

Electronically Filed
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Elizabeth A. Brown
Clerk of Supreme Court

1 **NOASC**
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6 **DISTRICT COURT**
7 **CLARK COUNTY, NEVADA**

8 RAEKWON ROBERTSON,

CASE NO.: A-20-823892-W

DEPT NO.: XII

9 Petitioner,

10 vs.

NOTICE OF APPEAL

11 STATE OF NEVADA.

12 Respondent.

13
14 TO: THE STATE OF NEVADA, Respondent.

15 TO: DEPARTMENT XII OF EIGHTH JUDICIAL DISTRICT COURT

16 Notice is hereby given that RAEKWON ROBERTSON, Petitioner in the above-entitled
17 action, appeals to the Nevada Supreme Court from the Findings of Fact and Conclusions of Law,
18 filed on December 8, 2022.

19 DATED this 6th day of January, 2023.

21 /s/ Steven S. Owens, Esq.
22 STEVEN S. OWENS, ESQ.
23 Nevada Bar No. 4352
24 1000 N. Green Valley #440-529
25 Henderson, Nevada 89074
26 (702) 595-1171
27 Attorney for Petitioner
28 RAEKWON ROBERTSON

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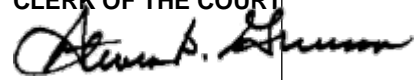
Attorney's Office by sending a copy via electronic mail to:

Steve Wolfson

Motions@clarkcountydac.com

BY:

Attorney for Petitioner
RAEKWON ROBERTSON



ASTA
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**DISTRICT COURT
CLARK COUNTY, NEVADA**

RAEKWON ROBERTSON,

CASE NO.: A-20-823892-W

DEPT NO.: XII

Petitioner,

vs.

CASE APPEAL STATEMENT

THE STATE OF NEVADA.

Respondent.

1. Appellant filing this case appeal statement: RAEKWON ROBERTSON

2. Judge issuing the decision, judgment, or order appealed from:

Honorable Michelle Leavitt

3. Appellant and the name and address of counsel for each appellant:

STEVEN S. OWENS, ESQ.
Nevada Bar No. 4352
1000 N. Green Valley #440-529
Henderson, Nevada 89074
Attorney for Petitioner

RAEKWON ROBERTSON, Petitioner

4. Respondent and the name and address of appellate counsel:

STEVEN B. WOLFSON
Clark County, Nevada District Attorney
200 Lewis Avenue
Las Vegas, Nevada 89101

STATE OF NEVADA, Respondent

5. Whether any attorney identified above is not licensed to practice law in Nevada:

Licensed

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

7. Whether appellant is represented by appointed or retained counsel on appeal:
Appointed

8. Whether appellant was granted leave to proceed in forma pauperis, and the date of entry of the district court order granting such leave: N/A

9. Date the proceedings commenced in the district court: October 29, 2020

10. Brief description of the nature of the action and result in the district court, including the type of judgment or order being appealed and the relief granted by the district court:
This is an appeal from the denial of petition for writ of habeas corpus (post-conviction)

11. Whether the case has previously been the subject of an appeal to or original writ proceeding in the Supreme Court and, if so, the caption and Supreme Court docket number of the prior proceedings:

Raekwon Robertson v. State of Nevada, SC#81400 – direct appeal affirmed

12. Whether this appeal involves child custody or visitation: No

13. If this is a civil case, whether this appeal involves the possibility of settlement: No

DATED this 6th day of January, 2023.

/s/ Steven S. Owens, Esq.
STEVEN S. OWENS, ESQ.
Nevada Bar No. 4352
1000 N. Green Valley #440-529
Henderson, Nevada 89074
(702) 595-1171
Attorney for Petitioner
RAEKWON ROBERTSON

CASE SUMMARY

CASE NO. A-20-823892-W

Rackwon Robertson, Plaintiff(s)
vs.
State of Nevada, Defendant(s)

§
§
§
§
§

Location: **Department 12**
 Judicial Officer: **Leavitt, Michelle**
 Filed on: **10/29/2020**
 Cross-Reference Case Number: **A823892**

CASE INFORMATION

Related Cases

C-17-328587-2 (Writ Related Case)

Case Type: **Writ of Habeas Corpus**

Statistical Closures

12/08/2022 Other Manner of Disposition

Case Status: **12/08/2022 Closed**

DATE

CASE ASSIGNMENT

Current Case Assignment

Case Number A-20-823892-W
 Court Department 12
 Date Assigned 10/29/2020
 Judicial Officer Leavitt, Michelle

