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 REPLY BRIEF

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ARGUMENT

I. The Respondent Misinterprets Caselaw to Exclude a Duty to Provide Effective Advice and Counsel on Whether to Testify.

The Respondent cites Ford v. State as controlling on this issue. "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)." Respondent's Brief p. 14.

In Ford v. State, Rickman had been called by the defense team to support her insanity claim by testifying that Ford had shot her previous husband in self-defense and that he had seen defendant Ford's previous husband hit her. Postconviction, Ford claimed ineffectiveness stating trial counsel should have prepared Rickman to testify. But the court found that Ford failed to show that trial counsel's performance had anything to do with Rickman's poor performance as a witness. Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). The Respondent argues this is controlling on whether Mendoza's counsel Wolfbrandt was ineffective when prejudicially providing incorrect statements of fact and law on first degree murder charges and whether he had a self-defense claim. But it is not.

First the Ford witness has no constitutionally guaranteed right to effective assistance of counsel. Therefore, he has no right to be informed of the state of the law on the central issue in the case – in that case – insanity. Second, he has no constitutionally guaranteed right to remain silent. Third, nor would defendant Ford have a right to have the subpoenaed witness Rickman be adequately informed on the state of insanity law or the facts of the case. She might have a claim to state that knowing what he planned to say it did not support her case so he should not have been called to testify. The court found that no prejudice was demonstrated by his testimony.

But Mendoza had a right to be advised of the correct status of law so he could take his right to remain silent and make an informed choice on whether to waive that. Serious damage was done to Mendoza's case when he took the stand to testify. Jorge Mendoza Direct Testimony: 10AA2387-2414; Direct Resumed: 10AA2445-2480; Cross Examination by Mr. DiGiacomo: 10AA2481-2500; 11AA2501-2513 Break 11AA2515-2538.

"Q When you fired the weapon, did you have any idea that it had hit anybody? A Yes. Q After you fired your weapon did the shooting at you cease? A Yes." 10AA2471-2.

"Q Would you agree with me if you hadn't joined this conspiracy, you would not have shot and killed Monty Gibson?

A Yes." 10AA2500.

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

Woflbrandt A No…. Postconviction Evidentiary Hearing 17AA3634.

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." 17AA3636.

He took the stand because his trial counsel told him he had grounds for a self-defense case in the law for the murder. 15AA3454-57. Further his counsel mislead him to believe that he was the only one who could have caused the death and that the other 3 defendants were no longer in the area. 17AA3639. He was convicted of first degree murder; his two codefendants were convicted of second degree murder. XVIII:3754-3782. Had he been told of the state of self-defense law in Nevada he would not have testified. 15AA3455. The benefits would have been three-fold. First, he would not have taken the stand and confessed to everything. Second, he could not have been impeached by his statements at the hospital when he testified and if he had moved to suppress them as he should have it is highly likely they would not have been admitted at all. Third, counsel should have, could have, then taken the only

reasonable and supportable strategy available and that would be to show repeatedly and at Opening and Closing and throughout the trial, that there was opportunity for the others to have caused the death.

All four were on the scene at the time of the murder. [IV:881-4, IX:2188] [VIII:1856-7] That Figueroa was the only one of the four seen by a witness in a home shooting his gun is significant. XIV:1308-9. That another neighbor saw the other two defendants right near Mendoza at the time of the shooting is important. VI:1401-12. And that the bullets found in the deceased could not be conclusively linked to Mendoza's gun is persuasive. VI:1308. All this had substantial chance of planting reasonable doubt on whether he actually caused the death – which appears very important to the jury given they convicted his two non-testifying codefendants of second degree murder. They were both gang members and had large criminal records. Mendoza had no prior criminal convictions and was not a gang member. He was married and had children. [See PSI filed separately at 2]. He had the potential for a job if he got treatment. He had a lot going for him and clearly could have reduced his sentence if convicted of second degree murder. Even a small increase in a defendant's sentence is prejudicial. Lampkin v. State, 470 S.W.3d 876, 886 (Tex. App. 2015). Trial counsel had a duty to hold the State to the job of proving their case and not freely concede things not necessary. He did not do this and that was devasting to the case of Jorge Mendoza.

