832-1844; *See also* X AA 2447-2462, 2470-2472, 2487-2500, *See also* XI AA 2501-2526.

Based upon the above and the totality of the circumstances, Appellant's statements to the detectives was voluntary. Thus, trial counsel was not ineffective for failing to move to suppress Appellant's statements because it would have been futile as trial counsel would not have been able to suppress the voluntary statement. *See* Ennis, 122 Nev. at 706, 137 P.3d at 1103. Therefore, the district court did not err in denying this claim in Appellant's Petition for Writ of Habeas Corpus (Post-Conviction).

CONCLUSION

Therefore, the above reasons, this Court should AFFIRM the district court's denial of Appellant's Petition for Writ of Habeas Corpus (Post-Conviction).

Dated this 4th day of October, 2021.

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the type-volume limitations of NRAP 32(a)(8)(B) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 12,830 words.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 4th day of October, 2021.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on October 4, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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