NOASC
LOWE LAW, L.L.C.
DIANE C. LOWE, ESQ. Nevada Bar No. 14573
7350 West Centennial Pkwy #3085
Las Vegas, Nevada 89131
(725)212-2451 – F: (702)442-0321
Email: DianeLowe@LoweLawLLC.com
Attorney for Jorge Mendoza

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

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

NOTICE OF APPEAL

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

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

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

DATED this 5th day of April 2021.

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

DIANE C. LOWE, ESQ.
Nevada Bar #14573
Lowe Law, L.L.C.
7350 West Centennial Pkwy #3085
Las Vegas, NV 89131
Telephone: (725)212-2451
Facsimile: (702)442-0321

Attorney for Petitioner Jorge Mendoza

CERTIFICATE OF SERVICE VIA ELECTRONIC FILING EMAIL Service and Email

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

Email Address:

Motions@clarkcountyda.com

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

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

Jorge Mendoza Inmate 1169537

High Desert State Prison

PO Box 650

Indian Springs, NV 89070-0650

/s/ Diane C Lowe, Esq

Attorney for Jorge Mendoza

ASTA
LOWE LAW, L.L.C.
DIANE C. LOWE, ESQ. Nevada Bar No. 14573
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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

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

1. **Name of appellant filing this case appeal statement:** Jorge Mendoza.

2. **Identify the judge issuing the decision, judgment, or order appealed from:** The Honorable Bita Yeager, Department 1, District

Court.

3. **Identify each appellant and the name and address of counsel for each appellant: Appellant: Jorge Mendoza; Counsel for appellant:** Diane C. Lowe, Esq., 7350 West Centennial Pkwy #3085, Las Vegas, NV 89131.

4. **Identify each respondent and the name and address of appellate counsel, if known, for each respondent.** Respondent: Warden, William Gittere. Counsel for Respondent: Alexander G. Chen, Esq. Clark County District Attorney 200 Lewis Avenue Las Vegas, Nevada 89155; Aaron D. Ford, Attorney General, 100 North Carson Street Carson City, Nevada 89701.

5. **Indicate whether any attorney identified above in response to question 3 or 4 is not licensed to practice law in Nevada.** All attorneys listed above are licensed to practice law in Nevada.

6. **Indicate whether appellant was represented by appointed or retained counsel in the district court:** Appointed.

7. **Indicate whether appellant is represented by appointed or retained counsel on appeal:** Appointed.

8. **Indicate whether appellant was granted leave to proceed in forma pauperis:** N/A.

9. **Indicate the date the proceedings commenced in the district court**

(e.g., **date complaint, indictment information, or petition was filed:** 10/23/14 and 12/4/14, 12/17/14 Amended Criminal Complaint Las Vegas Justice Court Case 14F14997A; a few notes of Preliminary Hearing dates 12/18/14, 12/19/14; 2/5/15; but then the case went to a Grand Jury January 8, 2015 at District Court Volume 1; 140 pages Volume 2 January 29 2015; and February 25, 2015 Grand Jury Hearing on Superseding Indictment and May 28, 2015 Grand Jury Hearing on Second Superseding Indictment.

10. Initial Arraignment June 10, 2015.

11. **Provide a brief description of the nature of the action and result in the district court, including the type of judgment or order being appealed and the relief granted by the district court:** This was a post-conviction writ of habeas corpus action denying relief after an evidentiary hearing pertaining to trial counsel's handling of a 19-day jury trial and the matters throughout the course of his representation.

Count	Crime	Expanded Version	Classification	Date of Occurrence	File Date	19-day Jury Trial	Date of Conviction
1	Conspiracy to Commit Robbery	200.380	Felony B	9/21/2014	1/30/15	9/12/16 - 10/7/16	12/12/2016
2	Burglary while in Possess of	205.060.4	Felony B	9/21/2014	1/30/15	9/12/16 - 10/7/16	12/12/2016
3	Home Invasion, While in Poss	205.067.4	Felony B	9/21/2014	1/30/15	9/12/16 - 10/7/16	12/12/2016
4	Attempt Robbery with a Deadly W	200.380	Felony B	9/21/2014	1/30/15	9/12/16 - 10/7/16	12/12/2016
5	Attempt Robbery with a Deadly W	200.380	Felony B	9/21/2014	1/30/15	9/12/16 - 10/7/16	12/12/2016

6	Murder with Use of a Deadly W	200.030.1	Felony A	9/21/2014	1/30/15	9/12/16 - 10/7/16	12/12/2016
7	Attempt Murder with a Deadly W	200.010	Felony B	9/21/2014	1/30/15	9/12/16 - 10/7/16	12/12/2016

Mr. Wolfbrandt was appointed to represented Petitioner Mendoza on November 12, 2014 at Justice Court, 14F14997A when a conflict arose with the prior counsel who was with the Public Defender's office. He remained the attorney to the end of the case appearing at the November 28, 2016 sentencing hearing as counsel of record for Mr. Mendoza. He did not however, handle the direct appeal. Attorney Amanda Gregory did.

Mr. Mendoza was ultimately charged and convicted of 7 criminal counts including Murder with use of a deadly weapon. He was tried with 2 codefendants. They were all convicted. Same verdict on all counts but 1. The 2 defendants were convicted of 2nd degree murder and Mr. Mendoza was convicted of first-degree murder. He lost his appeal. On January 22, 2020 Attorney Diane Lowe was appointed to represent Mr. Mendoza for his writ of Habeas Corpus Petition. His Petition was eFiled October 18, 2019. The Remittitur for Supreme Court Case 72056 was issued November 27, 2018. Therefore, his Petition fell within the 1 year statutory deadline and was timely.