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 lead to that conclusion.

Q Well, in fact, they didn't identify him directly; isn't it true? The 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? (Writer's clarification- question pertains to Mr. Mendoza's gun used .38 millimeter bullets generally – the bullet found in the deceased was never specifically linked to Mendoza's gun in particular – it would have been clearer to say which was the type of bullet used by the gun)

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 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 of the window and saw Figueroa shooting several shots and not of the other neighbors saw Mr. Mendoza shooting a gun?

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

17AA3628-3682 at 3639 Postconviction Evidentiary Hearing Transcript.

The Respondent also cites Lara v State to refute our claim of prejudicial ineffectiveness of the advice of counsel. 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."). They misinterpret our argument by appearing to frame it as ineffectiveness for not telling him what to expect once he got on the stand or walking him through his testimony in advance to make sure he

would give clear answers or telling him that he had the right to choose whether to testify. We have never claimed any of this including that he did not know it was his choice whether or not to testify. And by repeatedly arguing this in their brief the Respondent may confuse the reader into thinking this.

They overlook addressing Lara's very important holding that not only was Lara properly advised of his right to testify or not to testify – he also reasonably advised him in light of the law and evidence that "*his best course was to testify*." Lara v. State, 120 Nev. 177, 182, 87 P.3d 528, 531-32 (2004).

Attorney Wolfbrandt did not reasonably or effectively advise his client on whether or not to testify because he gave him inaccurate statements of law and fact on which to base his decision. The only reason Mendoza testified is because he thought he had grounds for self-defense to refute the first degree murder charge. That was clearly wrong. His affidavit attests to the fact that he would not have testified had he been advised correctly by his attorney. 15AA3455-6. Further, this is not merely an unsupported self-serving statement. It is bolstered by the fact that there is absolutely no other motive or benefit for him to testify found anywhere in the record. Even the jury instruction on this matter highlights "on the advice and counsel of his attorney." This makes clear that the advice and counsel on this matter is very important and failure to get this can support a prejudicial ineffectiveness claim.

> Jury instruction 42 15AA:3282 pdf.52. It is a constitutional right of a defendant in a criminal trial that

> he may not be compelled or required to testify. *Thus, the decision as to whether should testify is left to the defendant* ***on the advice and counsel of his attorney***...

These errors undermine the confidence in the outcome per Strickland. Furthermore, Lara as asserted by the Respondent - *does not* stand for the proposition that a district court canvass on the right to testify, can overcome and supplant any rights a defendant may have on his guaranteed sixth amendment right to effective advice and counsel of his attorney. Respondent's Brief p.16. No caselaw has been presented by the Respondent to support this proposition. There is no waiver in the canvass, to any constitutional right, present or future, other than the right to remain silent. And that waiver is limited by caselaw with the caveat that it may be challenged if proven to be done unknowingly due to prejudicially inaccurate ineffective advice by one's counsel. The court specifically made note in Lara of the proper advice and effectiveness given to him on whether it would be advisable for him to testify. This proves it is a valid right.

See also for recognition that there is a right to effective attorney advice on whether to testify: "Under those circumstances, advising Petitioner to forego his right to testify was not professionally unreasonable. Moreover, Petitioner can demonstrate no prejudice that resulted from following that advice. Therefore, the state appellate court's conclusion that Petitioner had failed to demonstrate that counsel rendered

ineffective assistance was neither contrary to, nor an unreasonable application of, *Strickland*. Petitioner is not entitled to habeas relief on this claim."

Diaz-Gaskin v. Skipper , 2018 U.S. Dist. LEXIS 174764, (W.D. Mich. Oct. 11, 2018); "In addition to arguing that he received inadequate advice from counsel that resulted in a waiver of his right to testify, defendant also contends that he is entitled to an evidentiary hearing regarding his waiver under Gonzalez v Elo, 972 F Supp 417 (ED Mich, 1997). Furthermore, the record does not support defendant's allegation that he was improperly advised. People v. Wright, No. 226743, 2002 Mich. App. LEXIS 3895, at *12-13 (Ct. App. June 28, 2002); "His inadequate advice to Smith about his testifying or not, and his failure to prepare him as a witness, if remedied, could have resulted in different testimony or in the defendant's more deliberate decision not to testify. … In the final analysis, even if the prejudice suffered is not found to have had a probable effect on the verdict, it is my judgment that Smith, on account of counsel's less than meaningful representation, did not receive, and was thereby deprived of, a fair trial." (CPL 440.10 [1] [h]; People v Baldi, 54 NY2d 137, supra.): People v. Smith , 169 Misc. 2d 581, 592-93, 643 N.Y.S.2d 315, 322 (Sup. Ct. 1996).

