IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 82740

JORGE MENDOZA,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

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

APPELLANT'S APPENDIX VOLUME XV

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

INST

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

JORGE MENDOZA,
DAVID MURPHY,
JOSEPH LAGUNA,

Defendant(s).

CASE NO: C-15-303991

DEPT NO: V

INSTRUCTIONS TO THE JURY (INSTRUCTION NO. 1)

MEMBERS OF THE JURY:

It is now my duty as judge to instruct you in the law that applies to this case. It is your duty as jurors to follow these instructions and to apply the rules of law to the facts as you find them from the evidence.

You must not be concerned with the wisdom of any rule of law stated in these instructions. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your oath to base a verdict upon any other view of the law than that given in the instructions of the Court.

INSTRUCTION NO. 2

If, in these instructions, any rule, direction or idea is repeated or stated in different ways, no emphasis thereon is intended by me and none may be inferred by you. For that reason, you are not to single out any certain sentence or any individual point or instruction and ignore the others, but you are to consider all the instructions as a whole and regard each in the light of all the others.

The order in which the instructions are given has no significance as to their relative importance.

INSTRUCTION NO. 3

A Superseding Indictment is but a formal method of accusing a person of a crime and is not of itself any evidence of his guilt.

In this case, it is charged in an Superseding Indictment that on or about the 21st day of September, 2014, the Defendants committed the offenses of CONSPIRACY TO COMMIT ROBBERY (Category B Felony - NRS 199.480, 200.380 - NOC 50147); BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON (Category B Felony - NRS 205.060 - NOC 50426); HOME INVASION WHILE IN POSSESSION OF A DEADLY WEAPON (Category B Felony - NRS 205.067 - NOC 50437); ATTEMPT ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony - NRS 193.330, 200.380, 193.165 - NOC 50145); MURDER WITH USE OF A DEADLY WEAPON (Category A Felony - NRS 200.010, 200.030, 193.165 - NOC 50001) and ATTEMPT MURDER WITH USE OF A DEADLY WEAPON (Category B Felony - NRS 200.010, 200.030, 193.330, 193.165 - NOC 50031), within the County of Clark, State of Nevada, as follows:

COUNT 1 - CONSPIRACY TO COMMIT ROBBERY

did wilfully, unlawfully, and feloniously conspire with each other and/or ROBERT FIGUEROA to commit a robbery.

COUNT 2 - BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON

did then and there wilfully, unlawfully, and feloniously enter, with intent to commit larceny and/or robbery and/or murder, that certain residence occupied by JOSEPH LARSEN and/or MONTY GIBSON, located at 1661 Broadmere Street, Las Vegas, Clark County, Nevada, said Defendants did possess and/or gain possession of a deadly weapon, to wit: a 9mm rifle and/or a hand gun and/or pellet gun, during the commission of the crime and/or before leaving the structure; the Defendant being responsible under one or more theories of criminal liability, to wit: 1) by directly or indirectly committing the acts constituting the offense and/or 2) by aiding and abetting in the commission of the crime by Defendant DAVID MURPHY, aka, David Mark Murphy driving co-conspirators to scene and/or acting as a lookout and/or by acting as the "get away" driver, SUMMER LARSEN identifying JOSEPH LARSEN's home

as a target and/or meeting with the co-defendants and/or unidentified co-conspirators to plan the robbery of JOSEPH LARSEN and/or MONTY GIBSON, and JORGE MENDOZA and/or ROBERT FIGUEROA and/or JOSEPH LAGUNA going to the residence with weapons to rob JOSEPH LARSEN and/or MONTY GIBSON, thereafter, JOSEPH LARSEN shooting at JORGE MENDOZA and ROBERT FIGUEROA and/or JOSEPH LAGUNA to prevent the taking of the property, JORGE MENDOZA and/or other conspirators returning fire, striking and killing MONTY GIBSON, the co-conspirators acting in concert throughout and/or 3) a conspiracy to commit this crime.

COUNT 3 - HOME INVASION WHILE IN POSSESSION OF A DEADLY WEAPON

did then and there wilfully, unlawfully and feloniously forcibly enter an inhabited dwelling, to-wit: 1661 Broadmere Street, Las Vegas, Clark County Nevada, without permission of the owner, resident, or lawful occupant, to-wit: JOSEPH LARSEN and/or MONTY GIBSON, the said Defendant did possess and/or gain possession of a deadly weapon consisting of a 9mm Firearm and/or a hand gun and/or pellet gun, during the commission of the crime and/or before leaving the structure; the Defendants being responsible under one or more theories of criminal liability, to wit: 1) by directly or indirectly committing the acts constituting the offense and/or 2) by aiding and abetting in the commission of the crime by Defendant DAVID MURPHY, aka, David Mark Murphy driving co-conspirators to scene and/or acting as a lookout and/or by acting as the "get away" driver, SUMMER LARSEN identifying JOSEPH LARSEN's home as a target and/or meeting with the co-defendants to plan the robbery of JOSEPH LARSEN and/or MONTY GIBSON, and JORGE MENDOZA and/or ROBERT FIGUEROA and/or JOSEPH LAGUNA going to the residence with weapons to rob JOSEPH LARSEN and/or MONTY GIBSON, one of the conspirators breaking open the front door to the residence, thereafter, JOSEPH LARSEN shooting at JORGE MENDOZA and ROBERT FIGUEROA and/or JOSEPH LAGUNA to prevent the taking of the property, JORGE MENDOZA and/or JOSEPH LAGUNA returning fire, striking and killing MONTY GIBSON, the co-conspirators acting in concert throughout and/or 3) a conspiracy to commit this crime.

COUNT 4 - ATTEMPT ROBBERY WITH USE OF A DEADLY WEAPON

did then and there wilfully, unlawfully, and feloniously attempt to take personal property, to-wit: lawful money of the United States and/or marijuana, from the person of JOSEPH LARSEN, or in his presence, by means of force or violence, or fear of injury to, and without the consent and against the will of JOSEPH LARSEN, by entering his home with a weapon to take the property by force, thereafter JOSEPH LARSEN shooting at the defendants to prevent the taking of the property, with use of a deadly weapon, to-wit: a 9mm Firearm and/or a hand gun and/or pellet gun; the Defendants being responsible under one or more theories of criminal liability, to wit: 1) by directly or indirectly committing the acts constituting the offense and/or 2) by aiding and abetting in the commission of the crime by Defendant DAVID MURPHY, aka, David Mark Murphy driving co-conspirators to scene and/or acting as a lookout and/or by acting as the "get away" driver, SUMMER LARSEN identifying JOSEPH LARSEN's home as a target and/or meeting with the co-defendants and/or unidentified co-conspirators to plan the robbery of JOSEPH LARSEN and/or MONTY GIBSON, and JORGE MENDOZA and/or ROBERT FIGUEROA and/or JOSEPH LAGUNA going to the residence with weapons to rob JOSEPH LARSEN and/or MONTY GIBSON, one of the conspirators breaking open the front door to the residence, thereafter, JOSEPH LARSEN shooting at JORGE MENDOZA and ROBERT FIGUEROA and/or JOSEPH LAGUNA to prevent the taking of the property, JORGE MENDOZA and/or other conspirators returning fire at JOSEPH LARSEN, the co-conspirators acting in concert throughout and/or 3) a conspiracy to commit this crime.

COUNT 5 - ATTEMPT ROBBERY WITH USE OF A DEADLY WEAPON

did then and there wilfully, unlawfully, and feloniously attempt to take personal property, to-wit: lawful money of the United States and/or marijuana, from the person of MONTY GIBSON, or in his presence, by means of force or violence, or fear of injury to, and without the consent and against the will of MONTY GIBSON, by entering his home with a weapon to take the property by force, thereafter JOSEPH LARSEN shooting at the defendants to prevent the taking of the property, with use of a deadly weapon, to-wit: a 9mm Firearm

and/or a hand gun and/or pellet gun; the Defendants being responsible under one or more theories of criminal liability, to wit: 1) by directly or indirectly committing the acts constituting the offense and/or 2) by aiding and abetting in the commission of the crime by Defendant DAVID MURPHY, aka, David Mark Murphy driving co-conspirators to scene and/or acting as a lookout and/or by acting as the "get away" driver, SUMMER LARSEN identifying JOSEPH LARSEN's home as a target and/or meeting with the co-defendants and/or unidentified co-conspirators to plan the robbery of JOSEPH LARSEN and/or MONTY GIBSON, and JORGE MENDOZA and/or ROBERT FIGUEROA and/or JOSEPH LAGUNA going to the residence with weapons to rob JOSEPH LARSEN and/or MONTY GIBSON, one of the conspirators breaking open the front door to the residence, thereafter, JOSEPH LARSEN shooting at JORGE MENDOZA and ROBERT FIGUEROA and/or JOSEPH LAGUNA to prevent the taking of the property, JORGE MENDOZA and/or other conspirators returning fire, striking and killing MONTY GIBSON, the co-conspirators acting in concert throughout and/or 3) a conspiracy to commit this crime.

COUNT 6 - MURDER WITH USE OF A DEADLY WEAPON

did then and there wilfully, unlawfully, feloniously, with premeditation and deliberation, and with malice aforethought, kill MONTY GIBSON, a human being, by shooting at and into the body of the said MONTY GIBSON, with a deadly weapon, to-wit: a firearm, the defendants being responsible under one or more theories of criminal liability, to-wit: 1) by directly or indirectly committing the acts constituting the offense and/or 2) by aiding and abetting in the commission of the crime by Defendant DAVID MURPHY, aka, David Mark Murphy driving co-conspirators to scene and/or acting as a lookout and/or by acting as the "get away" driver, SUMMER LARSEN identifying JOSEPH LARSEN's home as a target and/or meeting with the co-defendants and/or unidentified co-conspirators to plan the robbery of JOSEPH LARSEN and/or MONTY GIBSON, and JORGE MENDOZA and/or ROBERT FIGUEROA and/or JOSEPH LAGUNA going to the residence with weapons to rob JOSEPH LARSEN and/or MONTY GIBSON, one of the conspirators breaking open the front door to the residence, thereafter, JOSEPH LARSEN shooting at JORGE MENDOZA and

ROBERT FIGUEROA and/or JOSEPH LAGUNA to prevent the taking of the property, JORGE MENDOZA and/or other conspirators returning fire, striking and killing MONTY GIBSON, the co-conspirators acting in concert throughout and/or 3) a conspiracy to commit this crime; the defendants being responsible under one or more of the following principles of criminal liability, to-wit: 1) by having premeditation and deliberation and/or 2) during the perpetration or attempted perpetration of a robbery and/or burglary and/or Home Invasion.

COUNT 7 - ATTEMPT MURDER WITH USE OF A DEADLY WEAPON

did then and there wilfully, unlawfully, feloniously and with malice aforethought attempt to kill JOSEPH LARSEN, a human being, by shooting at JOSEPH LARSEN, with use of a deadly weapon, to-wit: a 9mm Firearm and/or a hand gun and/or pellet gun, the defendants being responsible under one or more theories of criminal liability, to-wit: 1) by directly or indirectly committing the acts constituting the offense and/or 2) by aiding and abetting in the commission of the crime by Defendant DAVID MURPHY, aka, David Mark Murphy driving co-conspirators to scene and/or acting as a lookout and/or by acting as the "get away" driver, SUMMER LARSEN identifying JOSEPH LARSEN's home as a target and/or meeting with the co-defendants and/or unidentified co-conspirators to plan the robbery of JOSEPH LARSEN and/or MONTY GIBSON, and JORGE MENDOZA and/or ROBERT FIGUEROA and/or JOSEPH LAGUNA going to the residence with weapons to rob JOSEPH LARSEN and/or MONTY GIBSON, one of the conspirators breaking open the front door to the residence, thereafter, JOSEPH LARSEN shooting at JORGE MENDOZA and ROBERT FIGUEROA and/or JOSEPH LAGUNA to prevent the taking of the property, JORGE MENDOZA and/or other conspirators returning fire at JOSEPH LARSEN, the co-conspirators acting in concert throughout and/or 3) a conspiracy to commit this crime.

It is the duty of the jury to apply the rules of law contained in these instructions to the facts of the case and determine whether or not the defendants are guilty of one or more of the offenses charged.

INSTRUCTION NO. 4

You must give separate consideration to each individual defendant and to each separate charge against him. Each defendant is entitled to have his case determined from his own conduct and from the evidence that may be applicable to him.

INSTRUCTION NO. 5

A conspiracy is an agreement between two or more persons for an unlawful purpose. To be guilty of conspiracy, a defendant must intend to commit, or to aid in the commission of, the specific crime agreed to. The crime is the agreement to do something unlawful; it does not matter whether it was successful or not.

A person who knowingly does any act to further the object of a conspiracy, or otherwise participates therein, is criminally liable as a conspirator. However, mere knowledge or approval of, or acquiescence in, the object and purpose of a conspiracy without an agreement to cooperate in achieving such object or purpose does not make one a party to conspiracy. Conspiracy is seldom susceptible of direct proof and is usually established by inference from the conduct of the parties. In particular, a conspiracy may be supported by a coordinated series of acts, in furtherance of the underlying offense, sufficient to infer the existence of an agreement.

A conspiracy to commit a crime does not end upon the completion of the crime. The conspiracy continues until the co-conspirators have successfully gotten away and concealed the crime.

INSTRUCTION NO. ___6___

It is not necessary in proving a conspiracy to show a meeting of the alleged conspirators or the making of an express or formal agreement. The formation and existence of a conspiracy may be inferred from all circumstances tending to show the common intent and may be proved in the same way as any other fact may be proved, either by direct testimony of the fact or by circumstantial evidence, or by both direct and circumstantial evidence.

INSTRUCTION NO. ___7___

Each member of a criminal conspiracy is liable for each act and bound by each declaration of every other member of the conspiracy if the act or the declaration is in furtherance of the object of the conspiracy.

The act of one conspirator pursuant to or in furtherance of the common design of the conspiracy is the act of all conspirators. Every conspirator is legally responsible for a specific intent crime of a co-conspirator so long as the specific intent crime was intended by the defendant. A conspirator is also legally responsible for a general intent crime that follows as one of the reasonably forseeable consequences of the object of the conspiracy even if it was not intended as part of the original plan and even if he was not present at the time of the commission of such act.

Buglary, attempt robbery, and attempt murder are specific intent crimes.

Home invasion is a general intent crime.

INSTRUCTION NO. 8

Evidence that a person was in the company or associated with one or more other persons alleged or proven to have been members of a conspiracy is not, in itself, sufficient to prove that such person was a member of the alleged conspiracy. However, you are instructed that presence, companionship, and conduct before, during and after the offense are circumstances from which one's participation in the criminal intent may be inferred.

INSTRUCTION NO. 9

Where two or more persons are accused of committing a crime together, their guilt may be established without proof that each personally did every act constituting the offense charged.

All persons concerned in the commission of a crime who either directly and actively commit the act constituting the offense or who knowingly and with criminal intent aid and abet in its commission or, whether present or not, who advise and encourage its commission, with the intent that the crime be committed, are regarded by the law as principals in the crime thus committed and are equally guilty thereof.

A person aids and abets the commission of a crime if he knowingly and with criminal intent aids, promotes, encourages or instigates by act or advice, or by act and advice, the commission of such crime with the intention that the crime be committed.

The State is not required to prove precisely which defendant actually committed the crime and which defendant aided and abetted.

INSTRUCTION NO. __10___

Any person, who by day or night, enters any house, room, or other building with the intent to commit larceny, robbery and/or murder is guilty of burglary. Moreover, force or a "breaking" as such is not a necessary element of the crime of burglary.

INSTRUCTION NO. ____11____

The intention with which an entry was made is a question of fact which may be inferred from a defendant's conduct and all other circumstances disclosed by the evidence.

INSTRUCTION NO. ___12____

It is not necessary that the State prove a defendant actually committed a larceny, robbery, or murder inside the house after he entered in order for you to find him guilty of burglary. The gist of the crime of burglary is the unlawful entry with criminal intent. Therefore, a burglary was committed if a defendant entered the house with the intent to commit a larceny, robbery or murder regardless of whether or not that crime occurred.

INSTRUCTION NO. ___13____

Larceny is the stealing, taking and carrying away of the personal goods or property of another, with the specific intent to permanently deprive the owner thereof.

INSTRUCTION NO. ____14____

Every person who, in the commission of a burglary, commits any other crime may be prosecuted for each crime separately.

INSTRUCTION NO. __15____

A person who, by day or night, forcibly enters an inhabited dwelling without permission of the owner, resident or lawful occupant, whether or not a person is present at the time of the entry, is guilty of Invasion of the Home.

"Forcibly enters" means the entry of an inhabited dwelling involving any act of physical force resulting in damage to the structure.

"Inhabited dwelling" means any structure, building, house, room, apartment, tenement, tent, conveyance, vessel, boat, vehicle, house trailer, travel trailer, motor home or railroad car in which the owner or other lawful occupant resides.

INSTRUCTION NO. ____16____

Every person who commits the crime of burglary and/or home invasion, who has in his possession or gains possession of any firearm or deadly weapon at any time during the commission of the crime, at any time before leaving the structure, or upon leaving the structure, is guilty of burglary or home invasion while in possession of a weapon.

INSTRUCTION NO. ___17____

When two or more persons participate in the commission of a burglary or home invasion, and one or more of them enters the structure, it is not necessary to prove the other individual actually entered because one who aids and abets another in the commission of a burglary or home invasion is equally guilty as a principal.

INSTRUCTION NO. ___18____

The elements of an attempt to commit a crime are:

1) the intent to commit the crime;

2) performance of some act towards its commission; and

3) failure to consummate its commission.

INSTRUCTION NO. 19

Robbery is the unlawful taking of personal property from the person of another, or in his presence, against his will, by means of force or violence or fear of injury, immediate or future, to his person or property, or the person or property of a member of his family, or of anyone in his company at the time of the robbery. Such force or fear must be used to:

1. Obtain or retain possession of the property,

2. To prevent or overcome resistance to the taking of the property, or

3. To facilitate escape with the property.

In any case the degree of force is immaterial if used to compel acquiescence to the taking of or escaping with the property. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

The value of property or money taken is not an element of the crime of Robbery, and it is only necessary that the State prove the taking of some property or money.

INSTRUCTION NO. 20

In this case the defendants are accused in a Superseding Indictment alleging an open charge of murder. This charge may include murder of the first degree or murder of the second degree.

The jury must decide if each or any defendant is guilty of any offense and, if so, of which offense.

INSTRUCTION NO. 21

Murder is the unlawful killing of a human being with malice aforethought, either express or implied. The unlawful killing may be effected by any of the various means by which death may be occasioned.

INSTRUCTION NO. 23

Express malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof.

Malice may be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart.

INSTRUCTION NO. 22

Malice aforethought means the intentional doing of a wrongful act without legal cause or excuse or what the law considers adequate provocation. The condition of mind described as malice aforethought may arise, from anger, hatred, revenge, or from particular ill will, spite or grudge toward the person killed. It may also arise from any unjustifiable or unlawful motive or purpose to injure another, proceeding from a heart fatally bent on mischief or with reckless disregard of consequences and social duty. Malice aforethought does not imply deliberation or the lapse of any considerable time between the malicious intention to injure another and the actual execution of the intent but denotes an unlawful purpose and design as opposed to accident and mischance.

INSTRUCTION NO. 24

Murder of the first degree is murder which is perpetrated by means of any kind of willful, deliberate, and premeditated killing. All three elements -- willfulness, deliberation, and premeditation -- must be proven beyond a reasonable doubt before an accused can be convicted of first-degree murder.

Willfulness is the intent to kill. There need be no appreciable space of time between formation of the intent to kill and the act of killing.

Deliberation is the process of determining upon a course of action to kill as a result of thought, including weighing the reasons for and against the action and considering the consequences of the actions.

A deliberate determination may be arrived at in a short period of time. But in all cases the determination must not be formed in passion, or if formed in passion, it must be carried out after there has been time for the passion to subside and deliberation to occur. A mere unconsidered and rash impulse is not deliberate, even though it includes the intent to kill.

Premeditation is a design, a determination to kill, distinctly formed in the mind by the time of the killing.

Premeditation need not be for a day, an hour, or even a minute. It may be as instantaneous as successive thoughts of the mind. For if the jury believes from the evidence that the act constituting the killing has been preceded by and has been the result of premeditation, no matter how rapidly the act follows the premeditation, it is premeditated.

INSTRUCTION NO.___25___

The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances.

The true test is not the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it includes an intent to kill, is not deliberation and premeditation as will fix an unlawful killing as murder of the first degree.

