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 OPENING BRIEF

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APPELLANT'S OPENING BRIEF

I. ROUTING STATEMENT

Pursuant to NRAP 17(b)(3), this proceeding invokes the original jurisdiction of the Supreme Court and is not presumptively assigned to the Court of Appeals because it is a post-conviction appeal to a judgment of conviction and postconviction writ of habeas action for a jury trial verdict involving a category A felony and six category B felonies. XIII:3013-6.

II. JURISDICTIONAL STATEMENT

N.R.S. 177.015 gives this Court jurisdiction to review an appeal from a jury verdict. This is an appeal from the denial of a post-conviction petition for writ of habeas corpus in Jorge Mendoza vs. Warden, William Gittere,

Civil Case No. A-19-804157-W. XVII:3741-43. The written judgment of conviction was filed on December 2, 2016, for the companion criminal case C-15-303991-1. XIII:3013-6. The trial court denied post-conviction relief initially orally at the hearing on the briefings February 23, 2021. XVII:3628-82 at 3679-81The Notice of Entry of Findings of Fact, Conclusions of Law and Order was filed and served by Odyssey eServe April 2, 2021. XVII: 3692-740. A timely notice of appeal was filed on April 5, 2021. XVII:13741-43.

III. STATEMENT OF THE ISSUES

1. Trial Attorney Wolfbrandt ineffectively and prejudicially violated Mr. Mendoza's Fifth, Sixth and Fourteenth Amendment constitutional rights and rights under Article 1 section 8 of the Nevada Constitution by providing inaccurate statements of self-defense law to him.

2. Trial Attorney Wolfbrandt ineffectively and prejudicially provided inaccurate statements of law to the jury in his opening statement and closing argument and wrongly advised the jury that Jorge was the defendant who caused the death of Gibson.

3. Trial Attorney Wolfbrandt ineffectively and prejudicially failed to cross examine witnesses to effectively show there was evidence showing Jorge might not have been the shooter that caused the death of Monty Gibson.

4. Trial Attorney Wolfbrandt ineffectively and prejudicially Failed to move to suppress statements made to the Police by Mr. Mendoza at the hospital.

IV. STATEMENT OF THE CASE

Jorge Mendoza was convicted of First-Degree Murder with use of a deadly weapon and 6 Felony B crimes after a 19-day jury trial which resulted, for him, in an aggregate sentence of 23 years to Life imprisonment on December 12, 2016, the Honorable Judge Carolyn Ellsworth presiding throughout. XIII:3013-6. Three of five co-defendants - Jorge Mendoza, Joseph Larson and David Murphy were tried together, despite efforts to sever the cases. XI:2569-86. Joseph Laguna was convicted of Second-Degree Murder and 6 Felony B Counts. His aggregate sentence was 27 years to life. XIII:3007-8. David Murphy was convicted of Second-Degree Murder and 6 Felony B Counts. His aggregate sentence was 23 years to life. XIII:3008-9.

The first Indictment was electronically filed with the District Court January 30, 2015. I:20-6. The Superseding Indictment filed February 27, 2015, added Joseph Laguna (aka Montone, Joey) as a defendant joining Jorge Mendoza, Summer Larsen, and David Murphy (aka Dough Boy, Duboy) and dropping Defendant Robert Figueroa, who had taken a plea deal. I:27-33. A Second Superseding Indictment was filed May 29, 2015, adding at the end, the name of a witness that testified at the Grand Jury – Justin Brening. I:40

line 2. The date of occurrence was Sunday September 21, 2014. I:1. The 7 crimes charged included 6 felony B crimes and one Felony A crime:

Count 1 Conspiracy to Commit Robbery (Category B Felony – NRS 199.408, 200.380 – NOC 50147);

Count 2 Burglary while in Possession of a Deadly Weapon (Category B Felony – N.R.S. 205.060 – NOC 50426);

Count 3 Home Invasion while in Possession of a Deadly Weapon (Category B Felony – N.R.S. 205.067 - NOC 5037);

Count 4 Attempted Robbery with use of a Deadly Weapon (Category B Felony – N.R.S. 193.330, 200.380, 193.165 - NOC 50145);

Count 5 Attempted Robbery with use of a Deadly Weapon – (Category B Felony - NRS 193.330, 200.380, 193.165 - NOC 50145);

Count 6 Murder with Use of a Deadly Weapon – (Category A Felony – NRS 200.010, 200.030, 193.165 – NOC 50001);

Count 7 Attempt Murder with use of a Deadly Weapon – (Category B Felony – NRS 200.010, 200.030, 193.330, 193.165 – NOC 50031).

1AA13-19. 1AA27-33.

Mr. Mendoza was arraigned on February 23, 2015 and plead not guilty with his appointed Attorney William Wolfbrandt by his side. I:19.

As to the two codefendants not tried with the other three defendants - Summer Larsen (fka Rice) got a plea deal with the State in exchange for her testimony. She was sentenced on count 1 conspiracy to commit robbery to 1 to 4 years and on count 2 attempt robbery to 1 year 4 months to 6 years. C-15-303991-3. Deal: V:1018. Testimony: Jury Trial Day 6: V:1109-36 Jury Trial Day 7: V:1141-232.