12. **Indicate whether the case has previously been the subject of an appeal to or original writ proceeding in the Supreme Court and, if so, the caption and Supreme Court docket number of the prior proceeding:** Yes. Supreme Court Case 72056.

13. **Indicate whether this appeal involves child custody or visitation.** No it does not.

14. **If this is a civil case, indicate whether this appeal involves a possibility of settlement.** This is a civil case now but, no it does not involve a possibility of settlement unless he succeeds at appeal and it becomes a criminal case again.

DATED this 5th day of April, 2021.

Respectfully Submitted,
/s/ Diane C. Lowe, Esq.
DIANE C. LOWE, ESQ.
Nevada Bar #14573
Lowe Law, L.L.C.
7350 West Centennial Pkwy #3085
Las Vegas, NV 89131
Telephone: (725)212-2451
Facsimile: (702)442-0321

Attorney for Petitioner
Jorge Mendoza

CERTIFICATE OF SERVICE VIA ELECTRONIC FILING AND EMAIL

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

Motions@clarkcountyda.com

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

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

Jorge Mendoza Inmate 1169537
High Desert State Prison
PO Box 650
Indian Springs, NV 89070-0650

/s/ Diane C Lowe, Esq

Attorney for Jorge Mendoza

CASE SUMMARY
CASE NO. A-19-804157-W

Jorge Mendoza, Plaintiff(s)	§	Location:	**Department 1**
vs.	§	Judicial Officer:	**Yeager, Bita**
State of Nevada, Defendant(s)	§	Filed on:	**10/18/2019**
	§	Case Number History:	
	§	Cross-Reference Case Number:	**A804157**

CASE INFORMATION

Related Cases
C-15-303991-1 (Writ Related Case)

Case Type: **Writ of Habeas Corpus**

Case Flags: **Appealed to Supreme Court**
NRS 34.730 Case

DATE — CASE ASSIGNMENT

Current Case Assignment

Case Number	A-19-804157-W
Court	Department 1
Date Assigned	01/04/2021
Judicial Officer	Yeager, Bita

PARTY INFORMATION

Plaintiff	**Mendoza, Jorge**	**Lowe, Diane Carol** *Retained* 725-212-2451(W)
Defendant	**State of Nevada**	**Wolfson, Steven B** *Retained* 702-455-5320(W)
	William Gittene	**Wolfson, Steven B** *Retained* 702-455-5320(W)

DATE — EVENTS & ORDERS OF THE COURT — INDEX

10/18/2019	Inmate Filed - Petition for Writ of Habeas Corpus Party: Plaintiff Mendoza, Jorge *Post Conviction*
10/18/2019	Motion to Amend Filed By: Plaintiff Mendoza, Jorge
10/18/2019	Motion for Appointment of Attorney Filed By: Plaintiff Mendoza, Jorge *Ex Parte Motion for Appointment of Counsel and Request for Evidentiary Hearing*
10/18/2019	Application to Proceed in Forma Pauperis Filed By: Plaintiff Mendoza, Jorge
10/18/2019	Affidavit in Support of Application Proceed Forma Pauperis Filed By: Plaintiff Mendoza, Jorge *Affidavit in Support of Application to Proceed in Forma Pauperis*
10/28/2019	Order for Petition for Writ of Habeas Corpus

CASE SUMMARY
CASE NO. A-19-804157-W

	Order for Petition for Writ of Habeas Corpus
10/29/2019	Clerk's Notice of Hearing *Notice of Hearing*
11/14/2019	Motion to Amend Filed By: Plaintiff Mendoza, Jorge *Request for Hearing on Motion to Amend and Appoint Counsel prior to 1/13/20*
11/14/2019	Clerk's Notice of Hearing *Notice of Hearing*
12/10/2019	Response *State's Response to Jorge Mendoza s Petition for Writ of Habeas Corpus (Post-Conviction), Motion for Appointment of Counsel, Request for Evidentiary Hearing, and Motion to Amend*
12/16/2019	**Request** (9:00 AM) (Judicial Officer: Ellsworth, Carolyn) *Request for Hearing on Motion to Amend and Appoint Counsel Prior to 1-13-20* *Parties Present: Attorney Scarborough, Michael J.*
01/13/2020	**Petition for Writ of Habeas Corpus** (9:00 AM) (Judicial Officer: Ellsworth, Carolyn)
01/13/2020	**Motion to Amend** (9:00 AM) (Judicial Officer: Ellsworth, Carolyn) *Plaintiff's Motion to Amend*
01/13/2020	**Motion for Appointment of Attorney** (9:00 AM) (Judicial Officer: Ellsworth, Carolyn) *Plaintiff's - Ex Parte Motion for Appointment of Counsel and Request for Evidentiary Hearing*
01/13/2020	**All Pending Motions** (9:00 AM) (Judicial Officer: Ellsworth, Carolyn) *Parties Present: Attorney Keach, Eckley M.*
01/22/2020	**Status Check: Confirmation of Counsel** (9:00 AM) (Judicial Officer: Barker, David) *Status Check: Confirmation of Counsel (D. Christensen)*
01/22/2020	**Status Check** (9:00 AM) (Judicial Officer: Barker, David) *Status Check: Motion to Amend ... Petition for Writ of Habeas Corpus*
01/22/2020	**All Pending Motions** (9:00 AM) (Judicial Officer: Barker, David) *Parties Present: Attorney Scarborough, Michael J.* *Attorney Lowe, Diane Carol*
01/22/2020	Order Filed By: Plaintiff Mendoza, Jorge *ORDER APPOINTING COUNSEL and for Transfer of Casefile and Taking Judicial Notice of Case it Stems from C-15-303991-1*
01/22/2020	Order Filed By: Plaintiff Mendoza, Jorge *Order to ELY Prison to allow Scheduled Phone Calls Between Attorney Lowe and Petitioner Jorge Mendoza*
02/26/2020	**Status Check** (9:00 AM) (Judicial Officer: Ellsworth, Carolyn) *Status Check: REVIEW CASE FILE / SET BRIEFING SCHEDULE FOR PETITION* *Parties Present: Attorney Lacher, Ashley A.* *Attorney Lowe, Diane Carol*