Though some courts ruled against the defendants, they do not say that there is no right to adequate advice on whether to testify nor do they say that a court canvass can bar any future ineffectiveness claims on inadequate advice on whether to testify. Counsel Wolfbrandt's conduct was not within the range of reasonable professional advice. *See* Burt v. Titlow, 134 S. Ct 10, 17, 187 L. Ed. 2d 348 (2013)

As to the Respondent's Runion argument it is actually *they* that are misconstruing *our* argument. Respondent's Brief at 14-18. As you can see from our argument in the opening brief, we include under that initial aggressor self-defense section that Mendoza had not made a clear break with the criminal transaction: There was no benefit for Mr. Mendoza to testify and it could only hurt him. "The caselaw is clear under Runion that the initial aggressor to a crime has no self-defense claim. Runion v. State, 116 Nev. 1041, 13 P.3d 52 (2000). See also N.R.S. 200.120 (2015). Further under law it was clear he had not made a clear break with the initial crime and his actions were part of "one continuous transaction." Opening Brief p. 25-26.

With the prior Mendoza appeal, the Respondent calls the Mendoza self-defense argument in their Answering Brief to the Nevada Supreme Court case 72056 filed January 16, 2018 "entirely without merit." Answering Brief XV: 3368. And argues that Appellant's appeal argument for a new trial due to the judge's refusal to allow self-defense jury instructions "unavailing and nonsensical." Respondent's

Answering Brief XV:3369. The Nevada Court of Appeals in their Order of Affirmance filed October 30, 2018 cites several self-defense cases showing common law has long held there is no self-defense claim for a defendant charged with felony murder and also notes that Mendoza's own testimony demonstrated the felonies and killing were one continuous transaction: XV:3376-7: See People v. Tabios, 78 Cal. Rptr. 2d 753, 756-57)(Ct. App. 1998), disapproved of on other grounds by People v. Chun, 203 P.3d 425 (Cal. 2009); State v. Amado, 756 A.2d 274, 282-84(Conn. 2000) Sanchez-Dominguez v. State, 130 Nev. 85, 94, 318 P.3d 1068, 1074(2014). Tabios, 78 Cal. Rptr. 2d at 757 Order of Affirmance at 15PA423. Nay v. State, 123 Nev. 326, 332, 167 P.3d 430, 434 (2007)(United States v. Thomas, 34 P.3d 44, 48 (2d Cir. 1994).

This is an extraordinary case where trial counsel was clearly wrong on the law and admitted to not doing any research to find the correct state of self-defense law. 17AA3635. Respondent tries to parse out abandonment and claim by arguing self-defense we are ignoring the real issue of disengagement from the crime; but we are not. Included within the self-defense law is whether or not there has been an abandonment of the crime. And as they pointed out at the jury trial conference and appeal and the Appellate court clearly agreed. Counsel renders constitutionally ineffective assistance if it fails to investigate and pursue a reasonable defense because it incompetently interpreted the law. Carter v. Davis,