INSTRUCTION NO. __26___

There are certain kinds of murder in the first degree which carry with them conclusive evidence of malice aforethought. One of these classes of first degree murder is a killing committed in the perpetration or attempted perpetration of a burglary and/or robbery and/or home invasion. Therefore, a killing which is committed in the perpetration or attempted perpetration of a burglary and/or robbery and/or home invasion is deemed to be murder in the first degree, whether the killing was intentional, unintentional, accidental, or the result of provocation. This is called the felony murder rule.

The intent to perpetrate or attempt to perpetrate a burglary and/or robbery and/or home invasion must be proven beyond a reasonable doubt. In order for the felony murder rule to apply under a robbery theory, the intent to take the property must be formed prior to the act constituting the killing.

INSTRUCTION NO. 27

Robbery may spread over considerable and varying periods of time. All matters immediately prior to and having direct causal connection with the robbery, as well as acts immediately following it are deemed so closely connected with it as to be a part of the occurrence.

INSTRUCTION NO. ___28_____

One who commits or attempts to commit a burglary, robbery, or home invasion armed with deadly force, and attempts to kill or kills the intended victim or another when the victim responds with force to the robbery attempt, may not avail himself of the defense of self-defense.

In other words, if the person who kills or attempts to kill was committing an act inherently dangerous to human life, with felonious intent, during the course of a burglary, robbery or home invasion or as the natural and probable consequences of a conspiracy, the person may not rely upon self-defense.

INSTRUCTION NO. 29

If an illegal yet unintended act results from the intent to commit a crime, that act is also considered illegal. Under the doctrine of "transferred intent", original malice is transferred from one against whom it was entertained to the person who actually suffers the consequences of the unlawful act. For example, if a person intentionally directs force against one person wrongfully but, instead, hits another, his intent is said to be transferred from one to the other although he did not intend it in the first instance.

INSTRUCTION NO. ___30___

Murder in the first degree is a specific intent crime. A defendant cannot be liable under conspiracy and/or aiding and abetting theory for first degree murder for acts committed by a co-conspirator, unless that defendant also had a premeditated and deliberate specific intent to kill and/or the intent to commit a robbery and/or burglary and/or home invasion.

Murder in the second degree may be a general intent crime. As such, a defendant may be liable under a conspiracy theory and/or aiding and abetting for murder of the second degree for acts committed by a co-conspirator if the killing is one of the reasonably foreseeable consequences of the object of the conspiracy and the felony murder rule does not apply.

INSTRUCTION NO. __31___

Although your verdict must be unanimous as to the charge, you do not have to agree on the theory of guilt or liability. Therefore, even if you cannot agree on whether the facts establish a defendant is guilty of premeditated and deliberate murder or felony murder or is liable as a principle, aider and abettor, or co-conspirator, so long as all of you agree that the evidence establishes beyond a reasonable doubt that a defendant is guilty of murder in the first degree, your verdict shall be murder of the first degree.

INSTRUCTION NO. 32

You are instructed that if you find that the State has established that a defendant has committed first degree murder you shall select first degree murder as your verdict. The crime of first degree murder includes the crime of second degree murder. You may find a defendant guilty of second degree murder if:

1. You have not found, beyond a reasonable doubt, that a defendant is guilty of murder of the first degree, and

2. All twelve of you are convinced beyond a reasonable doubt that said defendant is guilty of the crime of second degree murder.

If you are convinced beyond a reasonable doubt that the crime of murder has been committed by a defendant, but you have a reasonable doubt whether such murder was of the first or of the second degree, you must give that said defendant the benefit of that doubt and return a verdict of murder of the second degree.

INSTRUCTION NO.___33__

All murder which is not murder of the first degree is murder of the second degree. Murder of the second degree is murder with malice aforethought, but without the admixture of premeditation and deliberation.

INSTRUCTION NO. 34

Attempted murder is the performance of an act or acts which tend, but fail, to kill a human being, when such acts are done with express malice, namely, with the deliberate intention unlawfully to kill.

It is not necessary to prove the elements of premeditation and deliberation in order to prove attempted murder.

INSTRUCTION NO. 35

You are instructed that if you find a defendant guilty of attempt robbery, first or second degree murder, and/or attempt murder you must also determine whether or not a deadly weapon was used in the commission of the crime or crimes.

If you find beyond a reasonable doubt that a deadly weapon was used in the commission of such an offense, then you shall return the appropriate guilty verdict reflecting "With Use of a Deadly Weapon".

If, however, you find that a deadly weapon was not used in the commission of such an offense, but you find that it was committed, then you shall return the appropriate guilty verdict reflecting that a deadly weapon was not used.

INSTRUCTION NO. 36

"Deadly weapon" means any instrument which, if used in the ordinary manner contemplated by its design and construction, will or is likely to cause substantial bodily harm or death, or, any weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death.

A firearm is a deadly weapon.

INSTRUCTION NO. ___37____

The State is not required to have recovered the deadly weapon used in an alleged crime, or to produce the deadly weapon in court at trial, to establish that a deadly weapon was used in the commission of the crime.

INSTRUCTION NO. __38___

If more than one person commits a crime, and one of them uses a deadly weapon in the commission of that crime, each may be convicted of using the deadly weapon even though he did not personally himself use the weapon.

An unarmed offender "uses" a deadly weapon when the unarmed offender is liable for the offense, another person liable to the offense is armed with and uses a deadly weapon in the commission of the offense, and the unarmed offender had knowledge of the use of the deadly weapon.

INSTRUCTION NO. 39

To constitute the crime charged, there must exist a union or joint operation of an act forbidden by law and an intent to do the act.

The intent with which an act is done is shown by the facts and circumstances surrounding the case.

Do not confuse intent with motive. Motive is what prompts a person to act. Intent refers only to the state of mind with which the act is done.

Motive is not an element of the crime charged and the State is not required to prove a motive on the part of a defendant in order to convict. However, you may consider evidence of motive or lack of motive as a circumstance in the case.

INSTRUCTION NO. 40

Each defendant is presumed innocent until the contrary is proved. This presumption places upon the State the burden of proving beyond a reasonable doubt every element of the crime charged and that the defendant is the person who committed the offense.

A reasonable doubt is one based on reason. It is not mere possible doubt but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation.

If you have a reasonable doubt as to the guilt of a defendant, he is entitled to a verdict of not guilty.

INSTRUCTION NO. 41

If you find that the State has failed to prove beyond a reasonable doubt any one element of a charged offense, you must find the defendant not guilty of that offense.

INSTRUCTION NO. 42

It is a constitutional right of a defendant in a criminal trial that he may not be compelled or required to testify. Thus, the decision as to whether he should testify is left to the defendant on the advice and counsel of his attorney. You must not draw any inference of guilt from the fact that he does not testify, nor should this fact be discussed by you or enter your deliberations in any way.

INSTRUCTION NO. 43

You are here to determine the guilt or innocence of the defendants from the evidence in the case. You are not called upon to return a verdict as to the guilt or innocence of any other person. So, if the evidence in the case convinces you beyond a reasonable doubt of the guilt of a defendant, you should so find, even though you may believe one or more persons are also guilty.

INSTRUCTION NO. 44

The evidence which you are to consider in this case consists of the testimony of the witnesses, the exhibits, and any facts admitted or agreed to by counsel.

There are two types of evidence; direct and circumstantial. Direct evidence is the testimony of a person who claims to have personal knowledge of the commission of the crime which has been charged, such as an eyewitness. Circumstantial evidence is the proof of a chain of facts and circumstances which tend to show whether a defendant is guilty or not guilty. The law makes no distinction between the weight to be given either direct or circumstantial evidence. Therefore, all of the evidence in the case, including the circumstantial evidence, should be considered by you in arriving at your verdict.

Statements, arguments and opinions of counsel are not evidence in the case. However, if the attorneys stipulate to the existence of a fact, you must accept the stipulation as evidence and regard that fact as proved.

You must not speculate to be true any insinuations suggested by a question asked a witness. A question is not evidence and may be considered only as it supplies meaning to the answer.

You must disregard any evidence to which an objection was sustained by the court and any evidence ordered stricken by the court.

Anything you may have seen or heard outside the courtroom is not evidence and must also be disregarded.

INSTRUCTION NO __45___

Whenever there is slight evidence that a conspiracy existed, and that a defendant was one of the members of the conspiracy, then the statements and the acts by any person likewise a member may be considered by the jury as evidence in the case as to that defendant found to have been a member, even though the statements and acts may have occurred in the absence and without the knowledge of that defendant, provided such statements and acts were knowingly made and done during the continuance of such conspiracy, and in furtherance of some object or purpose of the conspiracy.

INSTRUCTION NO. 46

The conviction shall not be had on the testimony of an accomplice unless he/she is corroborated by other evidence which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense; and the corroboration shall not be sufficient if it merely shows the commission of the offense or the circumstances thereof.

An accomplice is hereby defined as one who is liable for prosecution, for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.

To be an accomplice, the person must have aided, promoted, encouraged, or instigated by act or advice the commission of such offense with knowledge of the unlawful purpose of the person who committed the offense.

INSTRUCTION NO. ___47____

To corroborate the testimony of an accomplice there must be evidence of some act or fact related to the offense which, if believed, by itself and without any aid, interpretation or direction from the testimony of the accomplice, tends to connect a defendant with the commission of the offense charged.

However, it is not necessary that the evidence of the corroboration be sufficient in itself to establish every element of the offense charged, or that it corroborate every fact to which the accomplice testifies. If circumstances and evidence from sources other than the testimony of the accomplice tend on the whole to connect the accused with the crime charged, the accomplice is corroborated.

In determining whether an accomplice has been corroborated, you must first assume the testimony of the accomplice has been removed from the case. You must then determine whether there is any remaining evidence which tends to connect a defendant with the commission of the offense.

Evidence showing that a defendant was with an accomplice near the scene of the crime on the night it was committed, at the time it was committed is not, in and of itself, sufficient evidence to corroborate the testimony of an accomplice. Where the connecting evidence shows no more than an opportunity to commit a crime, simply proves suspicion, or is equally consonant with the reasonable explanation pointing toward innocent conduct on the part of a defendant, the evidence is to be deemed insufficient.

If there is not such independent evidence which tends to connect a defendant with the commission of the offense, the testimony of the accomplice is not corroborated.

INSTRUCTION NO. ___48____

Robert Figueroa is a co-defendant in this case and has testified. His negotiations are set forth in an exhibit, which has been provided to you, wherein he must testify truthfully to receive the benefit of those negotiations. Robert Figueroa has not been sentenced and the State has not indicated if they believe he has testified truthfully. You may view his testimony and regard the same in the light of possible pressure to which he is subject, which may include his desire to assist the State in obtaining a conviction, and his desire to receive the benefit of his negotiations.

The fact that a witness was given an inducement in exchange for his or her cooperation may be considered by you only for the purpose of determining the credibility of that witness. The existence of such an inducement does not necessarily destroy or impair the credibility of the witness. It is one of the circumstances that you may take into consideration in weighing the testimony of such a witness.

INSTRUCTION NO. 49

In deciding whether to believe testimony given by a witness pursuant to a plea agreement, you should use greater care and caution than you do when deciding whether to believe testimony given by an ordinary witness. Because that witness is also subject to prosecution for the same offense, that testimony may be strongly influenced by the hope or expectation that the prosecution will reward testimony that supports the prosecution's case by granting that person immunity or leniency. For this reason, you should view with distrust that testimony that supports the prosecution's case.

In giving you this warning about this testimony, I do not mean to suggest that you must or should disbelieve the testimony given by a witness pursuant to a plea agreement that you heard at this trial. Rather, you should give the testimony whatever weight you decide it deserves after considering all the evidence in the case.

INSTRUCTION NO. 50

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it.

In considering the testimony of any witness, you may take into account:

(1) The witness' opportunity and ability to see or hear or know the things testified to;

(2) The witness' memory;

(3) The witness' manner while testifying;

(4) The witness' interest in the outcome of the case, if any;

(5) The witness' bias or prejudice, if any;

(6) Whether other evidence contradicted the witness' testimony;

(7) The reasonableness of the witness' testimony in light of all the evidence; and

(8) Any factors that bear on the witness' believability.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify. What is important is how believable the witnesses were, and how much weight you think their testimony deserves.

INSTRUCTION NO.___51__

The fact a person has been convicted of a felony, may only be considered by you for the purpose of determining the credibility of that person. The fact of such a conviction does not necessarily destroy or impair the person's credibility. It is but one of the circumstances that you may take into consideration in weighing the testimony of such a person.

INSTRUCTION NO. 52

A witness who has special knowledge, skill, experience, training or education in a particular science, profession or occupation is an expert witness. An expert witness may give his or her opinion as to any matter in which he or she is skilled.

You should consider such expert opinion and weigh the reasons, if any, given for it. You are not bound, however, by such an opinion. Give it the weight to which you deem it entitled, whether that be great or slight, and you may reject it, if, in your judgment, the reasons given for it are unsound.

INSTRUCTION NO.___53____

Although you are to consider only the evidence in the case in reaching a verdict, you must bring to the consideration of the evidence your everyday common sense and judgment as reasonable men and women. Thus, you are not limited solely to what you see and hear as the witnesses testify. You may draw reasonable inferences from the evidence which you feel are justified in the light of common experience, keeping in mind that such inferences should not be based on speculation or guess.

A verdict may never be influenced by sympathy, prejudice or public opinion. Your decision should be the product of sincere judgment and sound discretion in accordance with these rules of law.

INSTRUCTION NO. 55

In your deliberation you may not discuss or consider the subject of punishment. Your duty is confined to the determination of the guilt or innocence of each defendant. ~~If your verdict is murder in the first degree, you will, at a later hearing, determine the issue of penalty or punishment.~~

INSTRUCTION NO. ~~56~~ 55

During the course of this trial, and your deliberations, you are not to:

(1) communicate with anyone in any way regarding this case or its merits-either by phone, text, Internet, or other means;

(2) read, watch, or listen to any news or media accounts or commentary about the case;

(3) do any research, such as consulting dictionaries, using the Internet, or using reference materials;

(4) make any investigation, test a theory of the case, re-create any aspect of the case, or in any other way investigate or learn about the case on your own.

INSTRUCTION NO. 57

When you retire to consider your verdict, you must select one of your member to act as foreperson who will preside over your deliberation and will be your spokesperson here in court.

During your deliberation, you will have all the exhibits which were admitted into evidence, these written instructions and forms of verdict which have been prepared for your convenience.

Your verdict must be unanimous. As soon as you have agreed upon a verdict, have it signed and dated by your foreperson and then return with it to this room.

INSTRUCTION NO. 57

If, during your deliberation, you should desire to be further informed on any point of law or hear again portions of the testimony, you must reduce your request to writing signed by the foreperson. The officer will then return you to court where the information sought will be given you in the presence of, and after notice to, the district attorney and each defendant and his counsel.

Playbacks of testimony are time-consuming and are not encouraged unless you deem it a necessity. Should you require a playback, you must carefully describe the testimony to be played back so that the court recorder can arrange her notes. Remember, the court is not at liberty to supplement the evidence.

INSTRUCTION NO. ~~59~~ 58

Now you will listen to the arguments of counsel who will endeavor to aid you to reach a proper verdict by refreshing in your minds the evidence and by showing the application thereof to the law; but, whatever counsel may say, you will bear in mind that it is your duty to be governed in your deliberation by the evidence as you understand it and remember it to be and by the law as given to you in these instructions, with the sole, fixed and steadfast purpose of doing equal and exact justice between each defendant and the State of Nevada.

GIVEN: _____

DISTRICT JUDGE

VER

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

JORGE MENDOZA,

Defendant.

CASE NO: C-15-303991

DEPT NO: V

VERDICT

We, the jury in the above entitled case, find the Defendant JORGE MENDOZA, as follows:

COUNT 1 - CONSPIRACY TO COMMIT ROBBERY

(Please check the appropriate box, select only one)

☐ Guilty of Conspiracy to Commit Robbery

☐ Not Guilty

We, the jury in the above entitled case, find the Defendant JORGE MENDOZA, as follows:

COUNT 2 – BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON

(Please check the appropriate box, select only one)

☐ Guilty of Burglary While In Possession of a Deadly Weapon

☐ Guilty of Burglary

☐ Not Guilty

We, the jury in the above entitled case, find the Defendant JORGE MENDOZA, as follows:

COUNT 3 – HOME INVASION WHILE IN POSSESSION OF A DEADLY WEAPON

(Please check the appropriate box, select only one)

☐ Guilty of Home Invasion While in Possession of a Deadly Weapon

☐ Guilty of Home Invasion

☐ Not Guilty

We, the jury in the above entitled case, find the Defendant JORGE MENDOZA, as follows:

COUNT 4 – ATTEMPT ROBBERY WITH A DEADLY WEAPON

(Please check the appropriate box, select only one)

☐ Guilty of Attempt Robbery With a Deadly Weapon

☐ Guilty of Attempt Robbery

☐ Not Guilty

We, the jury in the above entitled case, find the Defendant JORGE MENDOZA, as follows:

COUNT 5 - ATTEMPT ROBBERY WITH A DEADLY WEAPON

(Please check the appropriate box, select only one)

☐ Guilty of Attempt Robbery With a Deadly Weapon

☐ Guilty of Attempt Robbery

☐ Not Guilty

We, the jury in the above entitled case, find the Defendant JORGE MENDOZA, as follows:

COUNT 6 – MURDER WITH A DEADLY WEAPON

(Please check the appropriate box, select only one)

- ☐ Guilty of First Degree Murder With a Deadly Weapon
- ☐ Guilty of First Degree Murder
- ☐ Guilty of Second Degree Murder With a Deadly Weapon
- ☐ Guilty of Second Degree Murder
- ☐ Not Guilty

We, the jury in the above entitled case, find the Defendant JORGE MENDOZA, as follows:

COUNT 7 - ATTEMPT MURDER WITH A DEADLY WEAPON

(Please check the appropriate box, select only one)

- ☐ Guilty of Attempt Murder With a Deadly Weapon
- ☐ Guilty of Attempt Murder
- ☐ Not Guilty

DATED this _____ day of October, 2016

_____
FOREPERSON

VER

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

DAVID MURPHY,

Defendant.

CASE NO: C-15-303991

DEPT NO: V

VERDICT

We, the jury in the above entitled case, find the Defendant DAVID MURPHY, as follows:

COUNT 1 - CONSPIRACY TO COMMIT ROBBERY

(Please check the appropriate box, select only one)

☐ Guilty of Conspiracy to Commit Robbery

☐ Not Guilty

We, the jury in the above entitled case, find the Defendant DAVID MURPHY, as follows:

COUNT 2 – BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON

(Please check the appropriate box, select only one)

☐ Guilty of Burglary While In Possession of a Deadly Weapon

☐ Guilty of Burglary

☐ Not Guilty

We, the jury in the above entitled case, find the Defendant DAVID MURPHY, as follows:

COUNT 3 – HOME INVASION WHILE IN POSSESSION OF A DEADLY WEAPON

(Please check the appropriate box, select only one)

☐ Guilty of Home Invasion While in Possession of a Deadly Weapon

☐ Guilty of Home Invasion

☐ Not Guilty

We, the jury in the above entitled case, find the Defendant DAVID MURPHY, as follows:

COUNT 4 – ATTEMPT ROBBERY WITH A DEADLY WEAPON

(Please check the appropriate box, select only one)

☐ Guilty of Attempt Robbery With a Deadly Weapon

☐ Guilty of Attempt Robbery

☐ Not Guilty

We, the jury in the above entitled case, find the Defendant DAVID MURPHY, as follows:

COUNT 5 - ATTEMPT ROBBERY WITH A DEADLY WEAPON

(Please check the appropriate box, select only one)

☐ Guilty of Attempt Robbery With a Deadly Weapon

☐ Guilty of Attempt Robbery

☐ Not Guilty

We, the jury in the above entitled case, find the Defendant DAVID MURPHY, as follows:

COUNT 6 – MURDER WITH A DEADLY WEAPON

(Please check the appropriate box, select only one)

- ☐ Guilty of First Degree Murder With a Deadly Weapon
- ☐ Guilty of First Degree Murder
- ☐ Guilty of Second Degree Murder With a Deadly Weapon
- ☐ Guilty of Second Degree Murder
- ☐ Not Guilty

We, the jury in the above entitled case, find the Defendant DAVID MURPHY, as follows:

COUNT 7 - ATTEMPT MURDER WITH A DEADLY WEAPON

(Please check the appropriate box, select only one)

- ☐ Guilty of Attempt Murder With a Deadly Weapon
- ☐ Guilty of Attempt Murder
- ☐ Not Guilty

DATED this _____ day of October, 2016

_____

FOREPERSON

VER

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

JOSEPH LAGUNA,

Defendant.