CASE SUMMARY
CASE NO. A-19-804157-W

03/10/2020	Order *Order Granting in Part and Denying in Part Plaintiff's Ex Parte Motion for Appointment of Counseling and Request for Evidentiary Hearing*
03/12/2020	Order Denying Motion *Order Denying Request for Hearing on Motion to Amend and Appoint Counsel Prior to 1-13-20*
06/09/2020	Stipulation and Order Filed by: Plaintiff Mendoza, Jorge *Stipulation and Order to Reset Briefing Schedule and Hearing*
08/18/2020	Order for Production of Inmate *Order For Production of Inmate Jorge Mendoza*
08/18/2020	Order Filed By: Defendant State of Nevada; Defendant William Gittene *Order for Production of Inmate Jorge Mendoza*
09/20/2020	Supplemental Filed by: Plaintiff Mendoza, Jorge *SUPPLEMENTAL BRIEF AND EXHIBITS IN SUPPORT OF PETITIONER'S POSTCONVICTION PETITION FOR WRIT OF HABEAS CORPUS*
10/08/2020	Order *Order for Excess Attorney's Fees*
11/02/2020	Motion for Leave to File *Motion for Leave to Add Appendices form Appeal 72056 to Record for Writ Action*
11/03/2020	Clerk's Notice of Hearing *Notice of Hearing*
11/03/2020	Certificate of Service Filed by: Plaintiff Mendoza, Jorge *Certificate of Service re Notice of Hearing on Motion for Leave to Add Appendices from Appeal 72056 to Record for Writ Action*
11/04/2020	Non Opposition Filed By: Defendant State of Nevada *State's Non-Opposition to Defendant's Motion for Leave to Add Appendices from Appeal 72056 to Record for Writ Action*
11/05/2020	Order *Order Granting Motion for Leave to Add Appendices from Appeal 72056 to Record for this Writ Action*
11/05/2020	Appendix Filed By: Plaintiff Mendoza, Jorge *App Vol 1 to Opening Brief Appeal 72056 Ordered November 5, 2020 allowed Admitted to Mendoza Writ Case A-19-804147-W*
11/05/2020	Appendix

CASE SUMMARY
CASE NO. A-19-804157-W

Filed By: Plaintiff Mendoza, Jorge
App Vol 2 to Opening Brief Appeal 72056 Ordered November 5, 2020 allowed Admitted to Mendoza Writ Case A-19-804147-W

11/05/2020 Appendix
Filed By: Plaintiff Mendoza, Jorge
App Vol 3 to Opening Brief Appeal 72056 Ordered November 5, 2020 allowed Admitted to Mendoza Writ Case A-19-804147-W

11/05/2020 Appendix
Filed By: Plaintiff Mendoza, Jorge
App Vol 4 to Opening Brief Appeal 72056 Ordered November 5, 2020 allowed Admitted to Mendoza Writ Case A-19-804147-W

11/05/2020 Appendix
Filed By: Plaintiff Mendoza, Jorge
App Vol 5 to Opening Brief Appeal 72056 Ordered November 5, 2020 allowed Admitted to Mendoza Writ Case A-19-804147-W

11/05/2020 Appendix
Filed By: Plaintiff Mendoza, Jorge
App Vol 7 to Opening Brief Appeal 72056 Ordered November 5, 2020 allowed Admitted to Mendoza Writ Case A-19-804147-W

11/05/2020 Appendix
Filed By: Plaintiff Mendoza, Jorge
App Vol 8 to Opening Brief Appeal 72056 Ordered November 5, 2020 allowed Admitted to Mendoza Writ Case A-19-804147-W

11/05/2020 Appendix
Filed By: Plaintiff Mendoza, Jorge
App Vol 9 to Opening Brief Appeal 72056 Ordered November 5, 2020 allowed Admitted to Mendoza Writ Case A-19-804147-W

11/05/2020 Appendix
Filed By: Plaintiff Mendoza, Jorge
App Vol 10 to Opening Brief Appeal 72056 Ordered November 5, 2020 allowed Admitted to Mendoza Writ Case A-19-804147-W

11/05/2020 Appendix
Filed By: Plaintiff Mendoza, Jorge
App Vol 11 to Opening Brief Appeal 72056 Ordered November 5, 2020 allowed Admitted to Mendoza Writ Case A-19-804147-W

11/05/2020 Appendix
Filed By: Plaintiff Mendoza, Jorge
App Vol 13 to Opening Brief Appeal 72056 Ordered November 5, 2020 allowed Admitted to Mendoza Writ Case A-19-804147-W