946 F.3d 489, 496 (9th Cir. 2019). '…giving inadequate advice as to whether Lara should testify…' Lara v. State, 120 Nev. 177, 179, 182 87 P.3d 528, 529, 531 (2004). "Counsel is ineffective when he failed to investigate adequately the sole strategy for defense …" Fugate v. Head, 261 F.3d 1206, 1221 (11th Cir. 2001). Counsel has a constitutional duty to investigate and prepare a defense strategy, House v. Balkcom, 725 F.2d 608, 618 (11th Cir. 1984), and to not proceed with a "defense without evidence to support it," Young v. Zant, 677 F.2d 792, 798 (11th Cir. 1982). In order to show ineffective assistance of counsel for counsel's failure to investigate and present expert testimony at the sentencing phase, we have held that the petitioner must show: (a) that it was professionally unreasonable for counsel not to investigate; (b) what kind of, and how much, investigation an ordinary, reasonable lawyer would have undertaken; (c) that it is reasonably probable that a reasonable investigation would have turned up an expert who would have presented testimony similar to that which was eventually adduced; and (d) that it is reasonably probable that this testimony would have affected the sentence eventually imposed. Failure to meet *any* of these steps defeats the ineffectiveness claim. Elledge v. Dugger, 823 F.2d 1439, 1446 n.15 (11th Cir.) (per curiam), *withdrawn in part on other grounds,* 833 F.2d 250 (11th Cir. 1987)." Fugate v. Head , 261 F.3d 1206, 1221-22 (11th Cir. 2001). Here we have shown that it was professionally unreasonable for Wolfbrandt not to research the status of self-defense law and abandonment and relay

that correct information on law as well as facts of the case to his client. A reasonable attorney would have researched this area of law to be well versed on what it was prior to making his opening statement and advising his client he had a self-defense / abandonment case under the facts of his charges. An investigation would have revealed quite quickly what the correct status of longstanding Nevada self-defense law is. And that correct information would have led his client Mendoza to decline to testify and insist that his attorney not argue this in his Opening Statement and Closing Argument. "Under clearly established federal law, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary…. The relevant inquiry under Strickland is not what defense counsel could have pursued, but whether the choices made by defense counsel were reasonable." Roybal v. Davis, 148 F. Supp. 3d 958, 977 (S.D. Cal. 2015).

II. The Respondent Incorrectly Interprets Law to Allow Prejudicial Ineffective Wrong Statements of Law at Opening and Closing.

Mr. Mendoza's Attorney's Opening Statement was very short. About 2 transcript pages ending with: "We're going to try to convince you that he died as a result of self-defense, Mr. Mendoza's self-defense. So I know you guys – you'll be paying good attention to it. " 4AA000854 -6 / p. 54 Jury Trial Day 5. Closing: 12AA002873 -AA002887 at 12AA002874 / p. 68 Jury Trial day 18.

Respondent cites McCoy v. Louisiana as supporting trial counsel's grossly inadequate opening statement and closing argument. In McCoy, counsel conceded to his client's guilt of three murders at the guilt and sentencing phases over his client's objection. The U.S. Supreme Court overturned the conviction holding "Counsel could not admit his client's guilt of a charged crime over the client's intransigent objection to that admission, and violation of a defendant's Sixth Amendment secured autonomy constituted structural error, warranting a new trial, because the admission blocked the defendant's right to make fundamental choices about his own defense." McCoy v. Louisiana, 138 S. Ct. 1500, 1503, 200 L.Ed.2d 821, 821 (2018)

McCoy on close examination supports Mendoza's efforts to overturn his conviction.

"With individual liberty—and, in capital cases, life—at stake, it is the defendant's prerogative, not counsel's, to decide on the objective of his defense: to admit guilt in the hope of gaining mercy at the sentencing stage, or to maintain his innocence, leaving it to the State to prove his guilt beyond a reasonable doubt." McCoy v. Louisiana, 138 S. Ct. 1500, 1503, 200 L.Ed.2d 821, 821 (2018).

By giving Mr. Mendoza the wrong statement of law on self-defense and abandonment he took away from him the ability to knowingly decide on the objective of his defense. As noted in his affidavit had he known the state of law on

self-defense and we include in that abandonment - he would never have chosen to pursue that argument and he would have not waived his right to remain silent. 15AA3455-6. There would have been absolutely no reason for him to do so. And it follows that he like McCoy, would have vigorously objected to the opening and closing argument as well as his testimony on self-defense and admission to all the crimes if he knew that longstanding law was against him asserting that he was defending himself because he was the initial aggressor in the crime and he clearly had not abandoned it yet.