CASE NO: C-15-303991

DEPT NO: V

VERDICT

We, the jury in the above entitled case, find the Defendant JOSEPH LAGUNA, as follows:

COUNT 1 - CONSPIRACY TO COMMIT ROBBERY

(Please check the appropriate box, select only one)

☐ Guilty of Conspiracy to Commit Robbery

☐ Not Guilty

We, the jury in the above entitled case, find the Defendant JOSEPH LAGUNA, as follows:

COUNT 2 – BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON

(Please check the appropriate box, select only one)

☐ Guilty of Burglary While In Possession of a Deadly Weapon

☐ Guilty of Burglary

☐ Not Guilty

We, the jury in the above entitled case, find the Defendant JOSEPH LAGUNA, as follows:

COUNT 3 – HOME INVASION WHILE IN POSSESSION OF A DEADLY WEAPON

(Please check the appropriate box, select only one)

☐ Guilty of Home Invasion While in Possession of a Deadly Weapon

☐ Guilty of Home Invasion

☐ Not Guilty

We, the jury in the above entitled case, find the Defendant JOSEPH LAGUNA, as follows:

COUNT 4 – ATTEMPT ROBBERY WITH A DEADLY WEAPON

(Please check the appropriate box, select only one)

☐ Guilty of Attempt Robbery With a Deadly Weapon

☐ Guilty of Attempt Robbery

☐ Not Guilty

We, the jury in the above entitled case, find the Defendant JOSEPH LAGUNA, as follows:

COUNT 5 - ATTEMPT ROBBERY WITH A DEADLY WEAPON

(Please check the appropriate box, select only one)

☐ Guilty of Attempt Robbery With a Deadly Weapon

☐ Guilty of Attempt Robbery

☐ Not Guilty

We, the jury in the above entitled case, find the Defendant JOSEPH LAGUNA, as follows:

COUNT 6 – MURDER WITH A DEADLY WEAPON

(Please check the appropriate box, select only one)

- ☐ Guilty of First Degree Murder With a Deadly Weapon
- ☐ Guilty of First Degree Murder
- ☐ Guilty of Second Degree Murder With a Deadly Weapon
- ☐ Guilty of Second Degree Murder
- ☐ Not Guilty

We, the jury in the above entitled case, find the Defendant JOSEPH LAGUNA, as follows:

COUNT 7 - ATTEMPT MURDER WITH A DEADLY WEAPON

(Please check the appropriate box, select only one)

- ☐ Guilty of Attempt Murder With a Deadly Weapon
- ☐ Guilty of Attempt Murder
- ☐ Not Guilty

DATED this _____ day of October, 2016

_____
FOREPERSON

INSTRUCTION NO. 59

Burglary and home invasion end upon exit from the structure. Robbery can extend to acts taken to facilitate escape so long as the killing took place during the chain of events which constitute the attempt robbery.

Supplemental instruction given as a result of question from jury as to when does a Burglary, Home Invasion, Attempt Robbery.

IN THE SUPREME COURT IN THE STATE OF NEVADA

No. 72056

JORGE MENDOZA

Appellant,

vs.

THE STATE OF NEVADA

Respondent.

Direct Appeal From Judgment of Conviction
Eighth Judicial District Court, Clark County
The Honorable Carolyn Ellsworth, District Court Judge
District Court Case No. C-15-303991-1

APPELLANT'S OPENING BRIEF

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I.

ROUTING STATEMENT

This appeal is not presumptively assigned to the Court of Appeals pursuant to NRAP 17(b)(1) because the primary offense arises from a Category A felony, is not a plea, and challenges more than the imposed sentence or sufficiency of the evidence.

II.

JURISDICTIONAL STATEMENT

Appellant brings the instant appeal seeking reversal of the jury verdict and resulting judgment of conviction entered against him. Nevada law permits a direct appeal from a final judgment entered against a defendant in a felony criminal case. See NRS 177.015. The verdict reached by a jury amounts to a final judgment upon the filing of the judgment of conviction. Castillo v. State, 106 Nev. 349, 351 (1990). Appellant's sentencing hearing occurred on November 28, 2016. The Judgment of Conviction was filed on December 2, 2016. Appellant filed a timely Notice of Appeal on December 22, 2016.

III.

INTRODUCTION

Appellant Mendoza was charged with Count 1 - Conspiracy to Commit Robbery, Count 2 - Burglary While in Possession of a Deadly Weapon, Count 3 - Home Invasion With Use of a Deadly Weapon, Counts 4-5 - Attempt Robbery With

Use of a Deadly Weapon, Count 6 - Murder With Use of a Deadly Weapon, and Count 7 - Attempt Murder With Use of a Deadly Weapon. 1 AA 1. Mendoza was found guilty of all counts, including First Degree Murder, after a 19 day trial. 13 AA 3006.

As to Count 1 he was sentenced to 24-72 months, as to Count 2 he was sentenced to 48-180 months to run concurrent, as to Count 3 he was sentenced to 48-180 months to run concurrent, as to Count 4 he was sentenced to 36-120 months with a consecutive 36-120 months all to run concurrent to Count 3, as to Count 5 he was sentenced to 36-120 months to run concurrent, as to Count 6 he was sentenced to life with the possibility of parole after 20 years with a consecutive 48-240 months all to run concurrent to Count 5, and as to Count 7 he was sentenced to 48-240 months to run concurrent. His aggregate sentence is life with the possibility of parole after 23 years. 13 AA 3013. This direct appeal of his Judgment of Conviction follows.

IV.

STATEMENT OF THE ISSUES

A. Whether the District Court erred in allowing Summer Larsen to testify at trial.

B. Whether the District Court erred in permitting the State to admit cell phone records that were provided to Mendoza during the time of trial, and that were admitted through an undesignated expert.

C. Whether the District Court erred in allowing the State to disclose to the jury about Figueroa's agreement to testify required him to "testify truthfully".

D. Whether the District Court erred and violated Mendoza's right to a fair trial by refusing to allow Mendoza to have the jury instructed with regards to self-defense.

E. Whether cumulative error warrants reversal of Mendoza's conviction.

V.

STATEMENT OF THE CASE

This is an appeal from a Judgment of Conviction of a guilty verdict after a jury trial.

On October 22, 2014, the State filed a Criminal Complaint against Mendoza charging him as stated above. 1 AA 1. He was charged along with David Murphy, Robert Figueroa, and Summer Larsen. No preliminary hearing was held because the case went to the Grand Jury. On January 30, 2015, an Indictment was filed against Mendoza. He plead not guilty to the charges and a jury trial was set. 1 AA 19.

On February 27, 2015, a Superseding Indictment was filed adding Joseph Laguna as a fourth codefendant. 1 AA 27. On May 29, 2015, a Second Superseding Indictment was filed. 1 AA 34.

During the course of the case, two of the codefendants, Summer Larsen and Robert Figueroa, entered into Guilty Plea Agreements whereby they agreed to testify

against their codefendants. Figueroa entered into an agreement shortly after arrest. Larsen entered into an agreement just days before trial was set to begin.

A jury trial began on September 12, 2016, lasting 19 days. All defendants were convicted of all charges. With regard to the Open Murder charge, Mendoza was found guilty of first degree murder with use of a deadly weapon, while his codefendants were found guilty of second degree murder with use of a deadly weapon. As stated above, Mendoza was sentenced to an aggregate sentence of life with the possibility of parole after 23 years. Judgment of Conviction was filed on December 2, 2016, and this timely appeal follows.

VI.

STATEMENT OF THE FACTS

Appellant Mendoza was convicted of the murder of Monty Gibson, along with several other charges related to that murder, as stated above. Monty Gibson died from a gunshot wound to his head. 6 AA 1326.

Joseph Larsen resided at 1661 Broadmere where he sold marijuana out of his home for a living. 5 AA 1113-1114. Summer Larsen testified that she knew Defendant David Murphy since she was 18 years old, and that she married Defendant Joseph Larsen in 2012, and had an on and off sexual relationship with him from the time she was 18 years old. 5 AA 1111-1112. Summer had moved into 1661 Broadmere with Joseph Larsen in 2013. She eventually moved out of Broadmere

because she began having issues with Joseph Larsen. 5 AA 1113. After she moved out of the house she would continue to fight with Joseph and would do thing to the house, such as break in to steal marijuana or money. 5 AA 1114. She had broken into the house in July 2014 with another individual named Snoop, and they stole $12,000.00 and 12 pounds of marijuana. 5 AA 1116. Summer testified that she had informed David Murphy of the fact that she stole money and marijuana with Snoop, and that Murphy was unhappy with the fact that she did it with someone else and not him. 5 AA 1117. After multiple conversations with Murphy, he and Summer made a plan to rob the house that supplied Joseph Larsen with his drugs. 5 AA 1126. Summer claimed to have not known that Murphy intended to rob Joseph Larsen's residence.

Steven Larsen testified that Joseph Larsen is his son. 6 AA 1321. Steven helped Joseph and Summer rent the residence on 1661 Broadmere. 6 AA 1325. After Summer had moved out, Steven was aware of incidents where Summer caused damage to the residence. 6 AA 1335. Two weeks prior to the incident, Steven was present when Summer was breaking windows at the house. 6 AA 1327. About a month prior to the shooting there was a burglary at the residence. Id. Monty Gibson moved in with Joseph after Summer moved out to help with the bills. 6 AA 1330. On September 21, 2014, Gibson was in the process of moving out to live with his girlfriend. Id.

In the earlier hours on September 21, 2014, Steven was contacted by Tracy Rowe. 6 AA 1331. Rowe informed Steven that there was going to be a break in at Joseph's house. Steven contacted Joseph and told him and Gibson to leave the house and take anything they did not want stolen. Id. Steven believed that Summer was the person who was going to break into the residence. Id. Initially Joseph agreed to leave the residence. 6 AA 1332. However, Joseph called Steven back 20 minutes later and was upset and had informed Steven that people had kicked in his door. 6 AA 1332. He informed Steven that Gibson had been shot and that he had shot someone as well. 6 AA 1333. When Steven got to the residence, Gibson was dead in the doorway. 6 AA 1338. Joseph informed Steven that he and Gibson were inside eating pizza when there was a knock at the door, and then the door got kicked in. 6 AA 1341. A gun fight then ensued and Joseph shot Mendoza in the leg. 6 AA 1474. The intruders then left the house, Gibson went to shut the front door, and was shot in the head. 6 AA 1342.

Defendant Robert Figueroa testified that he was charged with the murder along with the other defendants. 8 AA 1805. After his arrest he entered into an agreement with the State and ultimately testified at the grand jury in this matter. 8 AA 1810. After he testified at the grand jury he entered into a formal guilty plea agreement, pleading guilty to Robbery with Use of a Deadly Weapon and Conspiracy to Commit Robbery. 8 AA 1812. He also entered into an agreement to testify. Id.

On the morning of September 21, 2014, Figueroa received a call from Joey Laguna. 10, 216. Laguna was Figueroa's roommate. 8 AA 1814. Laguna informed Figueroa that he had a robbery lined up with Murphy and Figueroa had decided to participate in the robbery with the other defendants. 8 AA 1815-1816. They were intending to rob 200 pounds of marijuana from Larsen's marijuana supplier's house. 8 AA 1818. At approximately 7:30a.m., Appellant and Laguna picked up Figueroa from his home. 8 AA 1819. Appellant was driving a light brown vehicle. Id. The intention was for Laguna, Figueroa and Appellant to rob the house of the marijuana, and bring it back to a truck that Murphy would be waiting for them in. 8 AA 1820. Once they get to the residence Mendoza said he did not want to go forward, and the men regrouped at Laguna's house. 8 AA 1823. Once back at Laguna's house, Murphy changed the plan into one to rob Larsen's house instead. 8 AA 1827. Later that evening, at approximately 7:00p.m. Mendoza return to Figueroa's house to pick him up again. 8 AA 1832. They then picked up Laguna and Murphy. 8 AA 1832. All four men were armed. 8 AA 1833. They arrived at 1661 Broadmere at approximately 8:00p.m. 8 AA 1835. Murphy dropped off the other three men at the house. 8 AA 1838. Once the three men approached the house, Figueroa kicked in the door and was immediately shot in the face upon entering the house. 8 AA 1839. Figueroa then retreated and began to run away from the house. 8 AA 1840. While retreating from the house, Figueroa witnessed Murphy picking Laguna back up from

the house in the vehicle. 8 AA 1842. Figueroa was bleeding, and ultimately decided to hide behind some bushes in a backyard of one of the houses in the neighborhood. 8 AA 1844. He remained in hiding for about 8-9 hours. Id. In the early morning hours of September 22, 2014, Figueroa's sister picked him up. 8 AA 1863. He went to a hospital in California to get treatment for his gunshot wound. 8 AA 1864. On October 20, 2014, he was finally arrested for his involvement in the crime. 8 AA 1866.

Roger Day testified that he resides on Long Cattle, which is close to where the shooting occurred. 6 AA 1401. At about 8:00pm on the evening he heard gun shots so he went to further investigate the sounds. 6 AA 1402. When he went to his door he witnesses a man standing outside his door on the street firing shots towards 1661 Broadmere house. 6 AA 1402-1404. The man had a black bandana over his face and a black hat. 6 AA 1402. He then witnessed the man run down Long Cattle out of sight. 6 AA 1409. Day also saw a second person on Broadmere scooting on the ground on his butt. Id. The person scooting on the ground had an injured leg and was also holding a rifle. 6 AA 1411. He was wearing an orange ski mask as well. 6 AA 1412.

Gene Walker testified that at on the evening of September 21, 2014, he called 911 because he heard gunshots in his neighborhood. 4 AA 871. He looked out his front window and saw a man in the street wearing an orange mask holding a semi-

automatic rifle scooting on the ground. 4 AA 876-877. Officer Kovacich heard a call of a shooting be broadcast so began to make his way to the scene of the shooting. 4 AA 905. Once Kovacich arrived at the scene, he narrowed down which residence the crime had occurred at, and noticed a blood trail at the corner of Broadmere and Long Cattle. 4 AA 906. At this point it was Kovacich and 4 other officers walking east. Id. Kovacich noticed a pick up truck with the tailgate down, and a rifle laying in the back of the bed. 4 AA 907. He called in the gun and proceeded to sweep the area following the blood trail. Id. The blood trail ended at Homestretch and Shifting Winds. The officer then set up a perimeter and called in for canine. 4 AA 912.

Officer Kovacich made his way back to the truck and noticed someone moving inside of the back seat of a black car in the area. 4 AA 914. Officer Ronald Theobald pulled the individual out of the black vehicle, and noticed an orange ski mask on the driver's side floor. 5 AA 1072. The individual in the black car was Appellant Mendoza. 5 AA 1074. Mendoza had been shot in the upper thigh. Id.

After the home invasion and homicide occurred, Joseph Larsen bought Summer a ticket to leave town. 5 AA 1128. She claims to have left because she thought it was her ex-boyfriend, Snoop, who had done it. 5 AA 1128. Summer testified that she did not know Appellant, or Defendants Laguna and Figueroa prior to this case. 5 AA 1129.

After a second suspect, Figueroa, was arrested in this homicide investigation, Summer flew back to town. 5 AA 1130. Joseph Larsen paid for her to stay in Emerald Suites. Id. While at Emerald Suites, Summer and Joseph had an altercation, and the police arrived. Id. Summer was arrested and interviewed by Detective Barry Jensen. Id. She stated that during that interview she was on drugs and does not remember what she said. Id.

After Summer Larsen was indicted for this case, she ultimately entered into a plea deal with the State of Nevada. 5 AA 1133. She plead guilty to conspiracy robbery and attempt robbery related to the robbery of Joseph Larsen's drug suppliers. Id. She testified she did not know that Joseph Larsen's house was going to be robbed on September 21, 2014, and she did not know that Murphy was involved. 5 AA 1136. She met with the State several months prior to trial, but did not enter into her guilty plea agreement until September 6, 2017, only days before trial was set to begin. 5 AA 1165.

VII.

LEGAL ARGUMENT

A. The District Court erred in failing to exclude Summer Larsen (Summer Rice) from testifying at trial.

On September 6, 2016, the State provided notice to Defendants that an agreement had been reached with Summer Larsen, and that the State intended to call

her as a witness at trial. Up until that day, the three remaining Defendants were under the belief that Larsen would be a co-defendant in their trial.

A calendar call in this matter was held on September 7, 2016. During that hearing, Defendants had argued that the State should not be permitted to call Larsen as a witness based on the untimely disclosure and the prejudice it would cause the remaining Defendants. 1 AA 41. Defendant Murphy filed a written motion in support of this argument. Defendants' position was that they would be prejudiced since they would not be allowed to adequately investigate into Larsen as a witness for cross examination purposes. The State argued that it had no ability to notice Larsen until after she formally entered into an agreement with them. Id. The district court judge ultimately denied any requests to exclude Larsen from testifying. Id. The court ruled that the State had provided timely notice, even though the Notice of Witness naming her as a witness was not filed until September 7, 2016, when trial was beginning on September 12, 2016. Id. Larsen's testified before the jury on September 22, 2016. 5 AA 1111.

NRS 174.234 provides, 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:
> (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.
> . . .

> 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.

The court found that the State complied with NRS 174.234 because it provided written notice of its intent to call Larsen the day after she formally entered into a guilty plea agreement with the State September 6, 2016. 1 AA 41.

The statute does allow for notice to be made "as soon as practicable", however, it also allows for the court to preclude a witness if it is determined that the party acted in bad faith by not noticing the witness within the 5 judicial days required by the statute. The State had done a proffer with Larsen several months before she entered into her agreement to testify. The State was well aware of the fact that Larsen would be accepting a plea bargain with the tradeoff that she testify against her codefendants, yet the State conveniently did not allow for that to happen until days before trial was set to begin. A ruling such as this creates quite a slippery slope where prosecutors will be persuaded to make informal agreements with cooperating defendants only to9 wait until immediately before trial, or even during trial, to formalize the agreement

and provide codefendants with proper notice. This would provide prosecutors with tactical advantages, and create an unfair situation where codefendants are not able to adequately prepare for the new witness.

The statute clearly allows for the trial court to exclude a witness if it is determined that there was bad faith in a failure to disclose a witness earlier. However, in this situation, the trial court did not even delve into the question of bad faith. There was no questioning that would have allowed for an adequate determination of whether or not the State acted in bad faith in its delay to notice Larsen as a witness. The court erred by failing to make factual determinations that were central to the issue, such as:

The court's error prejudiced Appellant and denied him the right to effectively cross-examine Larsen regarding the highly-incriminating testimony she provided at trial. "[P]ersons vulnerable to criminal prosecution have incentives to dissemble as an inducement for more favorable treatment by the State." Sheriff v. Acuna, 107 Nev. 664, 667 (1991). Based on that reality, this Court has long recognized the importance of ensuring that a defendant receives a full and fair opportunity to cross-examine a witness whose testimony is the product of a cooperation agreement with the State. See Lobato v. State, 120 Nev. 512, 519 (2004); Mazzan v. Warden, 116 Nev. 48, 67 (2000); Jimenez v. State, 112 Nev. 610, 620 (1996); Roberts v. State, 110 Nev. 1121,

1132-34, (1994), overruled on other grounds by Foster v. State, 116 Nev. 1088 (2000).

The trial court's belief that Appellant should have been preparing to cross-examine and impeach Larsen before he received notice that she was cooperating with the State is also flawed. Larsen's "testimony was central to the case, and therefore the jury's assessment of [her] credibility was important to the outcome of the trial." Jimenez v. State, 112 Nev. at 620. Informant testimony must be highly scrutinized to guard against fabrication. To guard against the inherent unreliability of informant testimony, one indispensable safeguard guarantees the defendant the right to investigate and prepare an effective cross-examination of an informant. See Acuna, 197 Nev. at 669.

The State's decision to not provide reasonable notice to Appellant of its cooperation agreement with Larsen deprived him of the opportunity to effectively impeach the witness on cross-examination. "It is well settled that evidence that would enable effective cross-examination and impeachment may be material and that nondisclosure of such evidence may deprive an accused of a fair trial." Roberts, 110 Nev. at 1132-33. Appellant's inability to effectively cross-examine Larsen was the direct result of untimely disclosure, and the District Court erred in not precluding her from testifying.