11/05/2020 Appendix
Filed By: Plaintiff Mendoza, Jorge
App Vol 12 to Opening Brief Appeal 72056 Ordered November 5, 2020 allowed Admitted to Mendoza Writ Case A-19-804147-W

11/05/2020 Appendix
Filed By: Plaintiff Mendoza, Jorge

CASE SUMMARY
CASE NO. A-19-804157-W

App Vol 6 to Opening Brief Appeal 72056 Ordered November 5, 2020 allowed Admitted to Mendoza Writ Case A-19-804147-W

11/05/2020 Certificate of Service
Filed by: Plaintiff Mendoza, Jorge
Certificate of Service of 13 Volume Appendices

11/16/2020 *CANCELED* **Motion for Leave** (12:00 PM) (Judicial Officer: Ellsworth, Carolyn)
Vacated - Moot
Defendant's Motion for Leave to Add Appendices form Appeal 72056 to Record for Writ Action

11/19/2020 Response
State's Response to Petitioner's Supplemental Brief in Support of Petitioners Post Conviction Petition for Writ of Habeas Corpus

12/14/2020 Appendix
Filed By: Plaintiff Mendoza, Jorge
Appendix Volume 14 A-19-804157-W-Mendoza v. Warden 233 pages

12/14/2020 Appendix
Appendix Volume 15 A-19-804157-W-Mendoza v. Warden 198 pages

12/14/2020 Reply
Reply to State Response to Supplemental Brief

12/17/2020 Order for Production of Inmate
Order for Production of Inmate Jorge Mendoza #1169537 for Video Appearance

12/18/2020 Appendix
Filed By: Other Lowe, Diane Carol
Corrected Appendix Volume 9. The appendix previously filed under APEN 9 was actually Volume 10 -2 volume 10s were inadvertently file and no Volume 9.

12/21/2020 Order
Order for Excess Attorney's Fees

01/04/2021 Case Reassigned to Department 1
Judicial Reassignment to Judge Bita Yeager

01/13/2021 Order
Filed By: Plaintiff Mendoza, Jorge
Revised Order for Production of Inmate Jorge Mendoza for Video Appearence

01/23/2021 Motion
Filed By: Plaintiff Mendoza, Jorge
Motion for Leave to Add to Record Hospital Records

01/25/2021 **Petition for Writ of Habeas Corpus** (8:30 AM) (Judicial Officer: Yeager, Bita)
Argument: Petition for Writ of Habeas Corpus
Parties Present: Attorney Di Giacomo, Marc P.
Attorney Lowe, Diane Carol
Plaintiff Mendoza, Jorge

01/26/2021 Clerk's Notice of Hearing
Notice of Hearing

CASE SUMMARY
CASE NO. A-19-804157-W

01/27/2021	Order *Order for Production of Inmate Jorge Mendoza #1169537 For Video Appearance*
02/18/2021	Motion Filed By: Plaintiff Mendoza, Jorge *Motion with Attachments to Court for How to Proceed on Evidentiary Hearing in light of Failed Service on Trial Attorney Wolfbrandt*
02/18/2021	Clerk's Notice of Hearing *Clerk's Notice of Hearing*
02/18/2021	Affidavit of Due Diligence *Affidavit of Due Diligence*
02/23/2021	**Evidentiary Hearing** (1:00 PM) (Judicial Officer: Yeager, Bita)
02/23/2021	**Motion for Leave** (1:00 PM) (Judicial Officer: Yeager, Bita) *Motion for Leave to Add to Record Hospital Records*
02/23/2021	**All Pending Motions** (1:00 PM) (Judicial Officer: Yeager, Bita) *ALL PENDING - EVIDENTIARY HEARING...MOTION FOR LEAVE TO ADD TO RECORD HOSPITAL RECORDS* *Parties Present: Attorney Di Giacomo, Marc P.* *Attorney Lowe, Diane Carol* *Plaintiff Mendoza, Jorge*
02/24/2021	Order *Order for Transcript*
02/24/2021	Order *Order for Transcripts of Proceedings*
02/24/2021	Order *Order Appointing Counsel*
03/01/2021	*CANCELED* **Motion** (8:30 AM) (Judicial Officer: Yeager, Bita) *Vacated - per Judge* *Motion to Court for Direction on How to Proceed in Light of Failed Service of Trial Attorney Wolfbrandt*
03/09/2021	Recorders Transcript of Hearing *Recorder's Transcript Re: Evidentiary Hearing, Motion for Leave to Add to Record Hospital Records 02-23-21*
03/14/2021	Objection Filed By: Plaintiff Mendoza, Jorge *Objection to Proposed Findings of Fact Conclusions of Law & Order*
04/02/2021	Finding of Fact and Conclusions of Law *Findings of Fact, Conclusions of Law and Order*
04/05/2021	Notice of Appeal (criminal) Party: Plaintiff Mendoza, Jorge *Notice of Appeal*

CASE SUMMARY
CASE NO. A-19-804157-W

04/05/2021	Case Appeal Statement Filed By: Plaintiff Mendoza, Jorge *Case Appeal Statement*
04/05/2021	Notice of Entry of Findings of Fact, Conclusions of Law Filed By: Defendant State of Nevada *wiznetfilings@ag.nv.gov, motions@clarkcountyda.com, ungermannh@clarkcountycourts.us*