"…relief still must be granted if the defendant shows that attorney errors rendered the trial fundamentally unfair.' Weaver v. Massachusetts, 137 S. Ct. 1899, 1903-04 (2017). Florida v. Nixon cited by Respondent again is distinguishable from Mendoza's case. Response Brief p. 25: "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 82 (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.”

In Florida, Defendant was convicted of murder and sentenced to death. Defendant asserted that his counsel was ineffective for conceding defendant's guilt during the trial phase without obtaining defendant's express consent.

The United States Supreme Court unanimously held “that the concession of guilt without explicit consent of defendant was not automatically prejudicial ineffective assistance of counsel. Defendant neither consented nor objected to counsel's proposed strategy and counsel acted reasonably in electing the most promising means of averting the death penalty. Further, the concession was not tantamount to a guilty plea since defendant retained his criminal trial and appeal rights, and counsel could not be deemed ineffective for attempting to impress the jury with his candor which could lend credence to counsel's mitigation efforts during the penalty phase. Florida v. Nixon , 543 U.S. 175, 178, 125 S. Ct. 551, 555, 160 L.Ed.2d 565, 565 (2004).

The court held that “A presumption of prejudice is reserved for cases in which counsel fails meaningfully to oppose the prosecution's case. A presumption of prejudice is not in order based solely on a defendant's failure to provide express consent to a tenable strategy counsel has adequately disclosed to and discussed with

the defendant." Florida v. Nixon, 543 U.S. 175, 178, 125 S. Ct. 551, 555, 160 L.Ed.2d 565, 565 (2004).

But with Mendoza and trial counsel's presentation of strategy – it was not a tenable strategy that he was presented with. He trusted his attorney to provide accurate advice on the law. Had he known he would have voiced his objection to such strategy.

'Under Strickland, courts measure an attorney's performance against an "objective standard of reasonableness," calibrated by "prevailing professional norms."' Correll v. Ryan, 539 F.3d 938, 941 (9th Cir. 2008). An erroneous view of the law is always an abuse of discretion. United States v. Tsarnaev , 968 F.3d 24, 34 (1st Cir. 2020). This District Court and Respondent are wrong. Furthermore, a District Court's Order may be overturned upon abuse of discretion. Randell v. State, 109 Nev. 5, 8, 846 P.2d 278, 280 (1993). "….when no *reasonable* trial strategy could justify the trial counsel's conduct, counsel's performance falls below an objective standard of reasonableness as a matter of law, regardless of whether the record adequately reflects the trial counsel's *subjective reasons* for acting as she did." Lampkin v. State, 470 S.W.3d 876, 886 (Tex. App. 2015).

That a decision can be labeled "tactical" does not end the *Strickland* inquiry. Rather, "a reviewing court must consider the reasonableness of the investigation said to support that strategy." Wiggins v. Smith, 539 U.S. 510, 527, 123 S. Ct. 2527

(2003)((citing Strickland, 466 U.S. at 691). "--it must be a reasonable strategy….An uninformed strategy is not a reasonable strategy. It is, in fact, no strategy at all. Strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation' Correll v. Ryan, 539 F.3d 938, 941 (9th Cir. 2008). XV:3433. XV:3435.

III. The Respondent Misinterprets our Argument on Prejudicial Ineffective Cross Examination

Respondent argues under Hargrove v State our claim on ineffective cross examination is not sufficiently pled. Respondent's Brief p. 33. In Hargrove defendant tried to withdraw his plea after conviction by arguing manifest injustice. The court concluded that naked allegations of innocence did not entitle him to an evidentiary hearing especially if the factual allegations were belied or repelled by the record. Hargrove v. State, 100 Nev. 498, 500, 686 P.2d 222, 223 (1984).