B. <u>The District Court erred in permitting the State to admit cell phone records that were provided to Mendoza during the time of trial, and that were admitted through an undesignated expert.</u>

The District Court erred in permitting cell phone records to be used at trial that were disclosed untimely, and that were admitted through undesignated expert testimony. On the sixth day of trial, the State emailed defense counsel previously undisclosed cellular telephone records for text messages between Appellant and Defendant Laguna. 5 AA 1025-1026. Based upon the fact that the records were disclosed late, and because Defendants had not had a chance to have their expert review the records, Defendants requested that the records be excluded pursuant to NRS 174.234. Defendants further argued that the State would need to present expert testimony regarding the new records, which violated Nevada law because they did not provide notice that expert testimony would be admitted regarding those records. 5 AA 1027. Since the State would need expert testimony to explain the new records to the jury, the State failed to provide notice of the substance of its expert's testimony, specific to the new records, twenty-one days before trial. Id.

The prosecution responded by claiming that they did not have a duty to turn over the records before they received them. Id. In explaining the timing of the disclosure, the State explained that it noticed the cellular records for Appellant's phone were not complete. Thereafter, the State contacted the appropriate custodian of records and asked why they failed to provide the complete cellular records

pertaining to the case. 5 AA 1026. Records were then received and immediately and sent to the Defendants. 5 AA 1026.

In response to the Defendant's argument regarding expert notice, and the fact that the State would require its detective to interpret the records as an expert, the State argued that "[i]t's not coming in through Detective Gandy, who's the expert who's going to be testifying to this. It's coming from a custodian of records from another company who's going to say, these are the phone records associated with my company and these are true, fair and accurate business records. I mean, that's the testimony it's coming in as." 5 AA 1028.

Joseph Sierra is a custodian of records for T-Mobile. 6 AA 1336. During trial Sierra testified as to how cell phones operate, and how cell phone towers are utilized. 6 AA 1337-1338. He also testified in great detail as to how to interpret the cell phone records, and what each aspect of the records indicated. 6 AA 1345. He provided information and records related to Appellant's phone account. 6 AA 1358. He then went into great deal regarding interpreting Mendoza's phone records, including interpreting text messages, phone calls, and tower locations. 6 AA 1360.

Despite the State's representations to the court previously, Sierra provided extensive expert testimony during his direct examination. Sierra explained how an individual cellular telephone emits a radio frequency signal to a nearby tower, the communication range of cell towers and the need for more towers in highly populated

areas, how each tower has multiple sectors that receive communications depending on the direction the cellular device is in relation to the tower, and how to read the cellular records to determine what tower a device utilized during a particular call as well as where it was directionally in relation to the tower.

The expert testimony the State elicited from the T-Mobile custodian of records, despite assuring the Court that all the custodian or records was going to be doing was authenticating the records, unfairly prejudiced the Appellant. Appellant did not have sufficient time to analyze the records, or effectively prepare to cross examine the custodian of records as the expert that he actually ended up testifying as. The trial court erred in allowing the prosecution to utilize records turned over during trial to form the basis of admitted expert testimony.

Nevada law imposes a duty on prosecutors to provide to the defense 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, the existence of which is known, or by the exercise of due diligence may become known, to the prosecuting attorney." NRS 174.235. The prosecutor's disclosures must occur not less than thirty days before the start of trial unless the court orders otherwise. NRS 174.285.

In this case, the prosecutor failed to provide Appellant with the cellular records admitted as State's Exhibit 303 thirty days before trial. Instead, the documents were

disclosed during the second week of trial. The State's failure to obtain and disclose the cellular records in a timely fashion was the result of inexcusable neglect. When the State reviewed the records it was clear that the records were not complete. Thus, the late disclosure was a direct product of the State's failure to exercise due diligence in preparing his case and providing required documentation over to Defendants.

By admitting the new records and permitting detailed expert testimony from an undisclosed expert concerning the records, the trial court severely prejudiced Appellant. Testimony concerning how cellular towers communicate with devices and record location amounts to expert testimony. See Burnside v. State, 131 Nev., Adv. Op. 40, 352 P.3d 627, 636-38 (2015). Much of the expert testimony elicited from the T-Mobile Custodian of Records focused on how to read and interpret the data. The State's failure to provide timely expert notice combined with the untimely disclosure of the records themselves worked to unfairly surprise and prejudice the Appellant.

Pursuant to NRS 174.295(2), the remedy for a violation of the discovery provisions is that the district court "may order the party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances." In this situation, the District Court provided absolutely no remedy for the untimely disclosure, but instead made

excuses for the State's lack of diligence and then went on further to allow the custodian of records to testify as an undisclosed expert.

The district court abused its discretion by permitting the State to use untimely disclosed records, and then compounded that by allowing expert testimony regarding those records. As such, this Court should reverse the trial court's decision.

C. <u>The District Court erred and violated Mendoza's 5th and 14th Amendment rights to a fair trial in allowing the State to disclose to the jury that Figueroa's agreement required him to testify truthfully</u>.

The District Court violated Mendoza's 5th and 14th Amendment rights to a fair trial by allowing the State to admit the entirety of Figueroa's agreement to testify and to question him regarding that agreement during redirect of the witness. During redirect of Robert Figueroa, Defendants objected to the admission of the Agreement to Testify. 9 AA 2055. They argued that they did not cross examine him regarding the agreement. 9 AA 2056. Since Defendants did not open the door to allow in the language regarding testifying truthfully within the Agreement to Testify, they did not believe that portion should be shown to the jury. Id. The State responded that all three Defendants had implied during cross examination that Figueroa was only providing information to get a better deal. Id. Appellant Mendoza joined into the objections regarding the agreement to testify truthfully. 9 AA 2058. The court ultimately decided to allow the State to admit the entire Guilty Plea Agreement,

including the Agreement to Testify, as an exhibit. 9 AA 2070. The State then directly questioned Figueroa regarding his agreement to testify truthfully. 9 AA 2074.

In Sessions v. State, 111 Nev. 328, 333 (1995) this Court stated that NRS 175.282 requires the court to "permit the jury to inspect the agreement" after excising any portion it deems irrelevant or prejudicial. The Court held that "neither the provision added by the State requiring "truthful testimony," nor the statutory provision declaring an agreement void when perverted by false testimony are to be included within the written agreement provided for a jury's inspection." Id. at 334. Additionally, the Court stated that Nevada law "does not provide a basis for the prosecution to comment on the truthfulness of the witness's testimony as it relates to the agreement." Id. at n. 3.

After the defendants completed their cross-examination of Figueroa, the trial court granted the State's motion to admit Figueroa's agreement to testify without redaction. The court ruled that the 'obligation to be truthful' language within the agreement to testify was admissible because the defendants attacked the credibility of the witness.

Appellant did not open the door to the admission of the truthfulness language within Figueroa's guilty plea agreement. Appellant attacked the credibility of the witness's testimony and his motivations for testifying on behalf of the State, but in no way commented on the truthfulness of the witness' testimony as it related to the

agreement. Under the decision of the trial court here, the entirety of agreements to testify will always be admitted since every defendant in a criminal case must question the credibility of a cooperating codefendant.

The trial court erred in allowing the jury to learn that Figueroa's agreement to testify required him to 'testify truthfully.' The prosecutor's questions on redirect examination implied to the jury that Figueroa must be telling the truth. The State's multiple references to the 'truthfulness language' improperly vouched for and bolstered Figueroa's credibility. As such, the District Court erred in allowing the Agreement to Testify to come in as evidence, unredacted, and Mendoza's conviction should be reversed.

D. <u>The District Court erred and violated Mendoza's 5th and 14th Amendment rights to a fair trial in refusing to allow Mendoza to have the jury instructed with regard to the theory of self-defense</u>.

Appellant chose to testify at his trial. He testified that he thought of David Murphy as a cousin because of his relationship with Appellant's wife. 10 AA 2392. He stated that his role in the robbery was simply to be to run in the house, grab a duffle bag, and run out. 10 AA 2396. After the first attempted robbery at the supplier house all the men met up again to go to 1661 Broadmere. 10 AA 2455. The plan was for Figueroa to open the door and for Mendoza to get the marijuana. Figueroa knocked the door open and took a few steps in when gunfire began to

ensue. 10 AA 2460-2461. Once the gunfire started Mendoza began to step away from the house. 10 AA 2461. Mendoza was shot in the leg and then fired back at the house, not trying to hit anyone. 10 AA 2462. As he was trying to get away he was shot in the leg. 10 AA 2464. Mendoza was trying to get away from the house because he was in fear for his life because he was still hearing gunshots. 10 AA 2468. He fired his weapon back towards the house at this point and shot Monty Gibson. 10 AA 2472.

After the close of evidence, the district court inquired as to whether defense had any additional jury instructions. 12 AA 2809. Mendoza indicted that he wanted to have the jury instructed as to self-defense. 12 AA 2810. Mendoza stated that he believed the jury should be instructed as to self-defense because it was required in this case because the State was proceeding under a felony murder theory, and at the time of the shooting, the felonies had already been completed. 12 AA 2811. At the time of the shooting Mendoza was no longer a threat to anyone, was outside of the residence, and was simply trying to get away. Id. The testimony was undisputed that Mendoza was retreating at the time of the shooting. 12 AA 2812. The State responded that Mendoza does not have any right or justification to fire his weapon at the homeowners as they came outside of their home, whether they were holding a weapon or not. 12 AA 2814. The State argued that since Mendoza was outside of the residence and simply saw the homeowner with a weapon, it would not justify

him shooting the homeowner. Mendoza responded by arguing that it is up to the jury to decide whether or not the conspiracy was still ongoing. 12 AA 2815. In denying the request to have a self-defense instruction, the court stated that one can not start a gun fight and then argue self-defense unless there's been a definite indication that the initial aggressor is no longer a threat. Id.

The District Court erred and violated Mendoza's right to a fair trial by precluding him from making his defense to the jury. Mendoza had testified with the intention of arguing self-defense, and the trial court made that virtually impossible by not allowing the jury to be instructed as to self-defense.

This Court has previously stated that "a defendant has the right to have the jury instructed on his theory of the case as disclosed by the evidence, no matter how weak or incredible the evidence might be." Margetts v. State, 107 Nev. 616, 619-20, 818 P.2d 392, 394 (1991).

In the current situation, Mendoza was clearly attempting to retreat from the residence when the shooting happened. The initial crimes were completed, and Mendoza had been shot and was scooting across the street to escape. He continued to hear gunshots, and while trying to get away while wounded on the ground, he saw one of the shooters in the doorway. He testified he was in fear for his life and shot at the person in the doorway. As the caselaw states, even if the evidence is weak to support a defendant's theory of defense, the defendant is entitled to have

the jury instructed as to that theory. Mendoza's complete trial strategy was destroyed once the judge refused to have the jury instructed as to self-defense. As such, this violated Mendoza's right to a fair trial, and his conviction should be reversed.

E. Cumulative error warrants reversal of Appellant Mendoza's Conviction.

Should this court fail to find that any single error compromised Mendoza's right to a fair trial, it should recognize that the cumulative effect of these named errors deprived him of a fair trial. The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually. McConnell v. State, 125 Nev. 243 (2009). Where cumulative error at trial denies a defendant his right to a fair trial, this Court must reverse the conviction. Big Pond v. State, 101 Nev. 1, 3 (1985).

Relevant factors to consider in evaluating a claim of cumulative error include whether "the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged." DeChant v. State, 116 Nev. 918, 927, 10 P.3d 108, 113 (2000).

Mendoza maintained a not guilty plea throughout the course of his case. He always maintained that he did not commit the crimes that were charged. However, due to the above issues, Mendoza never received a fair trial. If the collective presence of errors devastates one's confidence in the reliability of the verdict, a new trial is

required. See Killian v. Poole, 282 F.3d 1204, 1211 (9th Cir. 2002). Under the circumstances, cumulative deficiencies of trial counsel prejudiced Ford.

The issue of guilt was close in this case and the testimony against Appellant. The gravity of the charge is the highest of any in our criminal justice system. While each of the trial errors advanced in this pleading may not independently establish interference with Mendoza's substantial rights, the combined effects of the errors deprived Mendoza of a fair trial. This Court should reverse Mendoza's conviction because the multiple errors that occurred during trial deprived him of his Constitutional right to a fair trial.

VIII.

CONCLUSION

For each of the reasons set forth above, Appellant Jorge Mendoza's conviction after his jury trial should be reversed and remanded for a new trial.

Respectfully submitted this 1st day of November, 2017.

Respectfully submitted

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I further certify that this brief complies with the formatting requirements of NRAP 32(a)(4)-(6) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word, a word-processing program, in 14 point Times New Roman.

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I further certify that this brief complies with the type volume limitations of NRAP 32(a)(7) because it is proportionately spaced, has a typeface of 14 points or more and contains **7000 words**. I understand that I may be subject to sanctions in the event that the accompanying brief in not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 1st day of November, 2017.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on November 1, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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IN THE SUPREME COURT OF THE STATE OF NEVADA

JORGE MENDOZA,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 72056

RESPONDENT'S ANSWERING BRIEF

Appeal From Judgment of Conviction
Eighth Judicial District Court, Clark County

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IN THE SUPREME COURT OF THE STATE OF NEVADA

JORGE MENDOZA, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 72056

RESPONDENT'S ANSWERING BRIEF

Appeal from a Judgment of Conviction
Eighth Judicial District Court, Clark County

ROUTING STATEMENT

This appeal is not presumptively assigned to the Court of Appeals pursuant to NRAP 17(b)(1) because it is a direct appeal arising from a Judgment of Conviction for a Category A felony that is not challenging the sentence imposed or sufficiency of the evidence.

STATEMENT OF THE ISSUES

1. Whether the Whether the District Court correctly allowed Summer Larsen to testify at trial
2. Whether the District Court correctly permitted the State to admit cell phone records
3. District Court correctly allowed the State to discuss Figueroa's agreement to testify truthfully
4. Whether the District Court did not err in refusing to allow Appellant to instruct the jury on self-defense
5. Whether there was no cumulative error that warrants reversal

STATEMENT OF THE CASE

On February 3, 2015, Jorge Mendoza ("Appellant") was charged by way of Superseding Indictment with:(1) count of Conspiracy to Commit Robbery (Category B Felony-NRS 199.480); (1) count of Burglary While in Possession of a Deadly Weapon (Category B Felony-NRS 205.060); (1) count of Home Invasion While in Possession of a Deadly Weapon (Category B Felony-NRS 205.060), (2) counts of Attempt Robbery With Use of a Deadly Weapon (Category B Felony-NRS 193.330, 200.38); (1) count of Murder with Use of a Deadly Weapon (Category A Felony-NRS 200.010), and (1) count of Attempt Murder With Use of a Deadly Weapon (Category B Felony- NRS 200.010). 1 Appellant's Appendix (AA) 27-32.

On September 12, 2016, Appellant's jury trial commenced. Id. at 60. On October 7, 2016, the jury found Appellant guilty of all counts. 13 AA 3006.

On December 12, 2016, Judgment of Conviction was filed and Appellant 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) yeas 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; with eight-hundred (800) days credit for time served. Appellant's aggregate total sentence is life with a minimum of twenty three (23) years. 13 AA 3015.

On December 22, 2016, Appellant filed a Notice of Appeal. Id. at 3017.

STATEMENT OF THE FACTS

On September 21, 2014, Appellant invaded the house of Joseph Larsen ("Larsen") and Monty Gibson ("Gibson"), and shot and killed Gibson. That evening, Steve Larsen who is Larsen's father and owner of his house called Larsen and informed him that Larsen's house was going to be robbed and that Summer Larsen

(Summer) was the reason why. 4 AA 826-827. In or around July, 2014, Summer Larsen ("Summer") broke into her estranged husband, Larsen's house and stole $12,000 and approximately 12 pounds of marijuana. 5 AA 1115. She later told co-defendant, David Murphy ("Murphy"), that she had done so, and he asked her why she did not bring him along. 5 AA 1116 . Summer suggested that they could burglarize Larsen's supplier's house. Id. Summer told Murphy that Larsen's supplier obtained between 100-200 pounds of marijuana weekly, and described the procedure whereby Larsen's supplier obtained the marijuana and whereby Larsen, afterwards, purchased marijuana from his supplier. 5 AA 1117-1119. This conversation occurred approximately three weeks prior to the events of this case. 5 AA 1119-11120. Summer showed Murphy where Larsen's supplier's house was located. 5 AA 1120. After having several more conversations about robbing Larsen's supplier, Murphy told Appellant that he knew of a place they could burglarize to help Appellant get some money. 10 AA 2396. At 4:00 a.m. on September 21, 2014, Murphy called Appellant and then left his house to meet at Murphy's house in his Nissan Maxima. 10 AA 2397-2398. Appellant then picked up Murphy, and the two of them went to co-defendant Joey Laguna's ("Laguna") house. 10 AA 2399. Appellant then drove Laguna to Robert Figueroa's ("Figueroa") house, arriving around 7:30 a.m. 10 AA 2399-2400. Figueroa got into the car with a duffel bag. 10 AA 2400. Appellant, Laguna, and Figueroa then drove to an AMPM gas station to meet back up with

Murphy. 10 AA 2401. Murphy had an older white pick-up truck, and was waiting with a Hispanic woman with tattoos. 10 AA 2403. The woman drove Appellant's vehicle, and Murphy led in his pick-up truck. 10 AA 2404-2405. The two cars drove to the neighborhood where Larsen's supplier lived, but a lawn maintenance crew was detailing a yard a few houses away. 10 AA 2407-2408. Ultimately, no burglary occurred because the woman drove Appellant's car out of the neighborhood. 10 AA 2411. The group then proceeded back to Laguna's house, where they engaged in further discussions about trying again, or robbing somewhere else. 10 AA 2411-2412. Appellant and Figueroa left shortly thereafter. 10 AA 2413. Around 6:00 p.m., Murphy told Appellant to pick up Figueroa. 10 AA 2446. Appellant did so, then proceed to Laguna's house, stopping on the way at Appellant's house so that Appellant could arm himself with a Hi-point rifle. 10 AA 2447-2449. When they arrived at Laguna's house, Laguna came outside and Murphy arrived. 10 AA 2449-2450. Figueroa asked who they were going to rob, and Murphy answered. 10 AA 2450-2451. Eventually, the four of them left in Appellant's car, with Murphy driving because he knew where they were going. 10 AA 2451-2452. They drove to Laguna's house. 10 AA 2452-2453. On the way, the group decided to break into Larsen's house. 10 AA 2453. Figueroa was to enter the house, get everyone under control, Appellant was to enter the house and grab the marijuana from upstairs, and Laguna was to stay outside and provide cover in case someone unexpectedly appeared. 10

AA 2454. When they arrived, Murphy dropped them off, drove a short distance up the street, and made a U-turn to face the house and prepare to drive them away. 10 AA 2454-2455. Figueroa hit the door first, breaking it open on the second attempt. 10 AA 2455-2456. Figueroa entered the house, and Appellant remained near the front door with his rifle. 10 AA 2456. Shortly thereafter, gunfire erupted. 10 AA 2457. Figueroa was struck by a bullet in his face, dropped to the floor, and then was struck on his left side as he turned to flee out the door. 8 AA 1857. Figueroa ran down the street. 8 AA 1857. Appellant began firing his rifle into the house before he was shot in the leg and fell into the street. 10 AA 2464-2465. Laguna ran out into the street as well. 10 AA 2465. Appellant could not walk, so he scooted away from the house with the rifle still in his hands. 10 AA 2468-2470. Appellant continued firing his rifle at the house, killing Gibson. 10 AA 2471-2472; 5 AA 1058. While the shooting was occurring, Murphy picked up Laguna and fled the scene, stranding Appellant and Figueroa. 8 AA 1863, 1876. Appellant scooted to an abandoned car and crawled inside, where he waited until the police followed his blood trail and apprehended him. 10 AA 2475. Figueroa managed to escape down the street and hide in a neighbors' backyard for several hours. 8 AA 1863-1865. Figueroa called Laguna, who did not answer; Murphy called Figueroa and told him that he was not going to pick him up. 8 AA 1865-1867, 1879. Figueroa then called "everybody in [his] phone" over the next 8-9 hours until his sister agreed to pick him up. 8 AA

1879-1883. By then, Appellant had been apprehended and everyone else had escaped. Murphy later drove Appellant's wife to Appellant's car so that she could retrieve it. 7 AA 1637. Figueroa went to California and received medical care for his injuries. 9 AA 2110. Most of the conspirators have, and know each other by, nicknames. Murphy is "Duboy" or "Dough boy." 5 AA 1150. Laguna is "Montone." 8 AA 1814. After he returned, he was apprehended by police on October 20, 2014. At trial, both Figueroa and Appellant testified, generally consistently, as to the events described above. 10 AA 2387-11 AA 2538; 8 AA 1804-9 AA 2083. Additionally, the jury was presented with cell phone records that demonstrated Murphy, Appellant, Laguna, and Figueroa were talking to, and moving throughout the city together at the times, and to the locations, indicated by Appellant and Figueroa. 6 AA 1335-1400; 7 AA 1660-8 AA 1800.