DISTRICT COURT CIVIL COVER SHEET

A-19-804157-W
Dept. V

County, Nevada

Case No. .....
(Assigned by Clerk's Office)

I. Party Information *(provide both home and mailing addresses if different)*

Plaintiff(s) (name/address/phone):	Defendant(s) (name/address/phone):
Jorge Mendoza	State of Nevada
Attorney (name/address/phone):	Attorney (name/address/phone):

II. Nature of Controversy *(please select the one most applicable filing type below)*

Civil Case Filing Types

Real Property

Landlord/Tenant
- ☐ Unlawful Detainer
- ☐ Other Landlord/Tenant

Title to Property
- ☐ Judicial Foreclosure
- ☐ Other Title to Property

Other Real Property
- ☐ Condemnation/Eminent Domain
- ☐ Other Real Property

Torts

Negligence
- ☐ Auto
- ☐ Premises Liability
- ☐ Other Negligence

Malpractice
- ☐ Medical/Dental
- ☐ Legal
- ☐ Accounting
- ☐ Other Malpractice

Other Torts
- ☐ Product Liability
- ☐ Intentional Misconduct
- ☐ Employment Tort
- ☐ Insurance Tort
- ☐ Other Tort

Probate

Probate *(select case type and estate value)*
- ☐ Summary Administration
- ☐ General Administration
- ☐ Special Administration
- ☐ Set Aside
- ☐ Trust/Conservatorship
- ☐ Other Probate

Estate Value
- ☐ Over $200,000
- ☐ Between $100,000 and $200,000
- ☐ Under $100,000 or Unknown
- ☐ Under $2,500

Construction Defect & Contract

Construction Defect
- ☐ Chapter 40
- ☐ Other Construction Defect

Contract Case
- ☐ Uniform Commercial Code
- ☐ Building and Construction
- ☐ Insurance Carrier
- ☐ Commercial Instrument
- ☐ Collection of Accounts
- ☐ Employment Contract
- ☐ Other Contract

Judicial Review/Appeal

Judicial Review
- ☐ Foreclosure Mediation Case
- ☐ Petition to Seal Records
- ☐ Mental Competency

Nevada State Agency Appeal
- ☐ Department of Motor Vehicle
- ☐ Worker's Compensation
- ☐ Other Nevada State Agency

Appeal Other
- ☐ Appeal from Lower Court
- ☐ Other Judicial Review/Appeal

Civil Writ

Civil Writ
- ■ Writ of Habeas Corpus
- ☐ Writ of Mandamus
- ☐ Writ of Quo Warrant
- ☐ Writ of Prohibition
- ☐ Other Civil Writ

Other Civil Filing

Other Civil Filing
- ☐ Compromise of Minor's Claim
- ☐ Foreign Judgment
- ☐ Other Civil Matters

Business Court filings should be filed using the Business Court civil coversheet.

October 18, 2019
Date

PREPARED BY CLERK
Signature of initiating party or representative

See other side for family-related case filings.

Electronically Filed
04/02/2021 10:51 AM
CLERK OF THE COURT

FCL

DISTRICT COURT

CLARK COUNTY, NEVADA

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

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

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

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

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FINDINGS OF FACT, CONCLUSIONS OF LAW

PROCEDURAL HISTORY

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

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

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

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

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

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

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

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

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

FACTS

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

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

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

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

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

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

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

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

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

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

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ANALYSIS

I. INEFFECTIVE ASSISTANCE OF COUNSEL STANDARD

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

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

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

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

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

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

II. PETITIONER'S PRO PER CLAIMS FAIL

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

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

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

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

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

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

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

Pursuant to NRS 34.810:

1. The court shall dismiss a petition if the court determines that:

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

(b) The petitioner's conviction was the result of a trial and the grounds for the petition could have been:

(1) Presented to the trial court;

(2) Raised in a direct appeal or a prior petition for a writ of habeas corpus or postconviction relief; or

(3) Raised in any other proceeding that the petitioner has taken to secure relief from the petitioner's conviction and sentence, unless the court finds both cause for the failure to present the grounds and actual prejudice to the petitioner.

2. A second or successive petition must be dismissed if the judge or justice determines that it fails to allege new or different grounds for relief and that the prior determination was on the merits or, if new and different grounds are alleged, the judge or justice finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

3. Pursuant to subsections 1 and 2, the petitioner has the burden of pleading and proving specific facts that demonstrate:

(a) Good cause for the petitioner's failure to present the claim or for presenting the claim again; and

(b) Actual prejudice to the petitioner.

The petitioner shall include in the petition all prior proceedings in which the petitioner challenged the same conviction or sentence.

4. The court may dismiss a petition that fails to include any prior proceedings of which the court has knowledge through the record of the court or through the pleadings submitted by the respondent.

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

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

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

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

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

i. Summer Larsen's testimony

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

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

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

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

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

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

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

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

…

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

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

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

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

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

ii. Cell phone records

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

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

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

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

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

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

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

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

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

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

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

iii. Figueroa's agreement to testify

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

iv. Instruction on self-defense

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

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

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

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

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

v. Cumulative error

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Trial Counsel was Not Ineffective

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

III. PETITIONER'S SUPPLEMENTAL PETITION CLAIMS FAIL

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Jury Trial Day 9 at 87.

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

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

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

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

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

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

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

ORDER

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

DATED this _____ day of April, 2021.