'Hargrove contended, *inter alia*, that he pleaded without the effective advice and assistance of counsel, that his plea was the product of his "fear" of an habitual criminal sentence, and that Hargrove was in fact innocent of the bomb threat charge and could so establish by "newly-discovered evidence."… The court found noted that 'appellant's claim that certain witnesses could establish his innocence of the bomb threat charge was not accompanied by the witness' names or descriptions of

their intended testimony. As such, to the extent that it advanced merely "naked" allegations, the motion did not entitle appellant to an evidentiary hearing. *See* Vaillancourt v. Warden, 90 Nev. 431, 529 P.2d 204 (1974); Fine v. Warden, 90 Nev. 166, 521 P.2d 374 (1974); *see also* Wright v. State, 619 P.2d 155, 158 [*503] (Kan.Ct.App. 1980).' Hargrove at 502-503. Unlike Hargrove, Mendoza is arguing very specific facts anchored firmly in the record should have been used to cross examine every witness possible:

Key points to cross on at every opportunity would have been on knowledge as to whether the three other defendant's could have been carrying multiple weapons, whether it is possible the death could have been caused by a weapon not forwarded to evidence. The lack of effort to obtain all guns from defendants. XV:3433. XVII:3655. The possibility that all defendants could have had more than one gun and that Murphy also had a gun. XV:3451-3452. And to stress and show via questions and statements that there are solid unchallenged statements and testimony by a neighbor [IV:881-4 IX:2188] and Figueroa that all four defendants were still at the scene of the crime on the street by the house when Gibson was killed [VIII:1856-7] that 9 mm (.357) and .38 mm bullets can work in a .40 mm weapon [VI:1289-91]; and that the Firearm tool mark forensic scientist Lester could not conclusively state that the bullet causing his death came from Mendoza's gun. VI:1300. XV:3433. XV:3451-2. Opening Brief p. 32-33. These points all came

out and would have been known in advance of trial, from the grand jury testimony. 14AA3030-86; 14AA3087-3226. As we have noted the State presented 22 witnesses. To stress the points if possible all of them should have been crossed on all these issues to conclusively demonstrate there was a gaping hole in the State's case. But specifically, and most importantly these witnesses were not sufficiently crossed on these issues. Questions should have been asked of all law enforcement, scientists and neighbor witnesses revolving around the issues outlined herein. 17AA3628 Based on the grand jury transcripts we fully expect to know what all the answers to these questions are and anticipate the witnesses to say repeatedly – they cannot say whether there were additional guns on the defendant, in their experience criminals often carry more than one weapon, no they did not follow up and get the guns of the other 2 defendants, no they did not do additional testing of the bullets for strike marks. No they did not tear up the house and find all the bullets that day. No they did not find anyone to say that they saw him shooting that day; yes they did see that the other defendants were still in the area at the time of the shooting. No they did not find any other witnesses then one neighbor who said he saw one of the defendants shooting and that was Figueroa. And of course the question would be tweeked depending on whether it was a neighbor being questioned or an investigator or a medical examiner or forensic scientist.

Respondent cites Vergara-Martinez v. State, 132 Nev. 1041 (2016) an unpublished opinion: "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."). Respondent's Brief p. 33. But as we have displayed throughout – this immunity from challenge is *only* if the tactic taken is a reasonable strategy based on sound investigation. And that has not occurred here. Wolfbrandt displayed at the postconviction hearing that he did not have a firm grasp of the law or facts of the case and acknowledged he may have told his client that he was the only one who could have caused the death of Gibson because he was the only one left at the scene when the murder occurred and this is clearly wrong. Opening Brief p. 32

17AA3658 Postconviction Evidentiary Hearing Question to Mendoza : 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.

Do you know for a fact that your bullet caused the death of Monty Gibson ? A No.

IV. The Respondent Misinterprets the Law on Suppression of Statements to Law Enforcement.

"The introduction of an accused's involuntary confession requires reversal of the judgment of conviction, even though other evidence establishes guilt or corroborates

the confession." Blackburn v. Alabama, 361 U.S. 199, 200, 80 S. Ct. 274, 276, 4 L.Ed.2d 242, 244 (1960).

17AA3659 Postconviction Evidentiary Hearing Question to Mendoza : Q Were you treated like a suspect of the crime from the benning 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… 17AA3660 : Q Did he [Wolfbrandt] tell you that he was gong to move to suppress your statements a the hospital ? A Yes.

Respondent cites Passama and argues Mendoza's statement fails to pass the test under the totality of circumstances to allow suppression of his statement. Respondent's Brief p. 25. We have already addressed these factors in our Opening Brief p. 36 and fully explained why Mendoza's statements under the six part Passama test and totality of circumstances must be suppressed. Passama v. State, 103 Nev. 212, 735 P.2d 321 (1987).