Robert Figueroa also got a deal. And he was given an aggregate sentence of 5.6 to 19 years for robbery and robbery with use of a deadly weapon in case C-15-303991-2. VIII:1810-3. Testimony Jury Trial Day 10 VIII:1804-46. Day 11 VIII:1850, 1853-991. Day 12 VII:1995

Joseph Larsen, the roommate of deceased victim Monty Gibson testified at the second Grand Jury hearing under protest but did not testify at the jury trial. XIV:3153-81.

The 19-day jury trial commenced September 12, 2016. I:60.

Throughout the entirety the lawyers and Judge were:

Judge Carolyn Ellsworth, For the State Marc DiGiacomo, Agnes M. Lexis,

For Defendant Mendoza: William L Wolfbrandt, For Defendant Murphy Casey A. Landis, For Defendant Laguna Monique A McNeill. I:60.

Voir dire lasted 4 days. Jury Trial Day 1: I:60-202. Jury Trial Day 2 I:203-50, II:251-377. Jury Trial Day 3: II:378-500, III:501-605. Jury Trial Day 4

III:606-750, IV:751-802. The State presented 22 witnesses and rested their case on September 30, 2016, the fourteenth day of a nineteen-day jury trial. (tr. p. 74) X:2382.

Jorge Mendoza testified after the State rested. Jury Trial Day 14. (tr. p. 4-18) X:2386-500, XI:2501-13, XI:2514-39. The two other defendants introduced three defense witnesses. XI:2587-2717.

The short Sentencing Hearing for the three defendants was November 28, 2016. Mr. Mendoza declined his opportunity to address the court. The Judgment of Conviction was filed on December 2, 2016. XIII:3013-6.

Attorney William Wolfbrandt was Jorge's trial attorney. Attorney Amanda Gregory handled his appeal – Nevada Supreme Court Case 72056. Her Notice of Appeal was filed December 22, 2016. XIII:3017.

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. XV:3374-78. Remittitur issued and received by the District Court Clerk November 29, 2018.

On October 18, 2019, Mr. Mendoza filed a timely 8-page Petition for Writ of Habeas Corpus. XV:3379-87. The Evidentiary Hearing was set for February 23, 2021. XVII:3627. XVII:3628-82. Two witnesses were

presented for testimony. Former Attorney Lew Wolfbrandt and Convict Jorge Mendoza. XVII:3629.

Judge Yeager made an immediate oral bench ruling at the end of the hearing denying relief. XVII:3679. Her written Findings of Fact, Conclusions of Law & Order were filed April 2, 2021. XVII:A3692-4740. A timely Notice of Appeal was filed April 5, 2021. XVII:3741-3.

V. STATEMENT OF FACTS

On September 21, 2014, Monty Gibson was shot and killed at a house in Las Vegas that he shared with Joey Larsen, after 3 men, Robert Figueroa, Joseph Laguna, and Jorge Mendoza, broke down their door with the intent to steal marijuana. I:1-6. Figueroa was shot and struck twice with bullets by Larsen. XIV:3162. The three men immediately turned and ran away from the house. X:2460-1.

When Jorge was running from the house he was shot by Larsen and fell to the ground in the middle of the street. IV:876-7; XI1420, 1430; XIII:1844. Neighbor Gene Walker saw Murphy and Laguna drive by and stop at Jorge, seeing he was injured, did not pick him up and then drove off. IV:881-4. IX:2188.

Murphy had dropped the three off in the driveway and parked the car on the street just before the home invasion and waited for them to exit the house so he could drive them away. VIII:1837-8.

Figueroa testified that when he was running away, he was still hearing gunshots but denies firing his weapon. VIII:1856. He also stated that while he was looking back, he did not see Jorge or Laguna firing. VIII:1857. And that he saw Murphy drive up – Laguna ran up to the driveway and got in the car and they sped away. VIII:1842. Neighbor Roger Day, a retired correctional officer stated he saw Figueroa shooting but not Mendoza. XIV:1308-9. Figueroa and Jorge were each stranded injured with bullets on separate parts of the street. Figueroa hid in the bushes for eight to nine hours bleeding from his 2 gunshot wounds. VIII: 1844. XIV:3141. Ultimately, he was able to reach his sister who came to pick him up around 6 a.m. September 22. VIII:1862. He was arrested October 20, 2014, 29 days after the crime, when police surrounded him as he was leaving his apartment. VIII:1866.

After Jorge was struck by a bullet and had fallen to the ground in the middle of the street, he drug himself to a neighbor's truck to hide. IV:869;

876-7; XI:1420, 1430; XIII:1844. The police came almost immediately having gotten several 911 calls. XIV:3069-70. Not far from the scene they found Jorge's blood trail which led to a neighbor's truck. XIV:3185-6. He was ordered out of the truck and handcuffed. IV:919 lines 9-13. An ambulance arrived. He was given morphine. He was rushed to the hospital. He was given morphine again on arrival. Indication pain. Time 23:06 9/21/14. XVI:3602.

Detectives Tod Williams and Merrick questioned him twice at UMC hospital just after the crime – minutes after he was given his second morphine dose so he was sedated, in much pain and awaiting surgery to have a bullet removed from his femur. XVI:3487-3539. XVI:3540-56. VII:1562-4.