Dated this 2nd day of April, 2021

Bita Yeager

DISTRICT JUDGE

E59 E88 9BE5 2796
Bita Yeager
District Court Judge

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

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

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

AUTOMATED CERTIFICATE OF SERVICE

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Steven Wolfson	Juvenile Division - District Attorney's Office 601 N Pecos Road Las Vegas, NV, 89101

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Steven D. Grierson
CLERK OF THE COURT

NEFF

DISTRICT COURT
CLARK COUNTY, NEVADA

JORGE MENDOZA,

Petitioner,

vs.

STATE OF NEVADA,

Respondent,

Case No: A-19-804157-W

Dept No: I

NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

PLEASE TAKE NOTICE that on April 2, 2021, the court entered a decision or order in this matter, a true and correct copy of which is attached to this notice.

You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is mailed to you. This notice was mailed on April 5, 2021.

STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk

CERTIFICATE OF E-SERVICE / MAILING

I hereby certify that on this 5 day of April 2021, I served a copy of this Notice of Entry on the following:

☑ By e-mail:
Clark County District Attorney's Office
Attorney General's Office – Appellate Division-

☑ The United States mail addressed as follows:

Jorge Mendoza # 1169537
P.O. Box 650
Indian Springs, NV 89070

Diane C. Lowe, Esq.
7350 W. Centennial Pkwy., #3085
Las Vegas, NV 89131

/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

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

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

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FINDINGS OF FACT, CONCLUSIONS OF LAW

PROCEDURAL HISTORY

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

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

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

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

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

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

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

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

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

FACTS

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

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

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

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

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

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

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

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

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

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

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ANALYSIS

I. INEFFECTIVE ASSISTANCE OF COUNSEL STANDARD

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

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

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

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

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

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

II. PETITIONER'S PRO PER CLAIMS FAIL

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

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

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

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

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

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

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

Pursuant to NRS 34.810:

1. The court shall dismiss a petition if the court determines that:

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

(b) The petitioner's conviction was the result of a trial and the grounds for the petition could have been:

(1) Presented to the trial court;

(2) Raised in a direct appeal or a prior petition for a writ of habeas corpus or postconviction relief; or

(3) Raised in any other proceeding that the petitioner has taken to secure relief from the petitioner's conviction and sentence, unless the court finds both cause for the failure to present the grounds and actual prejudice to the petitioner.

2. A second or successive petition must be dismissed if the judge or justice determines that it fails to allege new or different grounds for relief and that the prior determination was on the merits or, if new and different grounds are alleged, the judge or justice finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

3. Pursuant to subsections 1 and 2, the petitioner has the burden of pleading and proving specific facts that demonstrate:

(a) Good cause for the petitioner's failure to present the claim or for presenting the claim again; and

(b) Actual prejudice to the petitioner.

The petitioner shall include in the petition all prior proceedings in which the petitioner challenged the same conviction or sentence.

4. The court may dismiss a petition that fails to include any prior proceedings of which the court has knowledge through the record of the court or through the pleadings submitted by the respondent.

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

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

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

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

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

i. Summer Larsen's testimony

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

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

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

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

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

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

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

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

…

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

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

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

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

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

ii. Cell phone records

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

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

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

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

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

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

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

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

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

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

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

iii. Figueroa's agreement to testify

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

iv. Instruction on self-defense

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

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

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

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

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

v. Cumulative error

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Trial Counsel was Not Ineffective

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

III. PETITIONER'S SUPPLEMENTAL PETITION CLAIMS FAIL

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Jury Trial Day 9 at 87.

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

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

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

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

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

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

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

ORDER

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

DATED this _____ day of April, 2021.

Dated this 2nd day of April, 2021

Bita Yeager

DISTRICT JUDGE

E59 E88 9BE5 2796
Bita Yeager
District Court Judge

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

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

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

AUTOMATED CERTIFICATE OF SERVICE

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

Service Date: 4/2/2021

Dept 5 Law Clerk	dept05lc@clarkcountycourts.us
Diane Lowe	DianeLowe@LoweLawLLC.com
District Attorney Clark County	motions@clarkcountyda.com
Taleen Pandukht	Taleen.Pandukht@clarkcountyda.com
Lara Corcoran	corcoranl@clarkcountycourts.us
Lisa Lizotte	LizotteL@clarkcountycourts.us

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

Steven Wolfson	Juvenile Division - District Attorney's Office 601 N Pecos Road Las Vegas, NV, 89101

Electronically Filed
12/02/2016 09:57:46 AM

JOCP

CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

JORGE MENDOZA
#2586625,

Defendant.

CASE NO: C-15-303991-1

DEPT NO: V

JUDGMENT OF CONVICTION
(JURY TRIAL)

The defendant previously entered a plea of not guilty to the crimes of COUNT 1 – CONSPIRACY TO COMMIT ROBBERY (a Category B Felony) in violation of NRS 199.480, 200.380; COUNT 2 – BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON (a Category B Felony) in violation of NRS 205.060; COUNT 3 – HOME INVASION WHILE IN POSSESSION OF A DEADLY WEAPON (a Category B Felony) in violation of NRS 205.067; COUNTS 4 & 5 - ATTEMPT ROBBERY WITH USE OF A DEADLY WEAPON (a Category B Felony) in violation of NRS 193.330, 200.380, 193.165; COUNT 6 – MURDER WITH USE OF A DEADLY WEAPON (a Category A Felony) in violation of NRS 200.010, 200.030, 193.165; and COUNT 7 – ATTEMPT MURDER WITH USE OF A DEADLY WEAPON (a Category B Felony) in violation of NRS 200.010, 200.030, 193.330;