SUMMARY OF THE ARGUMENT

First, the District Court did not err when it allowed Summer Larsen's testimony at trial because the State notified Appellant and co-defendant's that she would be a witness within 24 hours of the Court accepting her Guilty Plea Agreement. Prior to Summer Larsen accepting the plea agreement and passing the plea canvass, the State was unable to call her as a witness in its case in-chief. The Court correctly determined that Summer Larsen's testimony was not untimely and was admissible.

Second, the District Court was within its discretion to admit cell phone records produced by the custodian of records after voir dire began, because the State had properly requested the records well in advance of trial, and promptly turned them over once received. Not only did the State file multiple Notice of Expert Witnesses that included the above mentioned custodian of records, but Appellant also could have noticed the records were incomplete and subpoenaed them himself.

Next, the District Court did not err when it allowed the State to disclose to the jury that Figueroa's agreement to testify included an agreement to testify truthfully, because testimony was elicited that called into question Figueroa's credibility. Accordingly, the State was permitted to rebut the evidence attacking Figueroa's credibility with his agreement.

The District Court did not abuse its discretion by refusing to allow Appellant to instruct the jury on self-defense. Because Appellant was the initial aggressor, and there was no facts suggesting otherwise, the right to use self-defense was foreclosed to him.

Lastly, Appellant's claim of cumulative error is meritless as there was no single instance of error by the Court.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY ALLOWED SUMMER LARSEN TO TESTIFY AT TRIAL

Appellant 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. This argument is wholly without merit as the State informed counsel that Summer would be testifying less than 24 hours after she plead guilty.

First, Appellant did not object to Summer's testimony on the grounds of bad faith. Although there was a motion filed and a hearing held on the matter, the motion was filed on behalf of co-defendant, Murphy, not Appellant. Because Appellant himself did not raise an objection to the testimony on the grounds of bad faith or participate in the hearing held, all but plain error is waived. Martinorellan v. State, 131 Nev. __, __, 343 P.3d 590,593 (2015); Maestas v. State, 128 Nev. __, __, 275 P.3d 74, 89 (2012); Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003); Patterson v. State, 111 Nev. 1525,1530, 907 P.2d 948, 987 (1995); Ford v. Warden, 111 Nev. 872, 884, 901 P.2d 123,130 (1995). Plain error review states:

> "To amount to plain error, the 'error must be so unmistakable that it is apparent from a casual inspection of the record.'" Vega v. State, 126 Nev. __, __, 236 P.3d 632, 637 (2010) (quoting Nelson, 123 Nev. at 543, 170 P.3d at 524). In addition, "the defendant [must] demonstrate [] that the error affected his or her substantial rights, by causing 'actual prejudice or a miscarriage of justice.'" Valdez, 124 Nev. at 1190, 196 P.3d at 477 (quoting Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003))). Thus, reversal for plain error is only warranted if the error is readily apparent and the appellant demonstrates that the error was prejudicial to his substantial rights.

Martinorellan, 131 Nev. at __, 343 P.3d at 594.

Appellant cannot demonstrate that the Court erred by allowing the testimony at trial.

NRS 174.234 states:

> 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.
>
> 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, Appellant and the other co-defendants were notified immediately and provided the Guilty Plea Agreement, Amended Indictment, and Agreement to

Testify on September 6, 2016.[1] As it was late in the day, the State filed the formal notice of witness 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).

Appellant makes an allegation of bad faith by the State, 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 the whether the State acted in bad faith and made factual determinations central to the issue of admitting Summer's testimony. See AOB p. 13 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

[1] Which was four judicial days prior to trial. Had Monday not been a non-judicial day, the State assumes that the Court would have taken Ms. Larsen's plea on Monday and the statute would have been satisfied.

> 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.
> -Okay, 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: So your 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.

Respondents Appendix (RA) 69-71. After hearing argument on the matter the Court then determined that the notice was not untimely, nor was the defense prejudiced. Id.

Notably, Summer Larsen was a joined co-defendant who was likely to testify in her own defense. Appellant had to be prepared to cross-examine her whether or not she plead guilty. Further, Appellant 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, Appellant was not prejudiced.

Thus, 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, Appellant's claim should be denied.

II. THE DISTRICT COURT CORRECTLY PERMITTED THE STATE TO ADMIT CELL PHONE RECORDS

Appellant next argues that the Court erred by permitting untimely disclosed cell phone records to be used at trial that were admitted through an undesignated expert. Because Appellant himself failed to object to this issue below, all but plain error is waived. Martinorellan, 131 Nev. at __, 343 P.3d at 594.

On September 19, 2016, co-defendant's Murphy and Laguna made an oral motion to exclude phone records that the State had provided to him that morning. 5 AA 1025. The State responded that they had just gotten those phone records that morning and that the records were "immediately" emailed to counsel. Id. Texts from Murphy to Appellant and Laguna that appeared on Appellant and Laguna's phone had previously been disclosed, but appeared to be missing from the records provided from Murphy's phone. Id. 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.

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." RA 12. On April 3, 2015, the State filed a Supplemental Notice of Expert Witnesses, which again included those experts. RA 1. On August 15, 2016, the State filed a Second Supplemental Notice of Expert Witnesses, which included the above experts. RA 37. 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 Chris Candy, also from LVMPD, who was to testify as to the same. RA 46. The Notice included the required CVs. Id. Voir Dire began on September 12, 2016, 21 days later. 1 AA 66.

Appellant argues that the "substance" of the records disclosed on September 19, 2016, was not timely disclosed. AOB p. 15. However, Appellant 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 Summer would testify in section I, supra. The multiple Notices of Expert Witnesses put Appellant 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 prosecution asked for, and received, more complete records which were then immediately forwarded to Appellant and the other defendants. 5 AA 1026. Because the records were kept by cell phone companies, Appellant could have, of course, noticed that the records were incomplete sooner and subpoenaed those records himself. Equally importantly, most of the text messages appeared on Appellant and co-defendant Laguna's phones and was previously disclosed in those records; the records disclosed on September 19, 2016, merely showed the same messages from Murphy's phone. 5 AA 1027. 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. 5 AA 1027-1028. Beyond that, the State had *already* disclosed phone tower information for co-defendant Murphy's phone, and the additional text messaged comprised 686 *kilobytes* of information, or about 250 text messages. 5 AA 1032-1033. 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 talk with his expert to see how long that would take. 5 AA 1033.

The next day, on Tuesday, September 20, 2016, Murphy told the Court his expert would need two days, including that day. 6 AA 1311. The State replied that they did not expect their 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. 6 AA 1311. 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. 6 AA 1335. Appellant now complains, at length, about Sierra's allegedly "expert" testimony, which includes how cell phones are used, how towers are utilized, how to interpret cell phone records. Id.; AOB p. 16. Sierra's testimony regarding Appellant'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. See RA. 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, the 19th– exactly as the State represented to the Court. 6 AA 1355. The records had been previously requested by the State, but not produced by T-Mobile until that date. 6 AA 1602.

Appellant cites 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. 5 AA 1027. As such, NRS 174.235 is inapplicable. Appellant 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. 6 AA 1311. To the extent Appellant is under the impression that he was prejudiced, he along with Murphy's expert received twice as much time as was requested by Murphy. Appellant had the same time to prepare, and therefore was not prejudiced. As mentioned supra, Appellant abstained from objecting to or cross-examining Sierra on the cell phone records. Accordingly, under a plain error analysis, 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 were available earlier through Appellant's own due diligence. Therefore, the claim should be denied.

III. THE DISTRICT COURT CORRECTLY ALLOWED THE STATE TO DISCUSS FIGUEROA'S AGREEMENT

Appellant alleges that the Court violated his rights by allowing the State to admit Figueroa's agreement to testify and question him regarding that agreement. This argument is without merit because the Court allowed discussion of Figueroa's agreement to testify truthfully after his credibility was attacked on cross-examination.

This Court reviews a district court's decision to admit or exclude evidence for an abuse of discretion. Hernandez, 124 Nev. at 649, 188 P.3d at 1131; see, e.g., Mclellan, 124 Nev. at ___, 182 P.3d at 109. NRS 175.282 states:

> If a prosecuting attorney enters into an agreement with a defendant in which the defendant agrees to testify against another defendant in exchange for a plea of guilty, guilty but mentally ill or nolo contendere
> to a lesser charge or for a recommendation of a reduced sentence, the court shall:
> 1. After excising any portion it deems irrelevant or prejudicial, permit the jury to inspect the agreement;
> 2. If the defendant who is testifying has not entered a plea or been sentenced pursuant to the agreement, instruct the jury regarding the possible related pressures on the defendant by providing the
> jury with an appropriate cautionary instruction; and
> 3. Allow the defense counsel to cross-examine fully the defendant who is testifying concerning the agreement.

Appellant argues that the door was not open as to the admission of the truthfulness language within Figueroa's guilty plea agreement. In arguing so, Appellant relies on Session v. State, 111 Nev. 328, 333, 890 P.2d 792 (1995), to his position but, in fact, it demonstrates why his claim is meritless. In Sessions, this 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*, because cautionary jury instructions regarding the skepticism the jury ought to place on testimony from co-defendants-turned-State's-witnesses renders 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. 9 AA 2074; AOB 20. Further, the un-redacted plea agreement was provided to the jury because Appellant, Murphy, and Laguna did precisely what Sessions 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. 8 AA 1885-1910. 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. 8 AA 1888-1891, 1909-1910. Appellant's trial counsel followed, and to his credit managed to ross-examine Figueroa without mentioning the plea agreement. 8 AA 1911-1932. Murphy's counsel followed. 8 AA 1938- 8 AA 1991. He first asked a series of questions demonstrating that Figueroa had lied on numerous occasions. 8 AA 1940-1946. 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. 8 AA 1975-1978. 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." 8 AA 1978-1981.

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 walkingout 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.

9 AA 2028-2030.

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. 9 AA 2030-2037. The State then highlighted portions of previous statements and testimony that were consistent with his testimony at trial. 9 AA 2037-2051. 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. 9 AA 2038-2040.

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.

9 AA 2039-2040. 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. 6 AA 1450; 7 AA 1600. 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, well before Figueroa testified. 5 AA 1020-1023. The Court even recessed and reviewed Sessions prior to making a ruling. 5 AA 1024-1025.

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. 9 AA 2057-2058. The Guilty Plea Agreement and un-redacted Agreement to Testify were then admitted. 9 AA 2070. The jury instructions included the promised curative instruction. RA 140.

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 Appellant's testimony in his trial was substantially consistent with the testimony of Figueroa, Figueroa corroborated Appellant, therefore Appellant benefited from the jury considering Figueroa as truthful and any resulting error was also harmless.

IV. THE DISTRICT COURT DID NOT ERR IN REFUSING TO ALLOW INSTRUCTIONS ON SELF-DEFENSE

Appellant next alleges that the District Court erred in precluding jury instructions on self-defense. This argument is entirely without merit. The Court properly rejected

the instruction because Appellant was the initial aggressor and therefore was foreclosed from arguing self-defense.

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

Appellant complains that the Court improperly refused to have the jury instructed on self-defense, and therefore infringed on his theory of defense. AOB 21. Appellant's argument is unavailing and nonsensical. Because Appellant 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 Appellant 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 Appellant. Appellant'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 6 shots into the house, and he believed he had a right to fire his weapon. 10 AA 2482-2483; 11 AA 2530. Thus, it is clear that Appellant was not acting in self-defense. Therefore, the Court did not err in refusing to allow jury instructions regarding such.

V. THERE WAS NO CUMMULATIVE ERROR THAT WARRANTS REVERSAL

Appellant alleges that the cumulative effect of error deprived him of his right to a fair trial. AOB 24. This Court considers the following factors in addressing a claim of cumulative error: (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, 854-5 (2000). A defendant needs to present all three elements to be successful on appeal. Id. Moreover, 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) (citing Michigan v. Tucker, 417 U.S. 433, 94 S.Ct. 2357 (1974).

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

CONCLUSION

Based upon the foregoing, the State respectfully requests that the Judgment of Conviction be AFFIRMED.

Dated this 16th day of January, 2018.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page and type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, contains 6,338 words and does not exceed 30 pages.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 16th day of January, 2018.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on January 16, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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JEV/Raven Yim/ed

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JORGE MENDOZA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 72056

ORDER OF AFFIRMANCE

Jorge Mendoza appeals from a judgment of conviction entered pursuant to a jury verdict finding him guilty of conspiracy to commit robbery, burglary while in possession of a deadly weapon, home invasion while in possession of a deadly weapon, two counts of attempted robbery with use of a deadly weapon, murder with use of a deadly weapon, and attempted murder with use of a deadly weapon. Eighth Judicial District Court, Clark County; Carolyn Ellsworth, Judge.

Mendoza's charges arose from his involvement in a home burglary and fatal shooting. At trial, the State presented substantial evidence, including testimony from two coconspirators and evidence of Mendoza's cellular telephone location records before, during, and after the crime. The jury convicted Mendoza following a 19-day trial.[1]

On appeal, Mendoza argues the district court reversibly erred by (1) denying a motion to exclude coconspirator Summer Larsen as a witness due to the State's untimely notice, (2) admitting Mendoza's cellular telephone records, (3) disclosing coconspirator Robert Figueroa's unredacted plea agreement, and (4) refusing to instruct the jury on self-

[1]We do not recount the facts except as necessary to our disposition.

defense. He further argues that cumulative error warrants reversal. We disagree.

With respect to Mendoza's arguments regarding Summer Larsen[2] and the cellular telephone records,[3] Mendoza did not object below and we conclude he does not demonstrate plain error on appeal in light of the overwhelming evidence against him. *See Mclellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008) (holding the "failure to object precludes appellate review of the matter unless it rises to the level of plain error" (internal quotations omitted)).

Third, Mendoza argues that the district court improperly admitted accomplice Robert Figueroa's plea agreement without redacting its truthfulness provision. Under NRS 175.282(1), 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." *Sessions v. State*, 111 Nev. 328, 334, 890 P.2d 792, 796 (1995). Because here Mendoza's codefendant attacked Figueroa's credibility, we conclude that the district court did not err by admitting Figueroa's unredacted plea agreement.

---

[2]We note the district court likely abused its discretion by admitting Larsen's testimony, as NRS 174.234(1)(a)(2) requires the State to file and serve written notice at least five days before trial of all witnesses it intends to call. But, even had Mendoza objected below, the error was harmless under these facts. *See* NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.").

[3]The record belies Mendoza's argument that the State failed to timely disclose the cellular phone records or the timely notice the expert. *See* NRS 174.234 and NRS 174.235 (setting forth the applicable requirements).

Mendoza also claims that the district court abused its discretion by declining to instruct the jury on his proffered self-defense instruction. Mendoza argues that a self-defense instruction was warranted because the underlying felonies were fully completed and there was a time lapse before the killing occurred. Mendoza claims that he had fled the scene when the victims began shooting at him, and he only returned fire in self-defense because he was in fear for his life.

"We review a district court's denial of proposed jury instructions for abuse of discretion or judicial error." *Davis v. State*, 130 Nev. 136, 141, 321 P.3d 867, 871 (2014). "Generally, the defense has the right to have the jury instructed on a theory of the case as disclosed by the evidence, no matter how weak or incredible that evidence may be." *Runion v. State*, 116 Nev. 1041, 1050, 13 P.3d 52, 58 (2000). Nevertheless, the right of self-defense is generally unavailable to a defendant charged with felony murder. *See People v. Tabios*, 78 Cal. Rptr. 2d 753, 756-57 (Ct. App. 1998), *disapproved of on other grounds by People v. Chun*, 203 P.3d 425 (Cal. 2009); *State v. Amado*, 756 A.2d 274, 282-84 (Conn. 2000) (concluding that a defendant found guilty of felony murder cannot claim self-defense). And a defendant is guilty of felony murder even after the felony is complete "if the killing and the felony are part of one continuous transaction." *Sanchez-Dominguez v. State*, 130 Nev. 85, 94, 318 P.3d 1068, 1074 (2014).

We are unpersuaded by Mendoza's argument that he was entitled to claim self-defense because Mendoza's own trial testimony demonstrates that the felonies and the killing were one continuous transaction. Thus, the district court correctly ruled that Mendoza was not entitled to an instruction that he acted in self-defense. *See Tabios*, 78 Cal. Rptr. 2d at 757 (holding that in a prosecution for felony murder, "the

defendant is not permitted to offer any proof at all that he acted without malice"). Testifying on his own behalf, Mendoza expressly conceded to the following facts: he agreed with his coconspirators to break into a drug dealer's home with the intent to steal marijuana from inside of the home; he participated in the conspiracy by approaching the victim's home armed with a rifle, and he and his coconspirators kicked in the victim's front door where they were met with gunfire; as he tried to run away, he was shot in the femur and fell down into the grass in the front yard of the home; attempting to flee from the scene and unable to walk, he moved into the street; and, when he heard more gunfire and saw two armed figures shooting at him from the doorway, he fired toward the house, hitting someone. On cross-examination, Mendoza further conceded that when he fired towards the house, he knew the shot he fired killed the victim.

Mendoza admitted to committing conspiracy to commit robbery, burglary while in possession of a deadly weapon, home invasion while in possession of a deadly weapon, attempted robbery with use of a deadly weapon, and attempted murder with use of a deadly weapon during his testimony before the jury, and that these felonies and the killing occurred as one continuous transaction. *See Sanchez-Dominguez*, 130 Nev. at 93-94, 318 P.3d at 1074. Therefore, Mendoza's testimony that he committed the underlying felonies charged supplies the requisite malice for felony murder under these specific facts. *See Nay v. State*, 123 Nev. 326, 332, 167 P.3d 430, 434 (2007) (noting that "[w]ith respect to felony murder, malice is implied by the intent to commit the underlying felony"). Thus, the district court did not abuse its discretion by denying Mendoza's request to instruct the jury on self-defense. *Cf. Amado*, 756 A.2d at 283 (recognizing that "[o]ne who commits or attempts a robbery armed with deadly force, and kills the

intended victim when the victim responds with force to the robbery attempt, may not avail himself of the defense of self-defense" (alteration in original) (quoting *United States v. Thomas*, 34 F.3d 44, 48 (2d Cir. 1994))).[4] Accordingly, we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Silver

_____, J.
Tao

_____, J.
Gibbons

cc: Hon. Carolyn Ellsworth, District Judge
Gregory & Waldo, LLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

[4]We further hold that, in light of our conclusion that Mendoza fails to demonstrate any error, his argument that cumulative error requires the reversal of his conviction is without merit. *See Pascua v. State*, 122 Nev. 1001, 1008 n.16, 145 P.3d 1031, 1035 n.16 (2006) (rejecting appellant's argument of cumulative error where the "errors were insignificant or nonexistent").

Case No. C303991

Dept. No. _____

FILED
OCT 18 2019
CLERK OF COURT

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE
STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

A-19-804157-W
Dept. V

Jorge Mendoza
Petitioner,

v.

State of Nevada William Gittere
Respondent.

PETITION FOR WRIT
OF HABEAS CORPUS
(POSTCONVICTION)

INSTRUCTIONS:

(1) This petition must be legibly handwritten or typewritten, signed by the petitioner and verified.

(2) Additional pages are not permitted except where noted or with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) If you want an attorney appointed, you must complete the Affidavit in Support of Request to Proceed in Forma Pauperis. You must have an authorized officer at the prison complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.

(4) You must name as respondent the person by whom you are confined or restrained. If you are in a specific institution of the Department of Corrections, name the warden or head of the institution. If you're not in a specific institution of the Department but within its custody, name the Director of the Department of Corrections.

(5) You must include all grounds or claims for relief which you may have regarding your conviction or sentence. Failure to raise all grounds in this petition may preclude you from filing future petitions challenging your conviction and sentence.

(6) You must allege specific facts supporting the claims in the petitiou you file seeking relief from any conviction or sentence. Failure to allege specific facts rather than just conclusions may cause your petition to be *dismissed*. If *your petition contains* a claim of ineffective assistance of counsel, that claim will operate to waive the attorney-client privilege for the proceeding in which you claim your counsel was ineffective.

RECEIVED
OCT 18 2019
CLERK OF THE COURT

(7) When the petition is fully completed, the original and one copy must be filed with the clerk of the state district court for the county in which you were convicted. One copy must be mailed to the respondent, one copy to the Attorney General's Office, and one copy to the district attorney of the county in which you were convicted or to the original prosecutor if you are challenging your original conviction or sentence. Copies must conform in all particulars to the original submitted for filing.