PARTY INFORMATION

Plaintiff

Robertson, Rackwon

Owens, Steven S.
Retained
 7024556453(W)

Defendant

State of Nevada

Wolfson, Steven B
Retained
 702-671-2700(W)


DATE

EVENTS & ORDERS OF THE COURT


INDEX

EVENTS


10/29/2020

 Inmate Filed - Petition for Writ of Habeas Corpus
 Party: Plaintiff Robertson, Rackwon
[1] Post Conviction


11/05/2020

 Inmate Filed - Petition for Writ of Habeas Corpus
 Party: Plaintiff Robertson, Rackwon
[2] Post Conviction

05/26/2022

 Inmate Filed - Petition for Writ of Habeas Corpus
 Party: Plaintiff Robertson, Rackwon
[4] Post Conviction

05/26/2022

 Motion for Appointment of Attorney
 Filed By: Plaintiff Robertson, Rackwon
[5] Ex Parte Motion for Appointment of Attorney and Request for Evidentiary Hearing

06/07/2022

 Order
[6] Order Appointing Counsel


08/19/2022


 Supplemental


CASE SUMMARY


CASE NO. A-20-823892-W


Filed by: Plaintiff Robertson, Raekwon
[7] Supplemental Brief in Support of Petition for Writ of Habeas Corpus (Post-Conviction)

10/05/2022  **Response**
[8] State's Response to Petitioner's Petition for Writ of Habeas Corpus (Post Conviction) and Petitioner's Supplemental Post Conviction Petition for Writ of Habeas Corpus


12/08/2022  **Findings of Fact, Conclusions of Law and Judgment**
[9] Findings of Fact, Conclusions of Law and Order Denying Petition for Writ of Habeas Corpus (Post- Conviction) and Supplemental Petition for Writ of Habeas Corpus (Post-Conviction)


12/13/2022  **Notice of Entry of Findings of Fact, Conclusions of Law**
[10] Notice of Entry of Findings of Fact, Conclusions of Law and Order


01/06/2023  **Notice of Appeal (Criminal)**
 Party: Plaintiff Robertson, Raekwon
[11] Notice of Appeal


01/06/2023  **Case Appeal Statement**
 Filed By: Plaintiff Robertson, Raekwon
[12] Case Appeal Statement

HEARINGS

12/22/2020  **At Request of Court (10:15 AM)** (Judicial Officer: Leavitt, Michelle)
Inmate filed Petition
 Stayed; Inmate filed Petition
 Journal Entry Details:
Michael Sanft, Esq., present on behalf of the Petitioner. Petitioner not present. Court noted the concern of this matter and ORDERED, Petition STAYED as Mr. Sanft has filed the direct appeal. NDC;

06/02/2022  **Appointment of Counsel (8:30 AM)** (Judicial Officer: Leavitt, Michelle)
 Counsel Confirmed;
 Journal Entry Details:
Mr. Owens advised he can ACCEPT appointment and confirmed a conflict check was completed. COURT ORDERED, matter SET for Status Check regarding briefing schedule. 07/07/22 8:30 AM STATUS CHECK: BRIEFING SCHEDULE;

07/07/2022  **Status Check (8:30 AM)** (Judicial Officer: Leavitt, Michelle)
Status Check: Briefing Schedule
 Briefing Schedule Set; Status Check: Briefing Schedule
 Journal Entry Details:
COURT ORDERED, opening brief due 08/22/22; Response due 10/05/22; Hearing on the Petition for Writ of Habeas Corpus SET. 10/13/22 8:30 AM HEARING: PETITION FOR WRIT;

11/17/2022  **Hearing (8:30 AM)** (Judicial Officer: Leavitt, Michelle)
Hearing Re: Petition for Writ of Habeas Corpus
 Denied; Respondent's Motion to Dismiss Appeal for Lack of Jurisdiction
 Journal Entry Details:
Following arguments by counsel, COURT ORDERED, Petition for Writ of Habeas Corpus DENIED. At request of Mr. Owens, COURT FURTHER ORDERED, Mr. Owens APPOINTED for the Appeal.;

DISTRICT COURT CIVIL COVER SHEET

A-20-823892-W

Dept. 12

County, Nevada

Case No. _____
(Assigned by Clerk's Office)**I. Party Information** (provide both home and mailing addresses if different)