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//

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X

and the matter having been tried before a jury and the defendant having been found guilty of said crimes, with a **FIRST DEGREE MURDER VERDICT** as to **COUNT 6**. Thereafter, on the 28th day of November, 2016, the defendant was present in court for sentencing with his counsel WILLIAM WOLFBRANDT, ESQ., and good cause appearing,

THE DEFENDANT IS HEREBY ADJUDGED guilty of said crimes as set forth in the jury's verdict and, in addition to the $25.00 Administrative Assessment Fee, an order and judgment of Restitution in the amount of $5,500.00 payable to and in favor of the State of Nevada Victims of Crime for which the defendant is jointly and severally liable with his co-defendants David Murphy and Joseph Laguna, a $150.00 DNA Analysis Fee including testing to determine genetic markers, and a $3.00 DNA Collection Fee, the defendant is sentenced to the Nevada Department of Corrections as follows:

on **COUNT 1** – to a MAXIMUM of SEVENTY TWO (72) MONTHS and a MINIMUM of TWENTY FOUR (24) MONTHS;

on **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;

on **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;

on **COUNT 4** - to a MAXIMUM of ONE HUNDRED TWENTY (120) MONTHS and a MINIMUM of THIRTY SIX (36) MONTHS, plus a CONSECUTIVE term of ONE HUNDRED TWENTY (120) MONTHS and a MINIMUM of THIRTY SIX (36) MONTHS for the Use of a Deadly Weapon, Count 4 to run CONCURRENTLY with Count 3;

on **COUNT 5** - to a MAXIMUM of ONE HUNDRED TWENTY (120) MONTHS and a MINIMUM of THIRTY SIX (36) MONTHS, plus a CONSECUTIVE term of ONE HUNDRED TWENTY (120) MONTHS and a MINIMUM of THIRTY SIX (36) MONTHS for the Use of a Deadly Weapon, Count 5 to run CONCURRENTLY with Count 4;

on **COUNT 6** - to LIFE with a possibility of parole after a term of TWENTY (20) YEARS have been served, plus a CONSECUTIVE term of TWO HUNDRED FORTY (240) MONTHS and a MINIMUM of THIRTY SIX (36) MONTHS for the Use of a Deadly Weapon; Count 6 to run CONCURRENTLY with COUNT 5;

on **COUNT 7** - to a MAXIMUM of TWO HUNDRED FORTY (240) MONTHS and a MINIMUM of FORTY EIGHT (48) MONTHS, plus a CONSECUTIVE term of TWO HUNDRED FORTY (240) MONTHS and a MINIMUM of THIRTY SIX (36) MONTHS for the Use of a Deadly Weapon, Count 7 to run CONCURRENTLY with Count 6; with EIGHT HUNDRED (800) days credit for time served. Defendant's AGGREGATE TOTAL SENTENCE is LIFE with a MINIMUM of TWENTY THREE (23) YEARS.

DATED this 30th day of November, 2016.

CAROLYN ELLSWORTH
DISTRICT JUDGE

DISTRICT COURT
CLARK COUNTY, NEVADA

Writ of Habeas Corpus	**COURT MINUTES**	**December 16, 2019**

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

December 16, 2019 9:00 AM Request

HEARD BY: Ellsworth, Carolyn **COURTROOM:** RJC Courtroom 16D

COURT CLERK: Andrea Natali

RECORDER: Lara Corcoran

REPORTER:

PARTIES PRESENT: Scarborough, Michael J. Attorney

JOURNAL ENTRIES

- Petitioner not present, incarcerated in the Nevada Dept. of Corrections. COURT NOTED, the Petitioner was asking for a hearing before today's date; however, ADVISED it would make a decision if counsel should be appointed on January 13, 2020 and ORDERED, request DENIED at this time.

1/13/20 - 9:00 AM - PETITION FOR WRIT OF HABEAS CORPUS ... PLAINTIFF'S MOTION TO AMEND ... PLAINTIFF'S - EX PARTE MOTION FOR APPOINTMENT OF COUNSEL AND REQUEST FOR EVIDENTIARY HEARING

CLERK'S NOTE: The foregoing minutes were distributed via general mail to the following party:
Jorge Mendoza #169537
PO Box 1989
Ely, NV 89301
(12/18/19 amn).

DISTRICT COURT
CLARK COUNTY, NEVADA

Writ of Habeas Corpus **COURT MINUTES** **January 13, 2020**

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

January 13, 2020 **9:00 AM** **All Pending Motions**

HEARD BY: Ellsworth, Carolyn **COURTROOM:** RJC Courtroom 16D

COURT CLERK: Andrea Natali

RECORDER: Lara Corcoran

REPORTER:

PARTIES PRESENT: Keach, Eckley M. Attorney

JOURNAL ENTRIES

- PETITION FOR WRIT OF HABEAS CORPUS ... PLAINTIFF'S MOTION TO AMEND ... PLAINTIFF'S - EX PARTE MOTION FOR APPOINTMENT OF COUNSEL AND REQUEST FOR EVIDENTIARY HEARING

Petitioner / Plaintiff not present, incarcerated in the Nevada Dept. of corrections. COURT ADVISED, it appeared the Petitioner was functionally illiterate; therefore, COURT ORDERED, counsel APPOINTED and matters SET for status check for counsel through Mr. Christensen's office to confirm. COURT FURTHER ORDERED, request for an evidentiary hearing is DENIED. COURT ADVISED it did not know what the motion to amend was about.