PETITION

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: Ely State Prison White Pine County via life sentence

2. Name and location of court which entered the judgment of conviction under attack: Eighth Judicial District Court Clark County

3. Date of judgment of conviction: 12-12-2016

4. Case number: C363991

5. (a) Length of sentence: Aggregated 23 years to life on multiple counts

(b) If sentence is death, state any date upon which execution is scheduled: N/A

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion? Yes ____ No /
If "yes", list crime, case number and sentence being served at this time: N/A

7. Nature of offense involved in conviction being challenged: Murder, Assault others

8. What was your plea? (check one):
(a) Not guilty / (b) Guilty ____ (c) Nolo contendere ____

9. If you entered a plea of guilty to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty was negotiated, give details:

10. If you were found guilty after a plea of not guilty, was the finding made by: (check one)
(a) Jury / (b) Judge without a jury ____

11. Did you testify at the trial? Yes / No ____

12. Did you appeal form the judgment of conviction? Yes / No ____

13. If you did appeal, answer the following:
(a) Name of Court: Supreme Court of Nevada
(b) Case number or citation: 72156
(c) Result: Denied

(d) Date of result: 10-30-2018
(Attach copy of order or decision, if available.)

14. If you did not appeal, explain briefly why you did not: N/A

15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal?
Yes ____ No ✓

16. If your answer to No. 15 was "yes", give the following information:
(a)(1) Name of court:
(2) Nature of proceeding:
(3) Grounds raised:
(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ____ No ____
(5) Result:
(6) Date of result:
(7) If known, citations of any written opinion or date of orders entered pursuant to such result:

(b) As to any second petition, application or motion, give the same information:
(1) Name of court:
(2) Nature of proceeding:
(3) Grounds raised:
(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ____ No ____
(5) Result:
(6) Date of result:
(7) If known, citations of any written opinion or date of orders entered pursuant to such a result:

(c) As to any third or subsequent additional applications or motions, give the same Information as above, list them on a separate sheet and attach.

(d) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any petition, application or motion?
(1) First petition, application or motion? Yes ____ No ____
Citation or date of decision:
(2) Second petition, application or motion? Yes ____ No ____
Citation or date of decision:
(3) Third or subsequent petitions, applications or motions? Yes ____ No ____
Citation or date of decision:

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)

17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion, application or any other postconviction proceeding? If so, identify:

(a) Which of the grounds is the same: N/A

(b) The proceedings in which these grounds were raised: N/A

(c) Briefly explain why you are again raising these grounds. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) N/A

18. If any of the grounds listed in No.'s 23(a), (b), (c) and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL NOT DONE TO PRESENT ON DIRECT

19. Are you filing this petition more than one year following the filing of the judgment of conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) N/A

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes ____ No ✓

If yes, state what court and case number: ____

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal: AMANDA GRIGSON

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack? Yes ____ No ✓

If yes, specify where and when it is to be served, if you know: ____

23. State concisely every ground on which you claim that you are being held unlawfully. summarize briefly the facts supporting each ground. If necessary you may attach pages stating additional grounds and facts supporting same.

(a) **Ground One:** CO defendant summation [illegible] was incorrectly allowed to testify at trial in violation of const I-14

Supporting FACTS (Tell your story briefly without citing cases or law.): court abused its discretion in allowing hen to testify to be ammended

(b) **Ground Two:** State improperly permitted cell phone records

violation of const I-14

Supporting FACTS (Tell your story briefly without citing cases or law.): court was not, on abused its discretion in allowing cell phone records in after voire dire hrg.

to be ammended

(c) **Ground Three:** court abused its discretion in by allowing Figueroa agreement to testify

in violation of const I-14

Supporting FACTS (Tell your story briefly without citing cases or law.): State coerced by directing to jury agreement to testify faithfully

to be ammended

(d) **Ground Four:** court erred by refusing Appellant to instruct jury on self defense

in violation of const I-14

Supporting FACTS (Tell your story briefly without citing cases or law.): was not allowed to instruct jury on self defense as a lesser charge.

to be ammended

(a) ~~Ground One~~: file Cumulative error warranted Reversal U.S.C.A. 14th To Be Ammended

Supporting FACTS (Tell your story briefly without citing cases or law.): Cumulative error warranted Reversal To Be Ammended

(b) ~~Ground Two~~: Six Trial Counsel was Ineffective U.S.C.A. 14th To Be Ammended

Supporting FACTS (Tell your story briefly without citing cases or law.): Trial Counsel was Ineffective in Representation of Petitioner To Be Ammended

(c) Ground Three: To be Ammended

Supporting FACTS (Tell your story briefly without citing cases or law.): To Be Ammended

(d) Ground Four: To be Ammended

Supporting FACTS (Tell your story briefly without citing cases or law.): To Be Ammended

WHEREFORE, petitioner prays that the court grant petitioner relief to which he may be entitled in this proceeding.

EXECUTED at Ely State Prison, on the 3 day of the month of October, of the year 2014.

X Jorge Mendoza
Signature of petitioner

Ely State Prison
Post Office Box 1989
Ely, Nevada 89301-1989

Signature of Attorney (if any)

Attorney for petitioner

Address

VERIFICATION

Under penalty of perjury, the undersigned declares that he is the petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and as to such matters he believes them to be true.

X Jorge Mendoza
Petitioner

Attorney for petitioner

AFFIRMATION PURSUANT TO NRS 23B.030

I, Jorge Mendoza, NDOC # 1169537,
CERTIFY THAT I AM THE UNDERSIGNED INDIVIDUAL AND THAT THE ATTACHED DOCUMENT ENTITLED Habeas corpus, IFP, Appointment of counsel, motion to amend,
DOES NOT CONTAIN THE SOCIAL SECURITY NUMBER OF ANY PERSONS, UNDER THE PAINS AND PENALTIES OF PERJURY.

DATED THIS 17 DAY OF October, 2020

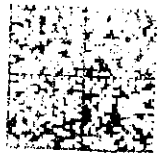
SIGNATURE: Jorge Mendoza X

INMATE PRINTED NAME: Jorge Mendoza

INMATE NDOC# 1169537

INMATE ADDRESS: ELY STATE PRISON
P.O. BOX 1989
ELY, NV. 89301

Jorge Mendoza #1169537
Ely State Prison
P.O. Box 1989
Ely, NV 89301



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EIGHTH Judicial District court Clerk
200 Lewis Ave 3RD Floor
Las Vegas, NV 89155

CONFIDENTIAL

FILED
NOV 14 2019
CLERK OF COURT

District court
Clark-county, Nevada

C303991

Jorge Mendoza
plaintiff

A-19-804157-W

State of Nevada
defendant

A-19-804157-W
Dept: V

Date of Hearing

Time of Hearing

Request for hearing
on motion to Amend
and Appoint counsel
prior to 1-13-20

A-19-804157-W
MAME
Motion to Amend
4875810

On or about 12-5-19 the plaintiff recieved notice of a 1-13-2020 hearing date on his P.C.P., motion to Amend, and motion to Appoint counsel.

The Respondent, the state of-Nevada was given 45-days to Respond.

this is giving the defendant an open check book, to Brutally, and professionally "Assault" the plaintiff with a motion to dismiss, Clearly violating due process and Equal protections of the U.S. constitution

He has a college Education and a degree in law, with a Battery of Paralegals, Investigators and internet Access, and he/she will and will take full Advantage of this unfair Balance of the Justice System should this court let him/her

NOV 14 2019
CLERK OF THE COURT

3388

the petition was a Ghost / Bare Bones petition drawn up by some one who has seen no discovery and trial transcripts, nothing, nor would he be allowed to do it if he did. His entire case file was lost on his transfer to here from Lovelock there is no law library access, and Mendoza, is not only not capable of representing himself, He does not have a clue as to what's going on, and he also has some ridiculous Number of years Aleng with a life sentence

the interests of justice require this court to appoint counsel, see motion to appoint counsel, and Ammend, and set off 1-13-2020 hearing date until this has been done

Respectfully 11-11-19

x Jorge Mendoza

x Jorge Mendoza

This document pursuant to NRS 238 does not contain the social security Number of any person

x Jorge Mendoza

Jorge Mendoza 69537
P.O. Box 1585
Ely, NV. 89301

FILED
OCT 18 2019
CLERK OF COURT

A-19-804157-W
Dept. V

IN THE Sixth DISTRICT COURT OF THE
STATE OF NEVADA IN AND FOR THE COUNTY OF Elko

Jorge Mendoza

Petitioner,

vs.

State of Nevada
William Gittere

Warden; State of Nevada,

Respondents.

CASE NUMBER:

EX PARTE MOTION FOR APPOINTMENT OF COUNSEL AND REQUEST FOR EVIDENTIARY HEARING

COMES NOW, Jorge Mendoza the Petitioner, in proper person, and moves this Court for its order allowing the appointment of counsel for Petitioner and for an evidentiary hearing. This motion is made and based in the interest of justice.

Pursuant to NRS 34.750(1):

> A petition may allege that the petitioner is unable to pay the costs of the proceedings or to employ counsel. If the court is satisfied that the allegation of indigency is true and the petitioner is not dismissed summarily, the court may appoint counsel to represent the petitioner. In making its determination, the court may consider, among other things, the severity of the consequences facing the petitioner and whether:
>
> (a) The issues presented are difficult;
>
> (b) The petitioner is unable to comprehend the proceedings; or

RECEIVED
OCT 18 2019
CLERK OF THE COURT

who is Helping the petitioner get into court has nothing to work with other than an affirmation of direct, and a Response to it By the district Attorney's office.

He is ~~not capable~~ competent to waive 39.1 of Representing himself, He has Reading comprehension and learning difficultys since Birth, and His primary language is spanish, the lan language here is ~~not~~ bilingual

His entire file was left at lockup when he was rolled up, Every bit of it except those two letters from trial counsel.

His sentences are

1) 24 to 72 months
2) 48 to 180 months
3) 48 to 180 months
4) 36 to 120 months
5) 36 to 120 months
6) 36 to 120 months
7) 36 to 120 months
8) 36 to 120 months
9) 20 years to life
10) 36 to 240 months
11) 48 to 120 months
12) 36 to 240 months

As I dont have a judgment of conviction count minutes, or sentencing transcripts, I'm unsure what the exact tally of consecutive or Concurrent sentences is, AND Neither is He.

1-B

the severity of the petitioners sentence clearly meets the standards in N.R.S. chapter 34. However,

Although in Korschnew v Warden 3.05:00587 Nevada was a lovelock case, the court ruled that in light of constitutionally suspect limitations by state prision on due process right of access to the courts by segregation inmates, interests of justice warranted appointment of councel in Habias corpus by segregation inmates

the petitioner is in protective segregation at E.S.P., which is 10 fold that as mentioned in 2007 Nevada decision. Access is virtually non existant at E.S.P.

Check out self help manuals, sample forms, are type written on 1980' typewriters, the self ~~half~~ self help is 1970, 1980, and 1990 at best, its a shame.

The inmates are General Population who intentionally give the run around, wrong advice and loose requests. You are fighting them and the supervision harder than your fighting your case

If you dont know exactly what your doing, exactly what you want, and are a seasoned prision litigator, your done.

in Bounds v Smith 430 U.S. 817 97 S.ct. 1491 1977 It was ruled that

in that the so called pasins system at Ely (3:92 cv 00297) are and even more so is inadequate. this in Bounds is 1977 and in Oaken in 2009. you must deal with a correctional officer as a runner who cannot be talked to other than sign here. this pasins system in 2019 still going on at Ely is an insult to law library access and a clear due process violation see also Truzillo v Williams 465 F.3d Spann v Garcia 3:92 cv 00646 1993 Reguarding pasins system at E.S.P.

I can go on and on and on with due process issues with E.S.P. law library and this is the petitioner's first time in prison. His primary language is spanish, He has reading comprehension and learning difficulties, and is clearly not capable of representing himself. in the interests of Justice appointment of counsel is warranted

Respectfully submitted
10-17-19

print X Jorge Mendoza
sign X Jorge Mendoza

P.O. Box 1989
Ely, Nev. 8930

1-C.

(c) Counsel is necessary to proceed with discovery.

Petitioner is presently incarcerated at Ely State Prison, is indigent and unable to retain private counsel to represent him.

Petitioner is unlearned and unfamiliar with the complexities of Nevada state law, particularly state post-conviction proceedings. Further, Petitioner alleges that the issues in this case are complex and require an evidentiary hearing. Petitioner is unable to factually develop and adequately present the claims without the assistance of counsel. Counsel is unable to adequately present the claims without an evidentiary hearing.

Dated this 17 day of October, 2026

X Jose Mendoza

In Proper Person

Jorge Mendoza #1169537
Ely State Prison
P.O. Box 1989
Ely, NV 89301

LAS VEGAS
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8TH Judicial Dist. Court
200 Lewis Ave 3RD Floor
Las Vegas, NV 89155

CONFIDENTIAL

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ELY STATE PRISON
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RSPN
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
TALEEN PANDUKHT
Chief Deputy District Attorney
Nevada Bar #005734
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

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: V

STATE'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION), MOTION FOR APPOINTMENT OF COUNSEL, REQUEST FOR EVIDENTIARY HEARING, AND MOTION TO AMEND

DATE OF HEARING: December 16, 2019
TIME OF HEARING: 9:00 AM

Comes now, the State of Nevada, by Steven B. Wolfson, Clark County District Attorney, through TALEEN PANDUKHT, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in 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.

This Response is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

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 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.

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. The State responds as follows:

STATEMENT OF THE 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.

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

At 4:00 a.m. on September 21, 2014, Murphy called Petitioner. Petitioner then left his house to meet at Murphy's house in his Nissan Maxima. He picked up Murphy, and the two of them went to co-defendant Joey Laguna's ("Laguna") house. Petitioner then drove Laguna

to Robert Figueroa's ("Figueroa") house, arriving around 7:30 a.m. Figueroa got into the car with a duffel bag. Petitioner, Laguna, and Figueroa then drove to an AMPM gas station to meet back up with Murphy. Murphy had an older white pick-up truck, and was waiting with a Hispanic woman with tattoos. The woman drove Petitioner's vehicle, and Murphy led in his pick-up truck. 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. Ultimately, no burglary occurred because the woman drove Petitioner's car out of the neighborhood.

The group then proceeded back to Laguna's house, where they engaged in further discussions about trying again, or robbing somewhere else. Petitioner and Figueroa left shortly thereafter. Around 6:00 p.m., Murphy told Petitioner to pick up Figueroa. 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. When they arrived at Laguna's house, Laguna came outside and Murphy arrived. Figueroa asked who they were going to rob, and Murphy answered. Eventually, the four of them left in Petitioner's car, with Murphy driving because he knew where they were going. They drove to Laguna's house. On the way, the group decided to break into Larsen's house. 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.

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. Figueroa hit the door first, breaking it open on the second attempt. Figueroa entered the house, and Petitioner remained near the front door with his rifle. Shortly thereafter, gunfire erupted. 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. Figueroa ran down the street. Petitioner began firing his rifle into the house before he was shot in the leg and fell into the street. Laguna ran out into the street as well. Petitioner could not walk, so he scooted away from the house with the rifle still in his hands. Petitioner continued firing his rifle at the house, killing Gibson. While the shooting was occurring, Murphy picked up Laguna and fled the scene, stranding Petitioner and Figueroa.

Petitioner scooted to an abandoned car and crawled inside, where he waited until the police followed his blood trail and apprehended him. Figueroa managed to escape down the street and hide in a neighbors' backyard for several hours. Figueroa called Laguna, who did not answer; Murphy called Figueroa and told him that he was not going to pick him up. Figueroa then called "everybody in [his] phone" over the next eight (8) or nine (9) hours until his sister agreed to pick him up. By then, Petitioner had been apprehended and everyone else had escaped. Murphy later drove Petitioner's wife to Petitioner's car so that she could retrieve it. Figueroa went to California and received medical care for his injuries. After he returned, he was apprehended by police on October 20, 2014.

At trial, both Figueroa and Petitioner testified, generally consistently, as to the events described above. Additionally, the jury was presented with cell phone records that demonstrated Murphy, Petitioner, Laguna, and Figueroa were talking to, and moving throughout the city together at the times, and to the locations, indicated by Petitioner and Figueroa.

ARGUMENT

In the Instant, barely legible, Petition, Petitioner seemingly argues 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. Fifth, Petitioner is not entitled to Counsel. Sixth, Petitioner is not entitled to an evidentiary hearing.

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I. PETITIONER'S CLAIMS 1-5 ARE PROCEDURALLY BARRED

a. 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 of these claims and affirmed Petitioner's Judgment of Conviction. Thus, such claims are barred by the doctrine of res judicata.

b. 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 the instant 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, this court should dismiss Petitioner's claims absent a showing of good cause and prejudice.

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

1. Summer Larson'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:

//

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1. Except as otherwise provided in this section, not less than 5 judicial days before trial or at such other time as the court directs:

(a) If the defendant will be tried for one or more offenses that are punishable as a gross misdemeanor or felony:

(1) The defendant shall file and serve upon the prosecuting attorney a written notice containing the names and last known addresses of all witnesses the defendant intends to call during the case in chief of the defendant; and

(2) The prosecuting attorney shall file and serve upon the defendant a written notice containing the names and last known addresses of all witnesses the prosecuting attorney intends to call during the case in chief of the State.

2. If the defendant will be tried for one or more offenses that are punishable as a gross misdemeanor or felony and a witness that a party intends to call during the case in chief of the State or during the case in chief of the defendant is expected to offer testimony as an expert witness, the party who intends to call that witness shall file and serve upon the opposing party, not less than 21 days before trial or at such other time as the court directs, a written notice containing:

(a) A brief statement regarding the subject matter on which the expert witness is expected to testify and the substance of the testimony;

(b) A copy of the curriculum vitae of the expert witness; and

(c) A copy of all reports made by or at the direction of the expert witness.

3. After complying with the provisions of subsections 1 and 2, each party has a continuing duty to file and serve upon the opposing party:

(a) Written notice of the names and last known addresses of any additional witnesses that the party intends to call during the case in chief of the State or during the case in chief of the defendant. A party shall file and serve written notice pursuant to this paragraph as soon as practicable after the party determines that the party intends to call an additional witness during the case in chief of the State or during the case in chief of the defendant. The court shall prohibit an additional witness from testifying if the court determines that the party acted in bad faith by not including the witness on the written notice required pursuant to subsection 1.

As is clear from the statute, the State must file a notice of witnesses it intends to call in its case in chief. On September 6, 2016, Summer Larsen entered a plea of guilty in the instant case and agreed to waive her Fifth Amendment privilege against self-incrimination. Until she entered her plea, was canvassed by the Court, and the Court accepted her plea, the State had no ability to call her as a witness. Upon the Court accepting her plea, Petitioner and the other co-defendants were notified immediately and provided the Guilty Plea Agreement, Amended Indictment, and Agreement to Testify on September 6, 2016. As it was late in the day, the State filed the formal notice of witnesses the morning of September 7, 2016. The State

complied with both the requirements and spirit of the statute. Moreover, the Nevada Supreme Court has noted, "there is a strong presumption to allow the testimony of even late-disclosed witnesses, and evidence should be admitted when it goes to the heart of the case." Sampson v. State, 121 Nev. 820, 122 P.3d 1255 (2005).

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

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

> doesn't change the fact that you have to make tactical decisions on how you cross examine someone.
>
> ...
>
> COURT: -- I don't know anything beyond that. So you're --So you're asking me to say that the State intentionally in bad faith, you now, conspired to not let you know about this until the last moment and I don't have any -- who does that.
>
> MR. LANDIS: I don't want -- I don't want the Court to speculate. I want the Court to determine and make a decision based on it. I want the Court to ask the State and if necessary ask Summer's attorney. I don't want you to speculate. I want you to determine if there was a reason for this to be as late as it was. I think that's a fair request because I think it's relevant to the position of this case.

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

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

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

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2. 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.

3. 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.

4. 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 is unavailing and nonsensical.

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.

5. 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.

II. PETITIONER'S PETITION SHOULD BE 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.

III. TRIAL COUNSEL WAS NOT INEFFECTIVE

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).

In the instant matter, just as he did throughout the Instant Petition, Petitioner has provided zero legal or factual support for his ineffective assistance of counsel claim. The State is therefore unable to respond to such claim and the claim should be denied.

IV. PETITIONER IS NOT ENTITLED TO APPOINTMENT OF COUNSEL

Under the U.S. Constitution, the Sixth Amendment provides no right to counsel in post-conviction proceedings. Coleman v. Thompson, 501 U.S. 722, 752, 111 S. Ct. 2546, 2566 (1991). In McKague v. Warden, 112 Nev. 159, 163, 912 P.2d 255, 258 (1996), the Nevada Supreme Court similarly observed that "[t]he Nevada Constitution...does not guarantee a right to counsel in post-conviction proceedings, as we interpret the Nevada Constitution's right to counsel provision as being coextensive with the Sixth Amendment to the United States Constitution." The McKague Court specifically held that with the exception of NRS 34.820(1)(a) (entitling appointed counsel when petitioner is under a sentence of death), one does not have "any constitutional or statutory right to counsel at all" in post-conviction proceedings. Id. at 164, 912 P.2d at 258.