But to highlight – he had no criminal record or experience with law enforcement; he was not read his Miranda rights. He was pulled from the vehicle while officers had weapons drawn at him and the vehicle he was hiding in. 4AA914. All the while they had an air unit helicopter with bright lights that shown down in the dark hovering above the black sedan to try to get a closer look at the suspect inside and assess the danger. 4AA914, 927. And there were 8-9 patrol vehicles present. 4AA920. He was handcuffed before entering and in the ambulance IV:896 at 918

lines 9-13, 928. And officer Kovacich appears to testify that he believed Mendoza was taken into custody at the scene. 4AA928 One witness who called in to the police to report the shooting reported that one of the men involved had a bright orange ski type mask on and Jorge when he was found by police was with a bright orange mask hat. State's witness Neighbor Gene Walker Jury Trial Day 5 - 4AA803 at 876, 879. He was placed on morphine twice before his interviews. He was ordered out of the vehicle he was in by law enforcement who found him after following a blood trial from the crime scene to the neighbor's driveway hiding 4AA121; and his mother in law and wife were told they could not go visit him in the hospital because he had been placed under arrest. Jury Trial Day VII:1266. Added to that he was in extreme pain which qualifies under factor six as the use of physical punishment – though they were not the ones who caused the original injury it was, as they admitted, very painful for him to be interviewed with his injury and further he was trapped because he could not physically go anywhere with his medical condition. For them to say he was not in custody is a sham, a farce and their characterization must be overlooked in light of the actual facts supporting calling it what it was - custodial detention that improperly failed to include reading Jorge his Miranda rights.

Mr. Wolfbrandt cross XII:2779

Q Detective Williams when you met with Jorge where exactly within the hospital were you?

A He was lying in one of a gurneys inside one of the rooms at UMC Trauma

Q were there tubes connect to his arms?

A I don't recall that but I would assume there was

Q would you agree that he was sedated with some pretty heavy pain medication?

A I have no idea if he was sedated XII:2780

Q well you knew pretty much the nature of that leg injury didn't you?

A I knew that his femur was broken, he had a bullet in his leg

Q Okay and would you expect that to be tremendously painful?

A I would yes XII:2780 line 10

Q When did you place or did you place Mr. Mendoza under arrest?

A I never arrested Mr. Mendoza[1]

Nothing further page XII:2780

Atty McNeill cross:

…Q Would you agree with me that somebody who's under the influence of a controlled substance may not give as accurate information to you as someone who isn't under the influence?

A It is possible. It would entirely depend on that individual and their – their ability to function under that kind of environment. XII:2783…

Q Okay. And you would agree with me that pain can sometimes be a cause of someone going into shock?

A Absolutely, yes. XII:2784 line 18.

Q This interview that we just heard, was that a half hour long, a little bit more?

A I think the total was about an hour.

…Q Okay. But he was – you said he was awaiting surgery?

A I believe so, yes. XII:2786

Q Okay. So at some point someone was going to come get him and wheel him into an operating room?

A Yes….

Q Did you ask anybody what they had given to Mr Mendoza before you started talking to him?

A No, we're not allowed to know. HIPPA rules, we're not allowed to know what medications or what medical things are going on.

Q You could have asked Mr. Mendoza, correct?

A Yes, I could have.

Q Okay. You didn't do that?

A No I did not. XII:2787

Landis cross

Q Landis: Somebody's in arrest or in custody meaning whatever they mean to you do you need to give Miranda warnings as an officer if you're going to talk to them?

A My understanding of Miranda is that if an individual is in my custody I'm asking interrogatory type questions I must read Miranda

Q And at a minimum would you view custody as meaning they're not free to leave?

A Well I made if very clear in my interview that he was not under arrest XII:2793

Q Let me ask you this if he – could he have ended the interview halfway through that first one and left the hospital Would you have allowed that?

A Well I don't think he was going to get up and walk with a busted femur, but he could have stopped the interview at any time he wanted.

Police Statements: XVI:3487-3539. XVI:3540-3556. Hospital Records: XVI:3592-3636. Order Admitting Hospital Records: XVII:3744.