1/22/20 - 9:00 AM - STATUS CHECK: CONFIRMATION FO COUNSEL (D. CHRISTENSEN) ... STATUS CHECK: MOTION TO AMEND ... PETITION FOR WRIT OF HABEAS CORPUS

CLERK'S NOTE: The foregoing minutes were distributed via general mail to the following party:
Jorge Mendoza #1168537
Ely State Prison
PO Box 1989
Ely, NV 89301

(1/14/20 amn).

DISTRICT COURT
CLARK COUNTY, NEVADA

Writ of Habeas Corpus	**COURT MINUTES**	**January 22, 2020**

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

January 22, 2020 **9:00 AM** **All Pending Motions**

HEARD BY: Barker, David **COURTROOM:** RJC Courtroom 16D

COURT CLERK: Andrea Natali

RECORDER: Lara Corcoran

REPORTER:

PARTIES PRESENT:

Lowe, Diane Carol	Attorney
Scarborough, Michael J.	Attorney

JOURNAL ENTRIES

- APPEARANCES CONTINUED: Deft. not present, incarcerated in the Nevada Dept. of Corrections.

STATUS CHECK: CONFIRMATION OF COUNSEL (D. CHRISTENSEN) ... STATUS CHECK: MOTION TO AMEND ... PETITION FOR WRIT OF HABEAS CORPUS

Ms. Lowe stated she could CONFIRM AS COUNSEL and advised she had two orders for the Court's consideration; one appointing counsel, transferring case file, and to take judicial notice of the criminal case, and another order to schedule a conference call with the Deft., as he was housed in Ely and that was a requirement Orders SIGNED IN OPEN COURT. At the request of counsel, COURT ORDERED, matter SET for status check.

2/26/20- 9:00 AM - STATUS CHECK: REVIEWING

CLERK'S NOTE: The foregoing minutes were distributed via general mail to the following party:
Jorge Mendoza #1168537
Ely State Prison

PO Box 1989
Ely, NV 89301
(1/23/20 amn).

DISTRICT COURT
CLARK COUNTY, NEVADA

Writ of Habeas Corpus	**COURT MINUTES**	**February 26, 2020**

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

February 26, 2020 **9:00 AM** **Status Check**

HEARD BY: Ellsworth, Carolyn **COURTROOM:** RJC Courtroom 16D

COURT CLERK: Andrea Natali

RECORDER: Lara Corcoran

REPORTER:

PARTIES PRESENT:

Lacher, Ashley A.	Attorney
Lowe, Diane Carol	Attorney

JOURNAL ENTRIES

- COURT ORDERED, matter SET for argument and the parties were notified of the following briefing schedule:
Defendant's supplemental petition DUE BY 6/22/20,
State's response DUE BY 8/21/20,
Defendant's reply DUE BY 9/4/20.

9/14/20 - 9:00 AM - ARGUMENT: PETITION FOR WRIT OF HABEAS CORPUS

DISTRICT COURT
CLARK COUNTY, NEVADA

Writ of Habeas Corpus	**COURT MINUTES**	**January 25, 2021**

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

January 25, 2021 **8:30 AM** **Petition for Writ of Habeas Corpus**

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

COURT CLERK: Michele Tucker

RECORDER: Lisa Lizotte

REPORTER:

PARTIES PRESENT:

Di Giacomo, Marc P.	Attorney
Lowe, Diane Carol	Attorney
Mendoza, Jorge	Plaintiff

JOURNAL ENTRIES

- Appearances made via BlueJeans Videoconferencing Application.

Court STATED the matter would be set for an Evidentiary Hearing. Colloquy.

IN CUSTODY

2/23/21 1:00 PM EVIDENTIARY HEARING

DISTRICT COURT
CLARK COUNTY, NEVADA

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

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

February 23, 2021 **1:00 PM** **All Pending Motions**

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

COURT CLERK: Michele Tucker

RECORDER: Lisa Lizotte

REPORTER:

PARTIES PRESENT:

Di Giacomo, Marc P.	Attorney
Lowe, Diane Carol	Attorney
Mendoza, Jorge	Plaintiff

JOURNAL ENTRIES

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

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

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

Lew Wolfbrand sworn and testified.

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

COURT STATED ITS FINDINGS and ORDERED, Petition DENIED.

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

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

CUSTODY

Certification of Copy

State of Nevada
County of Clark } **SS:**

I, Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, does hereby certify that the foregoing is a true, full and correct copy of the hereinafter stated original document(s):

NOTICE OF APPEAL; CASE APPEAL STATEMENT; DISTRICT COURT DOCKET ENTRIES; CIVIL COVER SHEET; FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER; NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER; JUDGMENT OF CONVICTION (JURY TRIAL) (FROM RELATED CRIMINAL CASE C-15-303991-1); DISTRICT COURT MINUTES

JORGE MENDOZA,

Plaintiff(s),

vs.

STATE OF NEVADA; WILLIAM GITTERE,

Defendant(s),

Case No: A-19-804157-W

Dept No: I

now on file and of record in this office.

IN WITNESS THEREOF, I have hereunto Set my hand and Affixed the seal of the Court at my office, Las Vegas, Nevada This 6 day of April 2021.

Steven D. Grierson, Clerk of the Court

Heather Ungermann, Deputy Clerk