However, the Nevada Legislature has given courts the discretion to appoint post-conviction counsel so long as "the court is satisfied that the allegation of indigency is true and the petition is not dismissed summarily." NRS 34.750. NRS 34.750 reads:

> A petition may allege that the Defendant is unable to pay the costs of the proceedings or employ counsel. If the court is satisfied that the allegation of indigency is true and the petition is not dismissed summarily, the court may appoint counsel at the time the court orders the filing of an answer and a return. In making its determination, the court may consider whether:
> (a) The issues are difficult;
> (b) The Defendant is unable to comprehend the proceedings; or
> (c) Counsel is necessary to proceed with discovery.

(emphasis added). Under NRS 34.750, it is clear that the court has discretion in determining whether to appoint counsel. To have an attorney appointed the defendant "must show that the requested review is not frivolous." Peterson v. Warden, Nevada State Prison, 87 Nev. 134, 136, 483 P.2d 204, 205 (1971) (citing former statute NRS 177.345(2)).

In the instant matter, because all of Petitioner's claims in the Instant Petition should be summarily dismissed for Petitioner failing to offer meaningful argument, Petitioner is not entitled to counsel. NRS 34.750. His Claims One (1) through Five (5) being procedurally barred as well as lacking merit, and his choice not to properly argue his ineffective assistance of counsel claim provide further support for Petitioner not receiving counsel. Consequently, Petitioner's request for counsel should be denied.

V. PETITIONER IS NOT ENTITLED TO AN EVIDENTIARY HEARING

NRS 34.770 determines when a defendant is entitled to an evidentiary hearing. It reads:

> 1. The judge or justice, upon review of the return, answer and all supporting documents which are filed, shall determine whether an evidentiary hearing is required. A petitioner must not be discharged or committed to the custody of a person other than the respondent unless an evidentiary hearing is held.
> 2. If the judge or justice determines that the petitioner is not entitled to relief and an evidentiary hearing is not required, he shall dismiss the petition without a hearing.

> 3. If the judge or justice determines that an evidentiary hearing is required, he shall grant the writ and shall set a date for the hearing.

The Nevada Supreme Court has held that if a petition can be resolved without expanding the record, then no evidentiary hearing is necessary. Marshall v. State, 110 Nev. 1328, 885 P.2d 603 (1994); Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002). A defendant is entitled to an evidentiary hearing if his petition is supported by specific factual allegations, which, if true, would entitle him to relief unless the factual allegations are repelled by the record. Marshall, 110 Nev. at 1331, 885 P.2d at 605; see also Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984) (holding that "[a] defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record"). "A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." Mann, 118 Nev. at 354, 46 P.3d at 1230 (2002).

It is improper to hold an evidentiary hearing simply to make a complete record. See State v. Eighth Judicial Dist. Court, 121 Nev. 225, 234, 112 P.3d 1070, 1076 (2005) ("The district court considered itself the 'equivalent of . . . the trial judge' and consequently wanted 'to make as complete a record as possible.' This is an incorrect basis for an evidentiary hearing."). Further, the United States Supreme Court has held that an evidentiary hearing is not required simply because counsel's actions are challenged as being unreasonable strategic decisions. Harrington v. Richter, 131 S. Ct. 770, 788 (2011). Although courts may not indulge post hoc rationalization for counsel's decision making that contradicts the available evidence of counsel's actions, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. Id. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Id. (citing Yarborough v. Gentry, 540 U.S. 1, 124 S. Ct. 1 (2003)). Strickland calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind. 466 U.S. 668, 688, 104 S. Ct. 2052, 2065 (1994).

The Instant Petition does not require an evidentiary hearing. Petitioner's Claims One (1) through (5) have already been decided by the Nevada Court of Appeals previously so an

expansion of the record is unnecessary. Likewise, Petitioner's ineffective assistance of counsel claim, as stated *supra*, provides no basis for review. Thus, this Court should deny Petitioner's request for an evidentiary hearing.

CONCLUSION

Based on the foregoing, the State respectfully requests that Petitioner's Petition for Writ of Habeas Corpus (Post-Conviction), Motion for Appointment of Counsel and Request for Evidentiary Hearing, and Motion to Amend be DENIED.

DATED this 10th day of December, 2019.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ TALEEN PANDUKHT*
TALEEN PANDUKHT
Chief Deputy District Attorney
Nevada Bar #005734

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 10th day of December, 2019, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

JORGE MENDOZA #1169537
ELY STATE PRISON
PO BOX 1989
ELY, NV 89301

BY /s/D. Daniels
Secretary for the District Attorney's Office

14F14997X/TRP/bg/Appellate

SUPP

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY NEVADA

JORGE MENDOZA, Petitioner, vs. WILLIAM GITTERE, WARDEN. Respondent.	Case No.: A-19-804157-W DEPT NO V [Stemming from C-15-303991-1] SUPPLEMENTAL BRIEF IN SUPPORT OF PETITIONER'S POSTCONVICTION PETITION FOR WRIT OF HABEAS

DATE OF HEARING: JANUARY 25, 2021

TIME OF HEARING: 9 AM

COMES NOW, Petitioner, JORGE MENDOZA, by and through his counsel of record DIANE C. LOWE, ESQ., and hereby submits his supplemental brief in support of his Petition for Writ of Habeas Corpus.

This Supplement is made and based upon the pleadings and papers on file herein, and the Points and Authorities attached hereto, and any oral arguments adduced at the time of hearing/s on this matter.

Dated this 20th day of September 2020.

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

POINTS AND AUTHORITIES

STATEMENT OF THE CASE

Jorge Mendoza was convicted of First-Degree Murder and 6 Felony B crimes after a 19-day jury trial which resulted in an aggregate sentence of 23 years to Life imprisonment on December 12, 2016, the Honorable Judge Carolyn Ellsworth presiding throughout. The first Indictment date was January 30, 2015. The Superseding Indictment filed February 27, 2015 added Joey Laguna as a defendant joining Jorge Mendoza, Summer Larsen and David Murphy and dropping Defendant Robert Figueroa. The date of occurrence was September 21, 2014. The 7 crimes charged included 6 felony B crimes and one Felony A crime:

Count 1 Conspiracy to Commit Robbery

Count 2 Burglary while in Possession of a Deadly Weapon

Count 3 Home Invasion while in Possession of a Deadly Weapon

Count 4 Attempted Robbery with use of a Deadly Weapon

Count 5 Attempted Robbery with use of a Deadly Weapon

Count 6 Murder with Use of a Deadly Weapon

Count 7 Attempt Murder with use of a Deadly Weapon

Robert Figueroa, the stepson of a Las Vegas METRO police officer and Summer Larsen got deals with the State to testify at the jury trial as part of their plea agreements. Voir dire lasted 4 days. The State presented 20 witnesses and rested their case on September 30, 2016 the fourteenth day of a nineteen-day jury trial. David Murphy and Joey Laguna tried to severe their trials from Jorge Mendoza twice but were unsuccessful. Jorge Mendoza testified directly after the State rested, thinking based on his attorney's advice he had legal grounds for asserting self-defense including jury instructions on self-defense but after he testified his attorney presented the request to the court and the request was denied.

While Attorney William Wolfbrandt handled everything from arraignment to sentencing, Attorney Amanda Gregory handled his appeal – Nevada Supreme Court Case 72056. Her Notice of Appeal was filed December 22, 2016. The Opening Brief filed November 2, 2017 raised the following issues:

The District Court Erred in allowing Summer Larsen to testify at trial.

The District Court erred in permitting the State to admit cell phone records that were provided to Mendoza during the time of trial and that were admitted through an undesignated expert.

The District Court erred in allowing the State to disclose to the jury about Figueroa's agreement to testify required him to testify truthfully

The District Court erred and violated Mendoza's right to a fair trial by refusing to allow Mendoza to have the jury instructed with regards to self-defense.

Cumulative error warrants reversal of Mendoza's conviction.

There was Oral Argument before the Court of Appeals, Chief Judge Silver Presiding on October 16, 2018. Mr. Mendoza lost. The Order of Affirmance was filed October 30, 2018. Remittitur issued and received by the District Court Clerk November 29, 2018.

On October 18, 2019 Mr. Mendoza filed an 8-page Petition for Writ of Habeas Corpus. On January 21, 2020 this attorney was appointed to represent Mr. Mendoza in his Writ action. The most recent Stipulation and Order has set the briefing schedule as follows:

September 22, 2020 Supplement Due

November 23, 2020 State's Response

December 14, 2020 Reply Due

Oral Arguments January 25, 2021 9 am

FACTUAL BACKGROUND

Joey and Summer Larsen were a young married couple when they moved into their leased house on Broadmere in Las Vegas NV. Joey's father helped get them the house by signing the lease. Joey trafficked drugs to make money full time and sometimes Summer would help him. Shortly after they moved in the couple started having marital troubles. Summer moved out and Monty Gibson aka Cali moved in. Summer was upset about things in their relationship and would come back to the house sometimes and break windows or cause other damage. A month before this incident she and a friend needed money and decided to go back to Broadmere and steal drugs and drug money. Successfully leaving with approximately $12,000 and a bag of THC she told another friend David Murphy aka Dough Boy sometimes spelled Duboy in the transcripts. He was mad he was left out of the first heist and so they decided on another one - this time against Joey's supplier. She gave him the location information and if testimony is to be believed - he lined up a team including old friends and referrals – Joey Laguna aka Montone – Figueroa's former 9-month cell mate from prison on an old sentence. Robert Figueroa. And Jorge

Mendoza pulled in because his wife was Dough Boy's cousin. [Transcript No 11 page 21 line 17].

They cased the house in the early morning hours of the drug supplier. And later that day they drove up to the house only to discover lots of activity outside, a lawn being mowed and a security camera so decided it was best not to go forward with their plans. They regrouped and decided later that night they would go to Joey Larsen's house instead. In the meantime, Summer Larsen had recently been talking to a friend and blabbed about coming into money soon. The friend took it to mean they were going to rob Joey again who was a mutual friend of theirs and she tried to call Joey to give him a head's up, but he wasn't picking up, so she called his father. He in turned called Joey and told them they had to get out of there – grab all their valuables and he would come pick both he and Cali up. So they did this - pulled their things downstairs ordered a pizza and were waiting for their ride. No more than an hour later Figueroa busted the door down. Joey had his gun in hand and shot him in the face and leg. Figueroa without shooting back pulled himself up and ran out of the house running down the street. Mendoza who was behind him also fled and as he did there were shots fired at him, he fell to the ground in the middle of the street and was trying to get away pulling himself forward with his arms.

Bullets kept coming so he fired in the direction of the house to send a warning to get them to stop so he could get away but as luck would have it appears he accidentally

hit Mr. Gibson who was outside the house behind a pillar about 4-5 feet away from the front door - and he peaked out from behind the pillar just in time to take the bullet. He toppled over and died.

Figueroa was hobbling down the street when he looked back and saw Murphy drive up – Laguna hopped in and they sped away. Figueroa and Mendoza each were stranded injured with bullets on separate parts of the street as they made their way to cover - one in a neighbor's car and the other further down the line in a backyard. The police came almost immediately having gotten several 911 calls. Not far from the scene they found Mr. Mendoza's blood trail which led to a neighbor's car. He was ordered out of the car. An ambulance arrived. He was rushed to the hospital. At the hospital he states, his injured leg was handcuffed to the bed at his ankle - and in fact was treated like a suspect from the moment he was ordered out of the car. Detectives questioned him twice at the hospital while he was heavily sedated, going in and out of consciousness, in much pain and awaiting surgery to have a bullet removed from his femur.

All involved were charged with murder and related crimes stemming from this incident. Figueroa went Stateside getting a deal from the State for testifying against everyone as did Summer Larsen. Mr. Mendoza, Mr. Murphy and Mr. Laguna were not so lucky.

SUMMARY OF ARGUMENT

Ineffective Assistance of Counsel: Failure to properly advise client that self-defense jury instructions had not been approved prior to his testifying; nor was caselaw on his side as to a self-defense claim; leading him for all practical purposes to take the stand, waive his right to remain silent and confess to first degree murder and all the other crimes charge with no conceivable benefit for doing so. He waived his right to remain silent not just on advice of counsel that was poor strategy – it was wrong. An incorrect interpretation of self-defense caselaw and jury instructions. Further it was ineffective to allow him to testify prior to determining how the judge would rule on the self-defense jury instruction issue. Mr. Mendoza was made promises of a valid self-defense presentation and based on those promises he waived his rights took the stand and confessed to first degree murder.

Ineffective Assistance of Counsel: Failure to test the State's case and act as an advocate including: Failure to move to suppress his 2 statements made to police while he was lying in the hospital. The tapes of these interviews were played at the jury trial. Further he rarely asked any questions at the jury trial, didn't initiate objections and or motions before or at the trial. Failed to object to information of second living victim Joey Larsen, failed to subpoena him. Failed to present to judge his request that he be released.

ARGUMENT

The Sixth Amendment to the United States Constitution provides that, "[in]n all criminal prosecutions the accused shall enjoy the right ... to have the Assistance of Counsel for his defense." This court has long recognized that 'the right to counsel is the right to effective assistance of counsel." Strickland v Washington, 466, U.S. 668, 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, 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 the counsel's errors there is a reasonable probability that the result of the proceedings would have been different. Strickland 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). The Nevada Supreme Court has held "claims of ineffective assistance of counsel must be reviewed under the 'reasonably effective assistance' standard

articulated by the U.S. Supreme Court in Strickland v Washington, requiring the petitioner to show that counsel's assistance was deficient and that the deficiency prejudiced the defense." Bennett v State, 111 Nev. 1099, 1108, 901 P.2d 676, 682 (Nev. 1995), and Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (Nev. 1966).

The court begins with the presumption of effectiveness and then must determine whether the defendant has demonstrated by a preponderance of the evidence that the counsel was ineffective. Means v State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). [The Nevada Supreme Court has held "that a habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence." Means v State at 1012, 33 (2004).]

The Nevada Supreme Court has held "claims of ineffective assistance of counsel must be reviewed under the 'reasonably effective assistance' standard articulated by the U.S. Supreme Court in Strickland v Washington, requiring the petitioner to show that counsel's assistance was deficient and that the deficiency prejudiced the defense." Bennett v State, 111 Nev. 1099, 1108, 901 P.2d 676, 682 (Nev. 1995), and Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (Nev. 1966). Prejudice to the defendant occurs where there is a reasonable probability that

but for counsel's errors, the result of the proceeding would have been different. Kirksey at 988, 1107.

On the same day Strickland was decided the Supreme Court issued their Opinion in United States v Cronic which touches more on what they consider a constructive denial of assistance altogether: "...if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." United States v Cronic, 466 U.S. 648, 104 S. Ct. 2039. (1984). "...even when no theory of defense is available, if the decision to stand trial has been made, counsel must hold the prosecution to its heavy burden of proof beyond a reasonable doubt.' United States v Cronic, 466 U.S. 648, 657 n. 19, 104 S. Ct. 2039, 2046 n.19 (1984).

No specific showing of prejudice was required in Davis v. Alaska, 415 U.S. 308 (1974), because the petitioner had been "denied the right of effective cross-examination" which "'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.'" Id. at 318 (citing Smith v. Illinois, 390 U.S. 129, 131 (1968), and Brookhart v. Janis, 384 U.S. 1, 3 (1966).

In Cronic the US Supreme Court ultimately decided that in the case at hand, there was to be no presumed prejudice applied to the trial counsel. In doing so

they overturned the US Court of Appeals for the 10th Circuit which they had found had wrongly held that prejudice could be presumed due solely because of: counsel's trial preparation time, counsel's inexperience, the gravity of the charge against respondent, the complexity of the case, and the accessibility of witnesses.

"Where the circumstances surrounding a criminal defendant's representation, particularly: (1) the time afforded for investigation and preparation, (2) the experience of counsel, (3) the gravity of the charge, (4) the complexity of possible defenses, and (5) the accessibility of witnesses to counsel, do not demonstrate that counsel failed to function in any meaningful sense as the government's adversary or that there was a breakdown of the adversarial process during the trial, the defendant can make out a Sixth Amendment claim of ineffective assistance of counsel only by pointing to specific errors made by counsel." United States v. Cronic, 466 U.S. 648, 649, 104 S. Ct. 2039, 2041 (1984). In Cronic, the trial court had appointed a young real estate lawyer to represent a defendant charged with complex mail fraud activities stealing over $9,400,000 via illicit transactions between banks in Tampa FL and Norman OK over a four-month period. Cronic at 651, 2042-43. He had never had a jury trial before, had no experience in mail fraud cases and was given only 25 days to review the record and prepare for a case that the State had been working on for over four and a half years. His client was convicted and sentenced to 25 years in prison. Id. An appeal ensued and reached the US

Supreme Court. The Supreme Court rejected the Court of Appeals test and held instead: "The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of **meaningful** adversarial testing." Cronic at 649, 2041. Further, " There are... circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." Id. "...if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of rights under U.S. Const. amend. VI that makes the adversary process itself presumptively unreliable. No specific showing of prejudice is required because the petitioner has been denied the right of effective cross-examination which would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." Id.

"....when a true adversarial criminal trial has been conducted, even if the defense counsel may have made demonstrable errors, the kind of testing envisioned by the Sixth Amendment has occurred, but if the process loses its character as a confrontation between adversaries, the constitutional guaranty is violated..." Id. "Demonstrable" is defined online as clearly apparent or capable of being logically proved. This however should not be interpreted to mean that all errors by the trial counsel made at a jury trial will by themselves take the entire representation of trial counsel out of the "presumed prejudice" category:

> "The Sixth Amendment does not require that counsel do what is impossible or unethical, and 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; at the same time, even when no theory of defense is available, if the decision to stand trial has been made, counsel must hold a prosecution to its heavy burden of proof beyond a reasonable doubt and even where there is a bona fide defense, counsel may still advise his client to plead guilty if that advice falls within the range of reasonable competence under the circumstances." Cronic at 649, 2041.

See Brown v Uttecht: The majority claims that Brown's attorneys made a tactical decision not to cross-examine Dr. Brinkley. Maj. Op. at 7612. That a decision can be labeled "tactical," however, does not end the *Strickland* inquiry. Rather, "a reviewing court must consider the reasonableness of the investigation said to support that strategy." Wiggins, 539 U.S. at 527 (citing Strickland, 466 U.S. at 691). Here, there is no evidence that the decision not to cross-examine Dr. Brinkley was based on a reasonable investigation.

Brown v. Uttecht, 530 F.3d 1031, 1047 (9th Cir. 2008) Wiggins v. Smith, 539 U.S. 510, 123 S. Ct. 2527 (2003); On an ineffective assistance claim, prevailing norms of practice as reflected in American Bar Association standards and the like are guides to determining what is reasonable. Id at 514, 2531

If 'demonstrable' is interpreted broadly it would swallow the rule entirely especially if you consider lack of action can be a demonstrable error.

In Cronic, no presumed prejudice was found because the Court of Appeals relied on the wrong factors instead of focusing on 'adversarial testing' of the case.

In U.S. v Swanson the United States Court of Appeals for the Ninth Circuit found that prejudice *could be* presumed because trial counsel "conceded to the jury that there was n.o reasonable doubt regarding the ultimate facts." United States v Swanson, 943 F.2d 1070, 1071 (9th Cir. 1991).

In Swanson the defendant had been indicted for bank robbery. Trial counsel told the jury in closing prior to discussing the inconsistencies in the testimony of the States witnesses that the evidence against his client was overwhelming and "...I don't think it really overall comes to the level of raising reasonable doubt ...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..." The Ninth Circuit said in commencing their opinion, "We must decide whether a court appointed defense counsel's concession, during closing argument, that no reasonable doubt exists regarding the only factual issues in dispute, constitutes a deprivation of the right to due process and the effective assistance of counsel that is prejudicial per se. We conclude that we must reverse because counsel's abandonment of his client's defense caused a breakdown in our adversarial system of justice." Swanson at 1080. So here, you see if trial counsel is to be believed is a case where the evidence against his client was overwhelming. And

yet the court determined prejudice could be presumed. "A lawyer who informs the jury that it is his view of the evidence that there is no reasonable doubt regarding the only factual issues that are in dispute has utterly failed to subject the prosecution's case to meaningful adversarial testing." Swanson at 1071.