Plaintiff(s) (name/address/phone): Raekwon Robertson	Defendant(s) (name/address/phone): State of Nevada
Attorney (name/address/phone):	Attorney (name/address/phone):

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

Real Property Landlord/Tenant <input type="checkbox"/> Unlawful Detainer <input type="checkbox"/> Other Landlord/Tenant Title to Property <input type="checkbox"/> Judicial Foreclosure <input type="checkbox"/> Other Title to Property Other Real Property <input type="checkbox"/> Condemnation/Eminent Domain <input type="checkbox"/> Other Real Property	Negligence <input type="checkbox"/> Auto <input type="checkbox"/> Premises Liability <input type="checkbox"/> Other Negligence Malpractice <input type="checkbox"/> Medical/Dental <input type="checkbox"/> Legal <input type="checkbox"/> Accounting <input type="checkbox"/> Other Malpractice	Torts Other Torts <input type="checkbox"/> Product Liability <input type="checkbox"/> Intentional Misconduct <input type="checkbox"/> Employment Tort <input type="checkbox"/> Insurance Tort <input type="checkbox"/> Other Tort
Probate Probate (select case type and estate value) <input type="checkbox"/> Summary Administration <input type="checkbox"/> General Administration <input type="checkbox"/> Special Administration <input type="checkbox"/> Set Aside <input type="checkbox"/> Trust/Conservatorship <input type="checkbox"/> Other Probate Estate Value <input type="checkbox"/> Over \$200,000 <input type="checkbox"/> Between \$100,000 and \$200,000 <input type="checkbox"/> Under \$100,000 or Unknown <input type="checkbox"/> Under \$2,500	Construction Defect & Contract Construction Defect <input type="checkbox"/> Chapter 40 <input type="checkbox"/> Other Construction Defect Contract Case <input type="checkbox"/> Uniform Commercial Code <input type="checkbox"/> Building and Construction <input type="checkbox"/> Insurance Carrier <input type="checkbox"/> Commercial Instrument <input type="checkbox"/> Collection of Accounts <input type="checkbox"/> Employment Contract <input type="checkbox"/> Other Contract	Judicial Review/Appeal Judicial Review <input type="checkbox"/> Foreclosure Mediation Case <input type="checkbox"/> Petition to Seal Records <input type="checkbox"/> Mental Competency Nevada State Agency Appeal <input type="checkbox"/> Department of Motor Vehicle <input type="checkbox"/> Worker's Compensation <input type="checkbox"/> Other Nevada State Agency Appeal Other <input type="checkbox"/> Appeal from Lower Court <input type="checkbox"/> Other Judicial Review/Appeal
Civil Writ Civil Writ <input checked="" type="checkbox"/> Writ of Habeas Corpus <input type="checkbox"/> Writ of Mandamus <input type="checkbox"/> Writ of Quo Warrant <input type="checkbox"/> Writ of Prohibition <input type="checkbox"/> Other Civil Writ		Other Civil Filing Other Civil Filing <input type="checkbox"/> Compromise of Minor's Claim <input type="checkbox"/> Foreign Judgment <input type="checkbox"/> Other Civil Matters

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

October 29, 2020

Date

PREPARED BY CLERK

Signature of initiating party or representative

See other side for family-related case filings.

FFCO
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
ALEXANDER CHEN
Chief Deputy District Attorney
Nevada Bar #010539
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

RAEKWON SETREY ROBERTSON,
aka, Raekwon Robertson, ID #825804,

Petitioner,

-vs-

THE STATE OF NEVADA,

Respondent.

CASE NO: A-20-823892-W

C-17-328587-2

DEPT NO: XII

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DENYING
PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) AND
SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS (POST-
CONVICTION)**

DATE OF HEARING: November 17, 2022
TIME OF HEARING: 8:30 AM

THIS CAUSE having come on for hearing before the Honorable MICHELLE LEAVITT, District Judge, on the 17TH day of NOVEMBER, 2022, RAEKWON SETREY ROBERTSON (hereinafter "Petitioner") not being present, being represented by STEVEN S. OWENS, ESQ. and the Respondent being represented by STEVEN B. WOLFSON, District Attorney, by and through GIANCARLO PESCI, Chief Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, testimony of witnesses, arguments of counsel, and/or documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law and order.