All involved were charged with murder and related crimes stemming from this incident. IAA1-18. Figueroa got a plea deal from the State for testifying against everyone [Jury Trial Days 10, 11, 12] as did Summer Larsen who participated in the initial planning stages of the crime. Jury Trial Day 9. Mr. Mendoza, Mr. Murphy and Mr. Laguna proceeded to a jury trial.

VI. STANDARD OF REVIEW

"The question of whether a defendant has received ineffective assistance of counsel at trial is a mixed question of law

and fact and is thus subject to independent review. State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993) (citing Strickland, 466 U.S. at 698). However, purely factual findings of the district court are entitled to deference on appeal. Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994)." Whorton v. Sheppard, No. 54284, 2010 Nev. LEXIS 72, at *1-2 (June 23, 2010). An appellate court reviews de novo the denial of a petition for a writ of habeas corpus. Shackleford v. Hubbard, 234 F.3d 1072, 1074 (9th Cir. 2000).

VII. SUMMARY OF THE ARGUMENT

Based on the legal advice of his trial attorney who insisted to him that he had grounds for self-defense under Nevada law - Jorge waived his right to remain silent and took responsibility for the death of Monty Gibson. XV3454-7. This incorrect statement of law and advice was ineffective and prejudicial in and of itself, but also a form of coercion which deprived him of his fifth amendment right not to testify and justifies a reversal of his conviction. It additionally violated his 14th Amendment due process rights and his sixth amendment right to effective assistance of counsel as well as those rights afforded to him under Article 1 section 8 of the Nevada Constitution. Prejudice should be presumed. When someone is made false

promises in exchange for their statement to police or commits to a plea agreement it can invalidate the plea and lead to a suppression of the statement. Here we argue that the inaccurate statement of self-defense law was of such great magnitude, and was relied on completely by Jorge to make his determination to testify and assent to trial strategy - that a similar result, in this case a new trial – should occur. There was some evidence that another shooter could have caused the death of Gibson. One neighbor said he saw Figueroa shooting. XIV:1308-9. Another neighbor said he saw Murphy and Laguna right next to Jorge in the street. VI:1401-12. Figueroa testified that as he was running away he looked back and saw Murphy Laguna and Jorge in the street. VIII:1857 So Jorge was not the only one left on the scene at the time of the shooting. The guns that were collected by police that day were the two of the victim / shooter who lived – Joseph Larson. XIV:3160. And the gun of Jorge. VII:1550, VIII:1383, X:2449. The guns of the other three defendants were not located at the scene. The record never conclusively establishes that the ringleader Murphy had a gun, but he probably did. The record does establish that Laguna and Figueroa had guns. VII:1833, VII:1553. Laguna's gun does not appear to have ever been requested of him upon his arrest. Figueroa claimed to have advised the police as to where they could find his gun. But there is some dispute on whether he was being

truthful about the exact gun or guns he had on him that day. Ultimately the police retrieved a gun from his girlfriend that he says is what he had. VIII:1859, 1882. It along with Jorge's gun and Larson's gun were forwarded to the Las Vegas Metropolitan Police Departments forensic scientist Anya Lester in the firearms and toolmarks analyst unit for testing and comparison with the cartridges found on the scene and the bullet and fragment found in the autopsy of Gibson. VI:1299-1309. Lester testified that though the bullet and fragment from the autopsy shared similar general characteristics with the rifle Jorge had on him that day – she was not able to conclusively identify it to said rifle. VI:1308. But she was able to rule out that the other victim's two surrendered weapons had caused his death as well as the gun surrendered over 28 days later by Figeuroa. VI:1308.

Jorge was convicted of first-degree murder. His 2 codefendants were convicted of second-degree murder. This is clear evidence that had he not testified he would have been convicted of second-degree murder as well. There is no one who saw him shooting. Not Figueroa, not any of the neighbors. In fact, the one neighbor who did see a shooter said it was Figueroa. XIV:1308-9. And while Mr. Wolfbrandt advised his client that evidence showed none of the other defendant's were on the scene at the time – a second neighbor told police that after the shooting he saw Murphy and

Laguna drive by Jorge injured in the street, stop and then drive away. VI:1401-12. And Figueroa testified that while he was running away he looked back and saw Jorge and Laguna. So all four defendants were still on the scene and should not have been ruled out as the shooter that caused the death.

A reasonable attorney would have done research on self-defense before giving his client such inaccurate advice. A reasonable attorney would have had a firm grasp on the law of the case and the facts alleged. Mr. Wolfbrandt did not. XVII:3635. Likewise, a reasonable attorney would have requested from the judge before his client testified - a ruling on whether self-defense jury instructions would be allowed, or at the very least advised his client that the instructions had not been approved yet so he could factor that into his decision making. XVII:3636 line 1125.

And because of his ineffective prejudicial decision to pursue a self-defense argument he overlooked all other possible avenues of representation such as highlighting to the jury that it was Figueroa who was seen shooting not Mendoza. And noting that Laguna and Murphy should not be ruled out as the ones who could have caused the death. The coroner determined based on the evidence it was his belief the shooter was four or more feet away from

Gibson at the time of shooting. VI:1333. This does not rule out any of the defendants from having caused the death.