Exhibit 334 Transcript of 2 hospital Mendoza interviews admitted XII:2762;

Jorge testified that his lawyer assured him he was going to move to suppress his hospital statements but he did not. XV:3456.

Exhibit 334A Recordings admitted and First Hospital Interview Played to Jury XII:2763. Jury Trial Day 17 State's rebuttal Witness Tod Williams XII:2776

2nd Hospital Interview of Mendoza played to Jury XII:2778-97.

The factors outlined by police in their interview of Mr. Mendoza clearly indicate – as Mr. Mendoza has asserted – that they considered him a suspect from the beginning. XV:271-273.

Under the totality of circumstances test Jorge's statement to police was not a product of rational intellect and free will – but you will also need to look at whether a reasonable person would feel free to terminate the interview and leave under the circumstances and with Jorge in a hospital bed in a hospital gown unable to move he was at a significant power disadvantage and the setting alone was coercive and made it difficult for him to refuse directly after being placed in the ambulance after being handcuffed. No reasonable person would have under the circumstances. 5XV:273.

Lowe Question:You didn't move to suppress his statements, did you ?

Wolfbrandt Answer : 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…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 contary to what he testified ; isn't that true ?

A Not that I recall. 17AA3638. Postconviction Evidentiary hearing.

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

A No, I didn't. 17AA3638.

Transcripts of Police Statements Part 1: 16AA3487-3539 Part 2 : 16AA3450-3556 show his statements were incriminating but very different from his trial testimony :

Q Can I talk to you for a minute. You wanna tell us what happened real quick ?

A I was gambling at the casino…

Q What casino

A Red Rock Casino….Just turned around and I just – this car following me. I cut into neighborhood to see if they were following me and they lit me up with the lights.

Q They lit you up ? Where is your vehicle ?

A They took it.

Q They took your car ? Who were you with ?

A By myself.

QYou was all by yourself ? Did you have a weapon ?

A No no weapon. I didn't have a weapon.

Q The police oficer that we just talked top said he found you sittn' in a car

A Yes

Q What were you doing sittin' in that car ?

A I was hiding, waiting for the gunfire to end. And then I woke up again I woke up when I woke in the car I just put my hands up so you guys can see me that I'm not trying to do nothing. I was just trying to hide from the gunshot fire. 16AA 3489-90.

….Q Okay Jorge we're not gonna listen to lies any longer ; not gonna waste your time….Your buddy is bleeding out. 16AA3502. ….Q He's also shot….When we go talk to him is he gonna give us the same store or is hew gonna tell us the truth… Jorge your're not a very good liar dude. We've been doing this way too long. 16AA3503. Q You're the second guy I've talked to tonight. You get to give me your version after this other guy. The other guy gives me a completely different store than you just gave me. So you get a chance now to tell us the truth. Cause if you don't give us the truth now we'll have to stick with your original story which is gonna make you look like a very bad man. 16AA3503-4….Q Okay. Ah. Just so

you're aware we're bonna take a DNA sampel from you and we're gonna compare it to the blood we've go at antoher crime scene. And when your blood ends up on that crime scene your store is not gonna hold watter. 16AA3505. You got shot and your buddy got shot. We folled your blood trial till we found you hiding in that car with your jacket and your gloves and your rifle. Your buddy kept running down the streetand we're still tradcking his blood trial. So when we find him, like I said earlier, we'll we'll talk to him and see how much he want sto tell us…..And we're gonna have your blood.. more than likely on the doorstep of that house because your blood trial goes right up to that house. So you're saying you got carjacked isn't gonna work. 16AA350.

This demonstrates they knew all along they had probable cause to arrest him and they are just saying they did not so they could question him before he got a lawyer. His statements should have been suppressed.

Conclusion

For all these reasons we ask that the decision of the District Court denying any relief from his convictions be overturned accompanied by an order for a new trial.

Dated this 30th day of December 2021.

Respectfully submitted,

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DATED this 30th Day of December 2021

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on December 30, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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

Jorge Mendoza

BY / s/ Diane C. Lowe_____
DIANE C. LOWE