///

1 **FINDINGS OF FACT, CONCLUSIONS OF LAW**

2 **PROCEDURAL HISTORY**

3 On December 14, 2017, an Indictment was filed charging RAEKWON SETREY
4 ROBERTSON aka RAEKWON ROBERTSON (hereinafter “Petitioner”) along with co-
5 defendants DEMARIO LOFTON-ROBINSON aka DEMARIO LOFTONROBINSON
6 (hereinafter “Lofton-Robinson”) and DAVONTAE AMARRI WHEELER (hereinafter
7 “Wheeler”) with seven (7) counts: Count 1– BURGLARY WHILE IN POSSESSION OF A
8 DEADLY WEAPON (Category B Felony – NRS 205.060); Count 2– CONSPIRACY TO
9 COMMIT ROBBERY (Category B Felony – NRS 200.380); Count 3– ROBBERY WITH
10 USE OF A DEADLY WEAPON (Category B Felony – NRS 200.380, 199.480); Count 4–
11 ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony – NRS 200.380,
12 199.480); Count 5– CONSPIRACY TO COMMIT ROBBERY (Category B Felony – NRS
13 200.380, 199.480); Count 6– ATTEMPT ROBBERY WITH USE OF A DEADLY WEAPON
14 (Category B Felony – NRS 200.380, 193.165); and Count 7 - MURDER WITH USE OF A
15 DEADLY WEAPON (Category A Felony – NRS 200.010, 200.030, 193.165).

16 On April 19, 2018, a Superseding Indictment was filed charging Petitioner and both co-
17 defendants with the same. On January 2, 2019, Lofton-Robinson moved to sever his trial and
18 the State did not oppose this motion. On February 11, 2020, an Amended Superseding
19 Indictment was filed charging Petitioner and Wheeler with Count 1– CONSPIRACY TO
20 COMMIT ROBBERY (Category B Felony – NRS 200.380); Count 2– ROBBERY WITH
21 USE OF A DEADLY WEAPON (Category B Felony – NRS 200.380, 199.480); and Count
22 3– MURDER WITH USE OF A DEADLY WEAPON (Category A Felony – NRS 200.010,
23 200.030, 193.165). The same day, Petitioner’s jury trial commenced. On February 24, 2020,
24 Petitioner’s jury trial concluded, and the jury found Petitioner guilty of Count 1–
25 CONSPIRACY TO COMMIT ROBBERY (Category B Felony – NRS 200.380); guilty of
26 Count 2– ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony – NRS
27 200.380, 199.480); and guilty of Count 3– MURDER WITH USE OF A DEADLY WEAPON
28 (Category A Felony – NRS 200.010, 200.030, 193.165). On March 12, 2020, a Guilty Plea

1 guilty to: Count 4– CONSPIRACY TO COMMIT ROBBERY (Category B Felony – NRS
2 200.380, 199.480) and Count 5– ROBBERY WITH USE OF A DEADLY WEAPON
3 (Category B Felony – NRS 200.380, 199.480). On June 11, 2020, Petitioner was adjudged
4 guilty and sentenced to the Nevada Department of Corrections (“NDOC”) as follows: as to
5 Count 1 – a maximum of seventy-two (72) months with a minimum parole eligibility of twenty
6 four (24) months; as to Count 2 – a maximum of one hundred twenty (120) months with a
7 minimum parole eligibility of forty-eight (48) months, plus a consecutive term of one hundred
8 twenty (120) months with a minimum parole eligibility of forty-eight (48) months for the use
9 of a deadly weapon; as to Count 3 – life with a minimum parole eligibility of twenty (20)
10 years, plus a consecutive term of twenty (20) years with a minimum parole eligibility of eight
11 (8) years for the use of a deadly weapon; as to Count 4 – a maximum of seventy-two (72)
12 months with a minimum parole eligibility of twenty-four (24) months; and as to Count 5 – a
13 maximum of one hundred eighty (180) months with a minimum parole eligibility of forty-
14 eight (48) months, plus a consecutive term of one hundred eighty (180) months with a
15 minimum parole eligibility of forty-eight (48) months for the use of a deadly weapon, all
16 counts to run concurrent.