Further, much like Swanson – by giving the wrong law in opening statement and closing argument hand in hand with telling the jury that his client was the one whose bullet caused the death – even though he admitted at the postconviction hearing he did not know this for certain – he in essence, after the cancellation effect of the correct jury instructions, went up and told the jury that Jorge was guilty of everything. IV:854-6, XII:2873-87, XVII:3636, 3671.

And finally by not moving to suppress Mr. Mendoza's hospital statements he not only reduced in the jury's eyes his credibility that he was acting in self-defense when shooting – since his story had so fully diverged – he made the jury dislike him even more. XVII:3637-8. The State played the interview tapes for a reason and they had a negative impact for Mr. Mendoza. XII:2763, 2778. Wolfbrandt should have moved to have them suppressed. He testified "It really didn't matter to me what he told the police because he was in the hospital and was under anesthesia. I'm sure he went through surgery because he had that femur bone shattered." XVII:3638. But it did matter. It was prejudicially ineffective for him not to do so.

VIII. 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.

United States v Cronic which touches more on what the Supreme Court considers 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).

The Cronic Supreme Court held "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. See also United States v Swanson, 943 F.2d 1070, 1071 (9th Cir. 1991).

A. Trial Attorney Wolfbrandt ineffectively and prejudicially violated Mr. Mendoza's Fifth, Sixth and Fourteenth Amendment Constitutional rights and rights under Article 1 section 8 of the Nevada Constitution by providing inaccurate statements of self-defense law to him.

Counsel renders constitutionally ineffective assistance if it fails to investigate and pursue a reasonable defense because it incompetently interpreted the law. Carter v. Davis, 946 F.3d 489, 496 (9th Cir. 2019).

XV:3430, 3448.

Wolfbrandt admitted at the postconviction evidentiary hearing that not only did he advise Jorge that he had grounds for self-defense – he did not even give him an inkling that there might not be a basis in the law for that.

> Did you ever tell him that under the law he might not actually have grounds for self-defense?
> A No I thought we had a righteous defense. XVII:3634.

> Q Did you do research on whether self-defense would be a proper legal claim for someone who was the initial aggressor?
> A I did not. XVII:3635.

Mr. Mendoza's testimony in part at the evidentiary hearing XVII:3660:

> Q Did you rely on the advice of your attorney, Attorney Wolfbrandt, throughout the tenure of his representation?
> A Yes.
> Q Do you recall the first time you met him?
> A: Yes
> Q: What did he say to you about how the case would be handled?

A He said that it was going to be a self-defense case after speaking with the investigator that he hired.
Q Did he give you an indication that the law might not support self-defense grounds?
A No.
…Q.. Had you thought there were not grounds for self-defense would you have waived your right [not](sic) to testify and testified anyway?
A No. XVII:3661.

Wolfbrandt also admitted he thought the other defendants were gone from the scene at the time of the shooting and there was no other evidence of any of them returning fire. XVII:3639. This as we have shown is not accurate and was another factor which would have inappropriately induced Jorge to testify. XV:3446-8.

This failure to fully research and address self-defense issues as well as to inform him correctly about the status of the law and that self-defense really was not a viable claim under the law as to his situation - affected his due process rights and inhibited him from effectively contributing to his own defense in this case. XV:3430, 3439 lines 7-11.

It also acted as a form of coercion in that it induced him to waive his Fifth Amendment right to remain silent – and testify. Had he known that self-defense law really could not help his case he would not have waived his right to remain silent. XV:3454-7. See Frazer v. United States, 18 F.3d 778 (9th Cir. 1994). Nevada courts have held that attorneys have a

duty to give their client adequate advice so that they can make informed decisions. Lara v. State, 120 Nev. 177, 179, 87 P.3d 528, 529 (2004). "A lawyer shall abide by a client's decisions concerning the objectives of representation and shall consult with the client as to the means by which they are to be pursued. In a criminal case, the lawyer shall abide by the client's decision, as to a plea to be entered, whether to waive jury trial and whether the client will testify. Model Rules of Prof'l Conduct, R. 1.2(a) (Final Draft 1982)." Jones v. Barnes, 463 U.S. 745, 746, 103 S. Ct. 3308, 3310 (1983). "An accused has the ultimate authority to make certain fundamental decisions regarding his case, including the decision to testify." Lara v. State, 120 Nev. 177, 178, 87 P.3d 528, 529 (2004). But if he is not informed about the law correctly or fully explained all his options – it transforms from a free will decision to one that is coerced.

We are not basing this point of ineffectiveness on the fact that he was not prepared to testify by his counsel by doing run throughs of what he was going to say and how to say it, although he did not[1]. We are not stating that it was his attorney's decision on whether he would testify and he had no say in the decision. We are claiming that he was made promises and assurances

[1] Attorney McNeill to Court in arguing her motion to sever: Mr. Mendoza clearly had no idea what the discovery said about his cell phone records with regard to the incident…Mr. Mendoza seemed to have no idea about those records and his testimony was very odd in light of – in light of that. 11AA002546-7 ; p. 238-9 Jury Trial Day 14.

and given inaccurate information on the state of self-defense law in Nevada and inaccurate information on forensic determination of Jorge being the shooter which was wrong by his counsel and thereby took away the voluntary quality of his testimony and made it coercive and a violation of his constitutional rights:

Compare with Plea Agreements: XV:3439

> Undue coercion occurs when a defendant is induced by promises or threats which deprive his plea of the nature of a voluntary act, not where a court makes a ruling later determined to be incorrect. Stevenson v. State, 131 Nev. 598, 599, 354 P.3d 1277, 1278 (2015).