Mr. Mendoza's case is more like the Swanson case than Cronic or Strickland. The important analysis at issue here is how to define 'demonstrable error' and how does that overlap with 'meaningful adversarial testing.'

The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted - even if defense counsel may have made **demonstrable** errors - the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated. United States v. Swanson, 943 F.2d 1070, 1072-73 (9th Cir. 1991).

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

Mr. Mendoza waived his right to remain silent not just on advice of counsel that was poor strategy – it was wrong. Wrong in a manner that exceeds the type of 'demonstrable error' contemplated in U.S. v Cronic. United States v. Cronic, 466 U.S. 648, 649, 104 S. Ct. 2039, 2041 (1984). It was an incorrect interpretation of self-defense caselaw and jury instructions. Like the attorney who does absolutely no testing of the facts of a case, Mr. Woflbrandt did that as well, but he also failed fully or even minimally to test the law. The same apathy of defense transferred fully to an apathy of research.

Further it was ineffective for Attorney Wolfbrandt to urge Mr. Mendoza to testify prior to determining how the judge would rule on the self-defense jury instruction issue. Mr. Mendoza was made promises of a valid self-defense presentation and based on those promises he waived his rights took the stand and confessed to first degree murder and all the other crimes as well. With a plea agreement the judge makes sure and is required to ensure that no promises were made to induce the defendant to commit to a plea agreement. If it later turns out there was a false promise it can invalidate the whole plea. Mr. Wolfbrandt failed to provide meaningful adversarial testing by insisting to his client that he take the stand assuring him he had legal grounds for self-defense. Far worse than a few words at closing - he had his client pronounce to the jury that there was 'no reasonable doubt regarding

the only factual issues in dispute.' The Swanson jury could have taken the closing with a grain of salt and decided we do not agree with the trial counsel's assessment and are not going to convict. Nothing in the Opinion states that he misstated evidence presented or told them his opinion was the law.

Mr. Wolfbrandt was on this case since on or before January 8, 2015. The Jury Trial commenced September 12, 2016. Mr. Mendoza testified on the fourteen day of the jury trial September 30, 2016 page 79. Four days *after* Mr. Mendoza confessed to murder on the stand at the advice of counsel, on the eighteenth day of the jury trial Attorney Wolfbrandt requested the self-defense jury instructions. October 6, 2016, page 4. A ten-page document outlining these proposed instructions was eFiled October 6, 2016:

> DEFENDANT'S PROPOSED JURY INSTRUCTIONS NOT USED AT TRIAL
> Attached hereto are the proposed jury instructions which were offered to the Court, but not submitted to the jury in the above entitled action. Steven D Grierson, CEO/Clerk of the Court By Denise Trujillo, Deputy Clerk of the Court:
>
> -If a homicide is justifiable, the person indicted shall upon his trial be fully acquitted and discharged.
> -The killing of another person in self-defense is justified and not unlawful when the person who does the killing actually and reasonably believes:
> 1 That there is imminent danger that the assailant will either kill him or cause him great bodily injury; and
> 2 that it is absolutely necessary under the circumstances for him to use in self-defense force or means that might cause the death of the other

person, for the purpose of avoiding death or great bodily injury to himself.

-A bare fear of death or great bodily injury is not sufficient to justify a killing. To justify taking the life of another in self-defense, the circumstances must be sufficient to excite the fears of a reasonable person placed in a similar situation. The person killing must act under the influence of those fears alone and not in revenge.

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

-The right of self-defense is not available to an original aggressor, that is a person who has sought a quarrel with the design to force a deadly issue and thus through his fraud, contrivance or fault, to create a real or apparent necessity for making a felonious assault.

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

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

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

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

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

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

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

-If a person kills another in self-defense, it must appear that the danger was so urgent and pressing that, in order to save his own life, or to prevent his receiving great bodily harm, the killing of the other was absolutely necessary; and the person killed was the assailant, or that the

slayer had really, and in good faith, endeavored to decline any further struggle before the mortal blow was given.

Attorney Wolfbrandt was also ineffective for not moving via a Motion in Limine type filing or pretrial motion for a decision prior to the commencement of trial or at the very least prior to Mr. Mendoza's testimony. Nev. R. Prac. Eight Jud. Dist. Ct. 2.47. Jury Trial Day 18 October 6, 2016 page 3 – 9:

> The Court: ...any objection to the giving of any of these instructions? [eFiled October 7, 2016 – 64 pages]
> All attorneys say no.
>
> The Court All right. Now does the defendant Mendoza have any additional instructions to propose?
> Wolfbrandt: Yes I believe you have the set of them up there, the self-defense instructions line 14 page 4
> The Court All right. Well I don't know which ones they are so I mean I have some but I don't know if these are the ones that you're proposing
> Wolfbrandt: I'm going to go through them here. And do we want to identify these like with letters A, B, C?
>
> The Court All right Well, I don't know which ones they are so, I mean, I have some, but I don't know if these are the ones that you're proposing.
> Wolfbrandt: I'm going to go through them here. And do we want to identify these like with letters A, B, C?
> The Court Yes. Well, I can mark them, but I just need to know first where they are. Why don't you approach and see if these that I'm holding in my hand are the same ones or do you have a copy to give me?
> Wolfbrandt: I've got – I've got a set here too.
> The Court: Is that your only set? All right, let's go off the record for a minute.

The Court So we're back on the record outside the presence and I have in my hand the seven instructions that Defendant Mendoza wishes to offer and the Court has indicated that it's not going to give, but these are the self-defense instructions page 5. So Mr. Wolfbrandt, would you like to state for the record why you believe that the Court should give them?

Atty 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 that 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. Page 16 line 3.

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 off hand 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. Page 7

The Court All right And the State's Response? Page 7

....But the law of self-defense is very specific about when it is you can and cannot use self-defense and the law does not allow it to happen there. Page 7 line 17

Moreover, the problem for Mr. Mendoza is that there is a second-degree felony murder rule, which says if you're still engaged within the felonious intent when the killing occurs, that crime is second degree murder no matter what your reason is.

The State cites Runion v State, 116 Nev. 1041, 13 P.3d 52 (Nev. 2000)– notes Mendoza never surrendered and dropped weapon so still part of conspiracy and crime.

The Court: And that's why the court said it would not give the self-defense instructions. And so these will be marked as a group as offered but not given by the court.

Wolfbrandt; And just lastly, it was my position to that it was for the jury to determine whether or not the conspiracy was still ongoing as they apply the instructions the court is going to give them. page 9.

Runion has laid out the parameters on self-defense claims in Nevada:

> At common law, an individual had a right to defend himself against apparent danger to the same extent as if the danger had been real, provided he acted upon a reasonable apprehension of danger. Specifically, homicide was justified where: (1) the defendant was not the aggressor in the encounter; (2) the defendant was confronted with actual and immediate danger of unlawful bodily harm or he reasonably believed that there was immediate danger of such a harm; and (3) the use of such force was necessary, in a proportionately reasonable amount, to avoid this danger. Runion v. State, 116 Nev. 1041, 1043, 13 P.3d 52, 54 (2000)

The right of self-defense is not available to an original aggressor, that is a person who has sought a quarrel with the design to force a deadly issue and thus through his fraud, contrivance or fault, to create a real or apparent necessity for making a felonious assault.

However, where a person, without voluntarily seeking, provoking, inviting, or willingly engaging in a difficulty of his own free will, is attacked by an assailant, he has the right to stand his ground and need not retreat when faced with the threat of deadly force. Runion v. State, 116 Nev. 1041, 1051-52, 13 P.3d 52, 59 (2000).

The jury had a question in deliberation: Page 59 Attorneys called back - the court says they have a juror question; "When does a person's involvement in the commission of a crime of attempt robbery or burglary or home invasion end? Line 17 Jury trial day 19 10/7/16

The court referred them to Jury Instruction 27 which was in their packet and had been given to them. "Burglary and home invasion end upon exit from the structure. Robbery can extend to acts taken to facilitate escape so long as the killing took place during the chain of events which constitute the robbery." Line 18 page 67 They had also been given the following:

Jury Instruction No 30 distinguishing 2nd degree murder page 35

Murder in the first degree is a specific intent crime. A defendant cannot be liable under conspiracy and or aiding and abetting theory for first degree murder for acts committed by a co-conspirator, unless that defendant also had a premeditated and deliberate specific

intent to kill and/or the intent to commit a robbery and/or burglary and/or home invasion.

Murder in the second degree may be a general intent crime. As such, a defendant may be liable under a conspiracy theory and/or aiding and abetting for murder of the second degree for acts committed by a co-conspirator if the killing is one of the reasonably foreseeable consequences of the object of the conspiracy and the felony murder rule does not apply.

Mendoza's testimony that he killed in self-defense with absolutely no support in law no self-defense instruction and in fact knowing in advance of jury instruction 28 prohibiting self-defense reliance goes beyond the common error excused that Strickland court's were contemplating and puts it more akin to Swanson in that there was absolutely no testing of the law – had there been he would have known there was no possible means of success – this goes beyond a 'demonstrable error' contemplated.

NRS 200.030 Degrees of murder; penalties.

1. **Murder of the first degree is murder** which is:

(a) Perpetrated by means of poison, lying in wait or torture, or by **any other kind of willful, deliberate and premeditated killing;**

(b) **Committed in the perpetration or attempted perpetration** of sexual assault, kidnapping, arson**, robbery, burglary, invasion of the home**, sexual abuse of a child, sexual molestation of a child under the age of 14 years, child abuse or abuse of an older person or vulnerable person pursuant to NRS 200.5099;....

2. **Murder of the second degree** is **all other kinds of murder.**

3. The jury before whom any person indicted for murder is tried shall, if they find the person guilty thereof, designate by their verdict whether the person is guilty of murder of the first or second degree.

4. A person convicted of murder of the first degree is guilty of a category A felony and shall be punished:

(a) By death, only if one or more aggravating circumstances are found and any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstance or circumstances, unless a court has made a finding pursuant to NRS 174.098 that the defendant is a person with an intellectual disability and has stricken the notice of intent to seek the death penalty; or

(b) By imprisonment in the state prison:

(1) For **life without the possibility of parole**;

(2) For **life with the possibility of parole, with eligibility for parole beginning when a minimum of 20 years has been served**; or

(3) **For a definite term of 50 years, with eligibility for parole beginning when a minimum of 20 years** has been served.

➥ A determination of whether aggravating circumstances exist is not necessary to fix the penalty at imprisonment for life with or without the possibility of parole.

5. A person convicted of **murder of the second degree is guilty of a category A felony** and shall be punished by imprisonment in the state prison:

(a) For **life with the possibility of parole, with eligibility for parole beginning when a minimum of 10 years has been served; or**

(b) For a **definite term of 25 years, with eligibility for parole beginning when a minimum of 10 years has been served.**

The appellate court affirmed the trial court's decision to deny self-defense jury instructions:

> "We review a district court's denial of proposed jury instructions for abuse of discretion or judicial error." Davis v. State, 130 Nev. 136, 141, 321 P.3d 867, 871 (2014). "Generally, the defense has the right to have the jury instructed on a theory of the case as disclosed by the evidence, no matter how weak or incredible that evidence may be." Runion v State, 116 Nev. 1041, 1050, 13 P.3d 52, 58 (2000). Nevertheless, the right of self-defense is generally unavailable to a defendant charged with felony murder. See People v Tabios, 78 Cal. Prpr. 2d 753, 756-57 (Ct. App. 1998),

> disapproved of on other grounds by People v Chun, 203 P.3d 425 (Call. 2009); State v Amadao, 756 A.2d 274, 282-84 (Conn. 2000)(Concluding that a defendant found guilty of felony murder cnnot claim self-defense). And a defendant is guilty of felony murder even after the felony is complete "if the killing and the felony are part of one continuous transaction." Sanchez-Dominguez v. State, 130 Nev. 85, 94, 318 P.3d 1068, 1074 (2014). We are unpersuaded by Mendoza's argument that he was entitled to claim self-defense because Mendoza's own trial testimony demonstrates that the felonies and the killing were one continuous transaction. Thus, the district court correctly ruled that Mendoza was not entitled to an instruction that he acted in self-defense. See Tabios, 78 Cal. Rptr. 2d at 757 (holding that in a prosecution for felony murder, "the defendant is not permitted to offer any proof at all that he acted without malice") ...

On Jury Trial Day 4 September 15, 2016 Prosecutor DiGiacomo tells the Jury "....And let me allay some fears for pretty much everybody in the room... This is not a capital case. There's no death penalty that's available for these defendants..." page 14 line 10.

Since he should have been aware that he planned to admit to murder on the stand there was absolutely no purpose at all for him to testify. Under Swanson even in cases of overwhelming evidence – prejudice can be presumed when the trial counsel betrays his client and his actions end up serving the State more than his own client. No testing of their case. And no research of the law. Further he did not properly advise his client that he may not have a self-defense prior to him taking the stand. In Swanson the defendant had been indicted for bank robbery. Trial counsel told the jury in closing prior to discussing the inconsistencies in

the testimony of the States witnesses that the evidence against his client was overwhelming and "...I don't think it really overall comes to the level of raising reasonable doubt ...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..."

The Ninth Circuit said in commencing their opinion, "We must decide whether a court appointed defense counsel's concession, during closing argument, that no reasonable doubt exists regarding the only factual issues in dispute, constitutes a deprivation of the right to due process and the effective assistance of counsel that is prejudicial per se. We conclude that we must reverse because counsel's abandonment of his client's defense caused a breakdown in our adversarial system of justice." United States v Swanson, 943 F.2d 1070, 1080 (9th Cir. 1991). So here, you see if trial counsel is to be believed is a case where the evidence against his client was overwhelming. And yet the court determined prejudice could be presumed. "A lawyer who informs the jury that it is his view of the evidence that there is no reasonable doubt regarding the only factual issues that are in dispute has utterly failed to subject the prosecution's case to meaningful adversarial testing." Swanson at 1071.

Mr. Mendoza's case is more like the Swanson case than Cronic or Strickland.

But even if prejudice is not presumed, we urge the Court to find that prejudice occurred. To establish ineffective assistance of counsel, a defendant must show that defense counsel's performance was objectively deficient and prejudiced his defense.Brown v. Uttecht, 530 F.3d 1031, 1032 (9th Cir. 2008) His lawyer had him take the stand and talk about being heroin addict and confess to all the charges against him. His two coconspirators and codefendants at the very same trial were convicted of 2nddegree murder whereas he was convicted of first-degree murder. The appalling errors made by his attorney on these issues of advising his client he had a self-defense claim when he clearly did not – then not telling him before he testified that the judge had not yet ruled on whether self-defense instructions would be allowed to the jury because he had not submitted the request yet. That plainly had an impact prejudicial to him as he was convicted on all counts as charged. [See attached Affidavit of Jorge Mendoza].

2. Ineffective Assistance of Counsel: Failure to test the State's case. Including: failure move to suppress his 2 statements made to police while he was lying in the hospital bed. The tapes of these interviews were played at the jury trial. Failure to ask questions at jury trial. Failure to move to severe from codefendants. Failure to take action when Mr Mendoza handed him a motion dismissing him as his attorney and asking him to advise the judge of his wishes.

Mr. Mendoza had strong grounds to suppress the statements he made at the hospital which were played to the jury. While he was being interviewed, he was

heavily sedated, going in and out of consciousness, slurring his words, his foot was chained to the bed. It was not a voluntary statement – he was not free to leave and the police took advantage of his extreme pain and sedation and detention by taking these statements with no Miranda warning. See attached Affidavit of Mr. Mendoza – he states he was treated like a suspect from the beginning and his attorney had promised to move to suppress his statements but never got around to it. 'When law enforcement agents restrain the ability of the suspect to move--particularly through physical restraints, but also through threats or intimidation--a suspect may reasonably feel he is subject to police domination within his own home and thus not free to leave or terminate the interrogation.' United States v. Craighead, 539 F.3d 1073, 1077 (9th Cir. 2008) Likewise as to him being in his hospital room. See also the 5th, 6th, and 14th Amendments to the United States Constitution; ; Harris v. New York, 401 U.S. 222 (1971), Terry v. Ohio, 392 U.S. 1 (1968), Miranda v. Arizona, 384 U.S. 436 (1966), Lynumn v. Illinois, 372 U.S. 528 (1963), Mapp v. Ohio, 367 U.S. 643 (1961), Brown v. Mississippi, 297 U.S. 278 (1936), Attorney Wolfbrandt joked more than once that since he was assigned to be the third defense attorney doing questions there were no more questions to ask. So, he was silent most of time. He failed to address further in questioning the possibility that Mr. Murphy and Laguna and Figueroa had a gun that matched that of Mr. Mendoza and just did not reveal that to police. More questions about the bullets that were never retained as

admitted by investigators should have been asked. And about whether the other suspects could have been the cause of the death of the murder victim unbeknownst to Mr. Mendoza. Also Mr. Mendoza tried to release his attorney and gave him a written motion to give to the judge, but he refused. He failed to object on Confrontation grounds and failed to subpoena the living victim JL. All these things caused Mr. Mendoza prejudice and failed to sow seeds of doubt when it was called for. This all caused prejudice and showed an utter lack of testing of the State's case and therefore prejudice must be presumed.

CONCLUSION

WHEREFORE, based upon the above and foregoing Mr. Mendoza respectfully requests this Court grant his Petition finding he received ineffective assistance of counsel and that ineffectiveness prejudiced him on multiple levels throughout his court proceedings. In the alternative prejudice should be presumed. Further we ask that this court grant an evidentiary hearing for testimony to be presented on these issues.

DATED this 20th day of September 2020.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED, by the undersigned that on this 20th day of September 2020, I served a true and correct copy of the foregoing **Supplement with Exhibit on the parties listed on the attached service list:**

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

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

SERVICE LIST

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY NEVADA

JORGE MENDOZA, Petitioner, vs. WILLIAM GITTERE, WARDEN. Respondent.	Case No.: A-19-804157-W DEPT NO V [Stemming from C-15-303991-1] SUPPLEMENTAL BRIEF IN SUPPORT OF PETITIONER'S POSTCONVICTION PETITION FOR WRIT OF HABEAS

EXHIBIT 1 AFFIDAVIT OF JORGE MENDOZA

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY NEVADA

JORGE MENDOZA, Petitioner/Plaintiff, vs. WILLIAM GITTERE - WARDEN Respondent/Defendant.	Case No.: A-19-804157-W & C-15-303991-1 DEPT NO V

AFFIDAVIT OF JORGE MENDOZA

1. I, JORGE MENDOZA am the Petitioner.
2. My trial attorney William L. Wolfbrandt was ineffective because he advised me I could assert self-defense in this action.
3. Because of this legal advice I waived my right to remain silent and testified at my jury trial on Jury Trial Day 14 Friday September 30, 2016 page 79.

4. Had I known I did not have a claim for self-defense and would not be allowed to have the self-defense jury instruction read to the jury, I never would have testified.

5. It was his responsibility to find out from Judge Ellsworth prior to me taking the stand whether I would be allowed to have the jury instructed on self-defense. I thought that he had determined this would be acceptable based on his representations to me.

6. About the 10th day of the trial I tried to fire my attorney and I had a motion prepared and I gave to him asking him to present to the Judge Carolyn Ellsworth, but he refused. I tried to fire him because I had already felt that he was being ineffective representing me via not asking questions and testing the state's case and not asking him questions I wanted him to. And not joining in motions that were being made and not being honest about his background.

7. My attorney told me that he was going to move to suppress the statements that I made at the hospital because he thought that they should be suppressed since they were made while I was under pain medications and going in and out of consciousness during the interviews. I was awaiting surgery at the time with a bullet still in my femur so was in a lot of pain. My ankle was chained

to the bed when the police questioned me. And I was very much treated as a suspect in the ambulance and at the hospital. No one read me my Miranda rights.

8. If called to testify this is what I would say.

AFFIDAVIT OF JORGE MENDOZA

STATE OF NEVADA)

COUNTY OF WHITE PINE)

I, Jorge Mendoza, the undersigned, do hereby swear that all statements, facts and events within my foregoing Affidavit are true and correct of my own knowledge, information and belief, and to those I believe them to be true and correct. Signed under penalty of perjury pursuant to NRS 208.165.

Respectfully Signed and Attested to this 10th day of September 2020.

Jorge Mendoza x

Jorge Mendoza

NRS 208.165 Execution of instrument by prisoner. A prisoner may execute any instrument by signing his or her name immediately following a declaration "under penalty of perjury" with the same legal effect as if he or she had acknowledged it or sworn to its truth before a person authorized to administer oaths. As used in this section, "prisoner" means a person confined in any jail or prison, or any facility for the detention of juvenile offenders, in this state.

(Added to NRS by 1985, 1643)