17 Petitioner’s Judgment of Conviction was filed on June 17, 2020. On June 24, 2020,
18 Petitioner filed a Notice of Appeal. Petitioner filed his appeal on November 12, 2020. On April
19 28, 2021, the Nevada Supreme Court affirmed Petitioner’s Judgment of Conviction. Remittitur
20 issued on June 8, 2021. On October 29, 2020, Petitioner filed a Pro Per Petition for Writ of
21 Habeas Corpus (“PWHC”). Petitioner filed a successive Pro Per PWHC on November 5, 2020.
22 Petitioner filed a third PWHC on May 26, 2022. On June 7, 2022, an Order was filed
23 appointing Steven S. Owens, Esq as counsel. On August 18, 2022, Petitioner filed a
24 Supplemental brief in support of the Petition for Writ of Habeas Corpus (“SPWHC”). The
25 State filed its Response to Petitioner’s Petition for Writ of Habeas Corpus (Post-Conviction)
26 and Supplemental Brief on October 5, 2022. On November 17, 2022, this Court denied
27 Petitioner’s PWHC and SPWHC.

28 ///

1 **FACTUAL SYNOPSIS¹**

2 In accordance with his GPA, Deshawn Robinson (hereinafter “Robinson”) testified against
3 Petitioner and Wheeler in exchange for not being charged with Murder with Use of a Deadly
4 Weapon. Per his testimony, on August 8, 2017, Petitioner sent his brother co-defendant
5 Lofton-Robinson a message inquiring as to whether the brothers were interested in joining him
6 in robbing a house that evening, for participation in which burglary Wheeler had already
7 accepted the invitation. The four men, Petitioner, Wheeler, Lofton-Robinson, and Robinson
8 thusly agreed to rob a house. All men carried firearms, with the exception of Robinson. That
9 evening, the group stopped at a convenience store wherein the clerk noticed the gun Wheeler
10 carried in a holster on his hip. Just before midnight, the group drove to Dewey and Lindell
11 Avenue in Lofton-Robinson’s white Mercury Grand Marquis.

12 At the same time, Mr. Robert Mason jogged past, noticed the men loitering in the area
13 in the middle of the night, and made a mental note of their car’s license plate. Shortly after
14 midnight, young nursing student Gabriel Valenzuela had returned to his home at 5536 West
15 Dewey. After retrieving the family’s mail from his mailbox, Mr. Valenzuela walked past the
16 group on his way into his home. Petitioner and his three accomplices demanded everything
17 Mr. Valenzuela had, then shot him three times in the head and torso, leaving him to die alone
18 in his driveway. The foursome then fled the scene without taking any of Mr. Valenzuela’s
19 property.

20 Robinson also testified that Petitioner fired first with a .22 caliber gun. Mr.
21 Valenzuela’s wounds included a gunshot wound in his abdomen from a .22 caliber gun. On
22 the evening of Mr. Valenzuela’s slaying, Petitioner was the sole carrier of a .22 caliber firearm.
23 In a search of Petitioner’s home, police recovered a .22 caliber gun that retained Petitioner’s
24 DNA. A bullet recovered from Mr. Valenzuela’s abdomen wound was too damaged to be
25 matched to Petitioner’s gun, but neither could the gun be eliminated as having fired said bullet.
26 Finally, ballistics evidence matched Petitioner’s gun to a cartridge case found at the crime

27 _____
28 ¹ The factual synopsis was acquired from Respondent’s Response to Petition for Writ of
Habeas Corpus (Post-Conviction) and Supplemental Brief in Support of Petition for Writ of
Habeas Corpus. (October 5, 2022).

1 scene.

2 ANALYSIS

3 Petitioner alleges the jury in his trial lacked a requisite number of people of color and
4 there was jury misconduct due to a sleeping juror. PWHC at 5.

5 Petitioner alleges that a personal relationship between Chief Deputy District Attorney
6 Giancarlo Pesci and District Court Judge Michelle Leavitt may have substantially affected his
7 trial and sentencing. PWHC at 5. Petitioner alleges that he was willing to accept a guilty plea
8 agreement but was unable to do so because the offered deal was contingent on acceptance by
9 both Petitioner and co-defendant Wheeler. PWHC at 5. Specifically, Petitioner alleges that
10 Counsel failed to: object to a text message on grounds that it constituted evidence of uncharged
11 bad acts; seek severance of trials for Petitioner and co-defendant Wheeler; investigate and raise
12 Petitioner's alleged mental health issues at trial; and raise Petitioner's alleged mental health
13 issues at sentencing as mitigation evidence. SPWHC at 5-12. The final claim in Petitioner's
14 Supplemental Brief is that counsel was ineffective during the appellate process. SPWHC at
15 12-15.