Compare with Police Confessions and Motions to Suppress:

> To determine the voluntariness of a confession, the court must consider the effect of the totality of the circumstances on the will of the defendant. The question in each case is whether the defendant's will was overborne when he confessed. Factors to be considered include:Sej the youth of the accused; his lack of education or his low intelligence; the lack of any advice of constitutional rights; the length of detention; the repeated and prolonged nature of questioning; and the use of physical punishment such as the deprivation of food or sleep. Passama v. State, 103 Nev. 212,213, 735 P.2d 321,322 (1987). See also Miller v. Fenton, 474 U.S. 104, 106 S.Ct. 445,449 (1985). Schneckloth v. Bustamonte, 412 U.S. 218, 226-227, 93 S. Ct. 2041, 2049 (1973).

He was promised that he had grounds for self-defense which would excuse a murder charge. He was advised that the evidence showed he was the shooter to cause the death. He made his decision to testify based on this inaccurate information.

He never would have testified if he knew that he did not have self-defense grounds. The law is clear that the initial aggressor does not have self-defense grounds and per Jury Instruction 27 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. XV:3445. He was convicted of first-degree murder and his 2 codefendants were convicted of second-degree murder. We believe this is largely because of his testimony. His testimony was given because of coercion. That coercion prejudiced him as can be seen by his harsher conviction. And even if one found that it did not prejudice him directly – we would assert that this is such a basic constitutional right that prejudice must be presumed. XV:3449 line 18-25. "There are… circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." United States v. Cronic, 466 U.S. 648, 649, 104 S. Ct. 2039, 2041 (1984).

Lara v. State does support the proposition that the decision on whether to testify is in the hands of the defendant not his attorney. Lara v. State, 120 Nev. 177, 87 P.3d 528 (2004). In that case Lara claimed his trial counsel was ineffective by advising him to testify and by failing to question him on his direct examination about his gang affiliation which led to a "devastating cross-examination by the State." Lara at 182, 531. The distinguishing

factors between Mr. Mendoza's case and those found in the Lara case are that in Lara the Nevada Supreme Court determined that "counsel's advice concerning the decision [on whether to testify] was not deficient: 'It was certainly reasonable to directly address all of the gang-related issues and to advise Lara that his best course was to testify.'" Lara at 182, 531-532. But in the Mendoza case the facts of the case were not supporting self-defense. Like with Swanson there has been a failure to identify any strategy that can justify the coercion of his client.

> "The Government has failed to identify any strategy that can justify Mr. Ochoa's betrayal of his client. " 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 reasonable doubt." Cronic, 466 U.S. at 656-57 n.19. 'To be sure, under Strickland, courts must defer to trial counsel's strategic decisions. A reasonable tactical choice based on an adequate inquiry is immune from attack under Strickland. However, to be considered a constitutionally adequate strategic choice, the decision must have been made after counsel has conducted reasonable investigations or made a reasonable decision that makes particular investigations unnecessary. In addition, even if a decision could be considered one of strategy, that does not render it immune from attack --it must be a reasonable strategy….An uninformed strategy is not a reason strategy. It is, in fact, no strategy at all. Strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation' Correll v. Ryan, 539 F.3d 938, 941 (9th Cir. 2008).

Arguing a case contrary to law and facts *is not* a reasonable strategy even if you feel like you have nothing to lose – but especially when, as seen in this case, he did have something to lose. XV:3433. He was the tag along

with this crime. No criminal record (see PSI), not the ringleader, not a gang member like all the others – and yet he ended up with the most onerous conviction. XV:3427-8. 'Under Strickland, courts measure an attorney's performance against an "objective standard of reasonableness," calibrated by "prevailing professional norms."' Correll v. Ryan, 539 F.3d 938, 941 (9th Cir. 2008). No reasonable attorney would have advised Mr. Mendoza to testify under the circumstances. Again, it is ultimately the Defendant's decision on whether or not to testify. But the caveat is that there can be no coercion for it to be voluntary. Incorrect information and promises relied on are a form of coercion. And by providing Mr. Mendoza with blatantly incompetent incorrect advice on the law and evidence – his legal defense was constitutionally unreasonable.

With the prior Mendoza appeal, the Respondent calls the Mendoza self-defense argument in their Answering Brief to the Nevada Supreme Court case 72056 filed January 16, 2018 "entirely without merit." Answering Brief XV: 3368. And argues that Appellant's appeal argument for a new trial due to the judge's refusal to allow self-defense jury instructions "unavailing and nonsensical." Respondent's Answering Brief XV:3369. The Nevada Court of Appeals in their Order of Affirmance filed October 30, 2018 cites several

self-defense cases showing common law has long held there is no self-defense claim for a defendant charged with felony murder and that Mendoza's own testimony demonstrated that the felonies and the killing were one continuous transaction. XV:3376-7. XV:3447-8.