16 **I. PETITIONER'S PRO PER PETITION IS LIMITED TO CLAIMS THAT ARE** 17 **NOT COGNIZABLE IN A PETITION FOR WRIT OF HABEAS CORPUS**

18 Petitioner attempts to make arguments that should have been raised on his direct appeal
19 and are not appropriate for a post-conviction petition for writ of habeas corpus.

20 NRS 34.810(1) reads:

21 The court shall dismiss a petition if the court determines that:

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

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

28 . . .

///

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

3 The Nevada Supreme Court has held that “challenges to the validity of a guilty plea and
4 claims of ineffective assistance of trial and appellate counsel must first be pursued in post-
5 conviction proceedings.... [A]ll other claims that are appropriate for a direct appeal must be
6 pursued on direct appeal, or they will be *considered waived in subsequent proceedings.*”
7 Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added)
8 (disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)). “A
9 court must dismiss a habeas petition if it presents claims that either were or could have been
10 presented in an earlier proceeding, unless the court finds both cause for failing to present the
11 claims earlier or for raising them again and actual prejudice to the petitioner.” Evans v. State,
12 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001).

13 Petitioner argues that the jury was not properly representative of the community, that
14 the judge and the prosecutor were not fair. Not only does he lack support for either of these
15 claims, but he also failed to raise them in a direct appeal. Therefore, in this petition, this court
16 deems the meritless claims that he raises in his pro per PWHC waived.

17 **A. Petitioner Cannot Demonstrate Jury Venire Was Product of**
18 **Systematic Exclusion**

19 Petitioner alleges that was “only one mixed African-American in the jury box when
20 there should have been three” because the defendants are people of color. PWHC at 5.
21 Assuming that Petitioner’s assertion is an attempt to argue that the jury venire failed to
22 represent a fair cross section of the community, this allegation is bare and naked, as well as
23 repelled by the record.

24 The Sixth and Fourteenth Amendments of the United States Constitution guarantee a
25 jury venire that is selected from a fair cross section of the community. Morgan v. State, 134
26 Nev. 200, 200, 416 P.3d 212, 217 (2018). A prima facie violation of the fair-cross-section
27 requirement necessitates that the defendant establish: (1) that the group alleged to be excluded
28 is a "distinctive" group in the community; (2) that the representation of this group in venires

1 from which juries are selected is not fair and reasonable in relation to the number of such
2 persons in the community; and (3) that this underrepresentation is due to systematic exclusion
3 of the group in the jury-selection process. Id. Valentine v. State established that the system of
4 selecting jurors by sending an equal number of jury summonses in each jurisdiction without
5 ascertaining the percentage of the population in each zip code, if true, could establish the
6 underrepresentation of a distinctive group based on systematic exclusion. 135 Nev. 463, 466,
7 454 P.3d 709, 714-15 (2019). However, Petitioner has failed to establish that the system
8 described in Valentine was the same system utilized to compose the jury venire for his trial.
9 In fact, a Batson hearing held on the second day of Petitioner's trial confirmed that challenged
10 system in Valentine was in fact not used to compose Petitioner's jury venire. TT Day 2 at 50.
11 Thus, the suggestion that the State engaged in the systematic exclusion of any group in the
12 composition of the jury venire is meritless.

13 **B. Petitioner Cannot Establish Jury Misconduct Nor That He Was**
14 **Prejudiced Thereby**

15 Petitioner alleges that juror #11 appeared to have been falling asleep during trial.
16 PWHC. At 5. However, this is a bare and naked allegation that must be summarily denied.
17 Hargrove, 100 Nev. at 502, 686 P.2d at 225.

18 The Sixth Amendment of the United States Constitution guarantees criminal defendants
19 the right to a trial with a fair and impartial jury. Burnside v. State, 131 Nev. 371, 410, 352 P.3d
20 627, 654 (2015) (citing Irvin v. Dowd, 366 U.S. 717, 722, 81 S. Ct. 1639, 6 L. Ed. 2d 751
21 (1961)). A defendant could be deprived of the Fifth Amendment right to due process or the
22 Sixth Amendment right to an impartial jury if jurors fall asleep and are unable to fairly consider
23 the defendant's case. See United States v. Freitag, 230 F.3d 1019, 1023 (7th Cir. 2000); United
24 States v. Springfield, 829 F.2d 860, 864 (9th Cir. 1987). Generally, juror misconduct, such as
25 inattentiveness or sleeping, does not warrant a new trial absent a showing of prejudice—i.e.,
26 that the defendant did not receive a fair trial. See United States v. Lawrence, 405 F.3d 888,
27 903 (10th Cir. 2005).