The recommendations made by Mr. Wolfbrandt were outside of the reasonable range of service and expectations of an attorney necessary to satisfy their constitutional duty of effectiveness for their client. XV:3430.

There was no benefit for Mr. Mendoza to testify and it could only hurt him. The caselaw is clear under Runion that the initial aggressor to a crime has no self-defense claim. Runion v. State, 116 Nev. 1041, 13 P.3d 52 (2000). See also N.R.S. 200.120 (2015). Further, he had not made a clear break with the initial crime and his actions were part of "one continuous transaction."

Under the law, Wolfbrandt's legal advice to his client was inaccurate. Not only was it inaccurate, but he ineffectively failed to advise Mendoza that his interpretation may not be correct. Also, he led Mr. Mendoza to believe that they would have self-defense jury instructions read to the jury. XV:3439-45. This was ruled out by the judge after Mr. Mendoza testified. XV:3444.

B. Trial Attorney Wolfbrandt ineffectively and prejudicially provided inaccurate statements of law to the jury in opening statement and closing argument and wrongly admitted Mr. Mendoza killed the victim.

Additionally we ask the court to extend the ruling in Swanson and find that when an attorney makes as his primary argument in opening and closing a case for self-defense to a murder charge -that is contrary to long standing Nevada law as well as the evidence at hand– it equates to a Swanson action where he essentially, with the negating factors of the correct instructions, tells the jury at the start of the case and the end of his case that his client Mr. Mendoza is guilty of first degree murder. United States v Swanson, 943 F.2d 1070, 1071 (9th Cir. 1991). IV:854-6. XII:3005-6. XV:3430-9. XV:3448-3450.

Mr. Mendoza's Attorney's Opening Argument was very short. About 2 transcript pages ending with: "We're going to try to convince you that he died as a result of self-defense, Mr. Mendoza's self-defense. So I know you guys – you'll be paying good attention to it." IV:000854 -6 / p. 54 Jury Trial Day 5. XV:3435. XV:3449 line 18-25.

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 no reasonable doubt regarding the ultimate facts." United States v Swanson, 943 F.2d 1070, 1071 (9th Cir. 1991). XV:3430. XV:3435.

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, 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. XV:3437-8.

Mr. Mendoza's case is more like the Swanson case factually than Cronic or Strickland. But all three should be applied ultimately to Mr. Mendoza's favor.

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).

Wolfbrandt's Opening and Closing for Mendoza come dangerously close to an identical Swanson scenario XII02873-2887 at 2874 / p. 68 Jury

Trial Day 18. There are factual differences between Swanson and the instant case, but they are insufficient to undermine the analogy. Ineffectiveness and prejudice must be found. XV:3430. XV:3435.

C. Trial Attorney Wolfbrandt ineffectively and prejudicially failed to cross examine witnesses to effectively show there was sufficient evidence showing Jorge might not have been the shooter that caused the death of Monty Gibson.

> "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. XV:3435-7/

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. XV:3436. 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). XV:3433, 3448.

The State in the Mendoza case at hand, argued at the postconviction evidentiary hearing that pursuing a self-defense strategy despite the state of the law was reasonable because it was all they had. XVII: 3676. We again stress that pursuing a strategy not supported by law is not the allowable 'strategy' contemplated by caselaw supporting a trial counsels' broad leeway in how to present a case to the jury. Attorney Wolfbrandt admits he did not research or investigation on self-defense law in Nevada. XV:3433.

The only correct strategy in this case given the overwhelming evidence against all the defendants generally - with room to create reasonable doubt as to the extent of each one's individual participation – would have been to advise his client not to testify. XV3437-8. Tell him he had no grounds for self-defense then of course as required by law, left it up to him. XVII:3671. But we know based on his declaration and postconviction testimony Mr. Mendoza would have chosen not to testify had he known. XV:3454-7.

Wolfbrandt should have moved to suppress his hospital statements. XVII:3673-4. XV:3430. XV:3435.

Then he should have vigorously cross examined all the witnesses to show where the disconnect in the State's case was. XVII:3675. That too, admittedly would have presented a hurdle to overcome and the reward at best would have been to have him convicted of second degree like his codefendants, instead of first-degree murder. There is a reasonable probability if he would have used questions in his cross examination throughout the trial that stressed the missing linkage of conclusive proof that Jorge caused the death hand in hand with the opportunity of the other defendant's to have done so, advised Mendoza not to testify, moved to suppress the hospital statements– he could have created 'reasonable doubt' in the minds of the jurors on the first degree murder issue. Kirksey v. State, 112 Ne. 980, 987, 923 P.2d 1102, 1107 (Nev. 1966). And given he was not the ringleader and had no prior convictions and was not a gang member – it may very well have enabled him to potentially reduce his minimum sentence by about 10 years. XV:3430. XV:3433. XV:3435. XV:3439 lines 5-11.

But instead, trial attorney Wolfbrandt urged a go for broke approach to try to remove a murder conviction possibility entirely. VII:3634. XV:3439-3446. But since the law did not support it – it was not reasonable, and it was not a strategy. Key points to cross on at every opportunity would have been on knowledge as to whether the three other defendant's could have been

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

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

D. Trial Attorney Wolfbrandt ineffectively and prejudicially Failed to move to suppress statements made to the Police by Mr. Mendoza at the hospital.

Mr. Mendoza had strong grounds to suppress the statements he made at the hospital which were played to the jury. Police Statements: XVI:3487-3539. XVI:3540-3556. Hospital Records: XVI:3592-3636. Order Admitting Hospital Records: XVII:3744. XV:3430. XV:3435. XV:3450-3451.

Jorge testified that his lawyer assured him he was going to move to suppress his hospital statements, but he did not. XV:3456. This was ineffective and prejudicial. His statements were played to the jury to diminish his credibility in their eyes and for that reason had a significant effect on his due process rights. And prejudiced him. Also, prejudice should be presumed for something so fundamental. Cronic, Swanson, supra. XV:3430. XV:3435.

While he was being interviewed, he was sedated, waiting for surgery in significant pain, unable to walk. 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 statement 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. XV:3456-7. '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). XV:3435.

Respondent in the brief at the district court level cites numerous cases outlining statement suppression law in Nevada and then concludes:

> "Here, a review of the totality of the circumstances reveals that moving to suppress Petitioner's two statements to Detectives while he was in the hospital would have been futile because his statements were voluntarily. See Ennis 122 Nev. At 706, 137 P.3d at 1103. Petitioner's reliance on a self-serving Affidavit does not negate that there was testimony presented at trial including from Petitioner himself, that demonstrated the voluntariness of Petitioner's statements." Response brief at 16.

Keep in mind, the police detective at the hospital, remarkably, states he did not have probable cause yet when they went to the hospital to talk to Mr. Mendoza. So they did not read him his Miranda rights and states he

answered the questions they asked of his own free will. Mr. Mendoza was in custody. A reasonable person in his situation would not have felt free to leave or terminate the interview. A suspect has a Fifth and Fourteenth Amendment right to have an attorney present during a custodial interrogation. Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L.Ed 2d 378(1981).

To determine the voluntariness of a confession, the court must consider the effect of the totality of the circumstances on the will of the defendant. The question in each case is whether the defendant's will was overborne when he confessed. Factors to be considered include: the youth of the accused; his lack of education or his low intelligence; the lack of any advice of constitutional rights; the length of detention; the repeated and prolonged nature of questioning; and the use of physical punishment such as the deprivation of food or sleep. Passama v. State, 103 Nev. 212, 213, 735 P.2d 321, 322 (1987).

Applying the Passama factors to this case: he was 32 years old at the time of the crime. [See PSI filed separately under see at 2]. He had a good childhood and a religious upbringing with no abuse or neglect. PSI:2. He was married with a 10-year-old son and an eight year old daughter. PSI 3. Prior to the offense he had been employed full time for 12 or more months.

PSI 3. He was a certified lineman and welter as well as certified in heavy equipment. He did not graduate from high school. He obtained his GED in 1999. PSI 3. He has no prior criminal record. PSI 4.

Factors to be considered include: the youth of the accused – at 32 Jorge was relatively young; his lack of education or his low intelligence – Jorge was not able to graduate from high school and instead obtained his GED – this may indicate low intelligence; the lack of any advice of constitutional rights – Jorge was not read his Miranda rights when he was handcuffed at the scene of the crime nor was he read his rights at the hospital. The official at the scene stated he did not want to give his name or discuss the events; the length of detention – the total of the two interviews was just under 1 hour; the repeated and prolonged nature of questioning – just under one hour the questioning was repetitive and badgering; and the use of physical punishment such as the deprivation of food or sleep – at the time he was under extreme pain waiting for surgery on his femur and had just been administered his second morphine dose. XVI:3592-3636. He was not allowed to see his family. They tried to come see him but the officer searching their house told them they couldn't because he was under arrest. See testimony of Second State witness Jury Trial Day 5: Patrol Officer Matthew Kovacich. His unit went to the black sedan Mr. Mendoza was in – he was pulled

out of the vehicle and placed in handcuffs. IV:896 at 918 lines 9-13. Ms. Estavillo testified she heard Police told Amanda (Mr. Mendoza's wife) it was illegal for her to go visit Jorge at the hospital since he was under arrest Testimony of Eighth State Witness Mother in law Michelle Estavillo Jury Trial Day VII:1266.

While he was being interviewed, he was heavily sedated, his words somewhat slurred, he thought his foot was chained to the bed, at the very least his leg was immobile and he could not walk. He knew this and the detective knew this. 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 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). Passama v. State, 103 Nev. 212, 725 P.2d 321 (1987) and Chambers v. State, 113 Nev. 974, 944 P.2d 805 (1997) In Passama the Nevada Supreme Court found "The confession was involuntary because a sheriff had succeeded in overbearing defendant's will. Although defendant was not young or uneducated, his intelligence was low-average." Passama at 213, 322. Passama had claimed that his confession was coerced and therefore involuntary and a violation of his due process rights to admit it at trial. He had voluntarily gone to the police department for a polygraph exam and then was interrogated afterwards for five hours at the end of which he signed a confession to the crimes he was accused of. Prior to the interrogation he had been advised of and waived his constitutional rights. But during the interview he was not provided with food or drink other than coffee and was not allowed to speak to his fiancé. Using the totality of circumstances analysis found in Schneckloth v. Bustamonte, 412 U.S. 218, 226-227(1973) the court determined that defendant's will was overborne when he confessed. And cited the above factors as improper as well as the police statements to defendant that they would let the prosecutor know if he failed to cooperate.

Of course, Mr. Mendoza did not confess to murder in his statement to police at the hospital, though he confessed to certain incriminating facts.

But his statement was played to the jury to diminish his credibility in their eyes and for that reason had a significant effect on his due process rights. And prejudiced him. Also, prejudice should be presumed for something so fundamental. Cronic, Swanson. Unlike Passama, Mr. Mendoza was not read his Miranda rights. He was taken advantage of, in a vulnerable situation. Police make note in their recorded interview that he is not handcuffed in the hospital room - but do not state anything about him being unable to move due to injury other than a snide comment at the jury trial:

See Jury Trial Day 9 Testimony September 22, 2016 17th State Witness Homicide Detective Tod Williams

> I and Detective Merrick went to UMC University Medical Center to interview Jorge Mendoza the individual that had been taken from the scene by ambulance to the hospital page 116 – verified photos of him and his xray he had a bullet wound on his left thigh we were there prior to surgery we went and talked with him. VII:01562 / p. 113 Jury Trial Day 9.

See Jury Trial Day 9 Testimony September 22, 2016 page 116 Testimony of Mendoza:

> Later when the police arrived…They grabbed my hands and they started pulling me. …. the ambulance arrived almost immediately they cut my clothes off and they wrapped my leg to stop the bleeding gave me a shot of morphine for the pain. I remember a detective coming and speaking to me at the hospital page 171 End of cross by Mr Wolfbrandt page 172

Jury Trial Day 17 10/5/16 Additional Testimony of Detective Tod Williams [portions omitted] Q After the first recording do you go back and then try to talk to Mr. Mendoza again? A yes I do.

> Jorge Mendoza's Second interview is played page 4 Also see Respondent's Appendix.

See cross XII:2779-2793.

But that does not lessen Mr. Mendoza's belief that he was unable to terminate the investigation and leave. The burden should fall on the police to inspect the extent of his detention before conducting an interview.

> It has long been recognized that criminal and penal statutes are to be strictly construed against the State. Where a statute is ambiguous, this court must construe its provisions to give meaning to all of the language and should read each sentence, phrase, and word to render it meaningful within the context of the purpose of the legislation. The intent of the legislature is the controlling factor in statutory interpretation. Runion v. State, 116 Nev. 1041, 1043, 13 P.3d 52, 54 (2000).

State v. McKellips, 118 Nev. 465 (2002): "Determining whether custody exists is a two-step process. First is to determine whether the reasonable person under the circumstances would feel that she was free to terminate the interrogation and leave. …. The next step considers whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in Miranda." The factors outlined by police in their interview of Mr. Mendoza clearly indicate – as Mr. Mendoza has asserted – that they considered him a suspect from the beginning. XV:271-273. At any time after the onset of the detention pursuant to NRS 171.123, the person so detained shall be arrested if probable cause for an arrest appears. If, after inquiry into the circumstances which prompted the detention, no probable cause for arrest appears, such person shall be released.

In Chambers v. State the Nevada Supreme Court held that "A confession is inadmissible unless freely and voluntarily given. In order to be voluntary it must be the product of a rational intellect and free will." Chambers at 977, 807. Chambers was found to have given a voluntary statement even though he was questioned for four hours after being stabbed, was not well rested and was intoxicated. And he knowingly and voluntarily signed the Miranda waiver.

Mr. Mendoza's case is distinguishable. He was physically injured unable to move and possibly at one point restrained to the bed. XV:272. He was waiting for surgery with a bullet still lodged in him. He was by the admission of one officer probably in significant pain. He was on pain medication. He was laying down. There were two officers. And he was never read his Miranda rights. And he was not at full capacity as to rational intellect and free will. No reasonable person would have been under the circumstances. XV:273. XV:3435.

X. CONCLUSION

WHEREFORE, based upon the above, Mr. Mendoza respectfully requests this Court to overturn his jury verdict and thus reverse the District Court Habeas Findings of Fact, Conclusions of Law & Order and remand the case back to the District Court with an order for a new trial.

Dated this 2nd day of September 2021.

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 Times New Roman in 14 size font.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

Proportionately spaced, has a typeface of 14 points or more and contains 9623 words;

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any,

of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 2nd Day of September 2021

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on September 2, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON FORD

ALEXANDER CHEN

/s/ Diane C. Lowe
DIANE C. LOWE, ESQ.

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

Jorge Mendoza

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

NRAP 26.1 DISCLOSURE

Pursuant to Rule 26.1, Nevada Rules of Appellate Procedure, the undersigned hereby certifies to the Court as follows:

1. Appellant Jorge Mendoza is an individual and there are no corporations, parent or otherwise, or publicly held companies requiring disclosure under Rule 26.1;

2. Appellant Jorge Mendoza is represented in this matter by Diane C. Lowe, Esq., Nevada Bar #14573. Appellant did not have a direct appeal of his conviction. He was represented by William L. Wolfbrandt at the trial level.

Respectfully submitted,

/s/ Diane C. Lowe
Diane C. Lowe Esq.