28 ///

1 First, an extensive search of the record confirms that there is nothing to suggest that a
2 single juror fell asleep at any point during Petitioner's trial beyond his unsubstantiated
3 insistence that this occurred.

4 Second, even if there were any basis for Petitioner's allegation, Petitioner must
5 nevertheless demonstrate that he was prejudiced by this alleged misconduct. However, there
6 was ample evidence to support Petitioner's convictions, his trial was conducted with a fair and
7 impartial jury, and Petitioner has failed to even assert otherwise. This claim is therefore denied.

8 **C. Petitioner Cannot Establish Any Personal Relationship between the**
9 **Prosecutor and Judge**

10 Petitioner alleges that a personal relationship between Chief Deputy District Attorney
11 Giancarlo Pesci and District Court Judge Michelle Leavitt may have substantially affected his
12 trial and sentencing. PWHC at 5. However, there is no suggestion of any such relationship
13 between Chief Deputy District Attorney Giancarlo Pesci and District Court Judge Michelle
14 Leavitt beyond Petitioner's unsupported assertion thereof. Accordingly, this claim is a bare
15 and naked assertion that is denied.

16 **D. Petitioner Cannot Establish the Existence of Any Contingent Plea**
17 **Agreement**

18 Petitioner alleges that he was willing to accept a guilty plea agreement but was unable
19 to do so because the offered deal was contingent on acceptance by both Petitioner and co-
20 defendant Wheeler. PWHC at 5. However, there is no evidence in the record that the State
21 ever offered any such deal. Accordingly, assuming that Petitioner cites the inability to enter
22 into a guilty plea agreement as evidence of the prejudice he suffered by his joint trial, there is
23 nothing in the record to substantiate even the possibility of said prejudice.

24 Moreover, if a contingent plea deal had been offered to Petitioner and co-defendant
25 Wheeler, there is no evidence that Petitioner was inclined to accept said offer. Even if
26 Petitioner were so inclined, Appellant has no right to a plea negotiation and the State has
27 significant discretion regarding both the content and conditions of any offers it chooses to
28 extend. Lafler v. Cooper, 566 U.S. 156, 168, 132 S. Ct. 1376, 1387 (2012). NRS 174.063 sets

1 forth a written statutory form for plea agreements. When addressing NRS 174.063, the Nevada
2 Supreme Court has noted that the language of the statute was “specifically crafted so that the
3 parties “retain some discretion as to the form of the written agreement, to facilitate the various
4 ‘fact patterns’ that arise in criminal law.” Sparks v. State, 110 P.3d 486 (2005) (quoting
5 Hearing on S.B. 549 Before the Senate Judiciary Comm., 68th Leg. (Nev., June 9, 1995)
6 (summarizing statement of Clark County Chief Deputy District Attorney Ben Graham)). As
7 such, the State had the discretion to make any plea offer extended to Appellant contingent on
8 Harlan accepting his plea agreement as well.

9 Finally, the Nevada Supreme Court has never concluded that making a defendant’s
10 offer of negotiation contingent on a co-defendant’s acceptance of the same offer is an
11 impermissible exercise of prosecutorial discretion, let alone a due process violation. Although
12 the Nevada Supreme Court has never addressed whether a prosecutor may validly make any
13 plea offer contingent on both defendants accepting said offer, Tennessee courts, for example,
14 have consistently held that prosecutors have the discretion “to make an offer of settlement
15 contingent upon all of the defendants accepting the offer and pleading guilty.” Parham v. State,
16 885 S.W.2d 375, 382 (Tenn.Crim. App. 1994) (citing State v. Street, 768 S.W.2d 703, 711
17 (Tenn.Crim.App.1988); Hodges v. State, 491 S.W.2d 624, 627–628 (Tenn.Crim.App.1973);
18 See State v. Turner, 713 S.W.2d 327, 329 (Tenn.Crim.App.), cert. denied, 479 U.S. 933, 107
19 S.Ct. 407, 93 L.Ed.2d 360 (1986)). Tennessee courts have further elaborated that not only do
20 prosecutors have the discretion to extend an offer of negotiation, but they also have the
21 discretion to revoke plea agreements and that such agreements are revocable until accepted by
22 the court. Id. As such, contingent plea negotiations are an accepted form of plea bargaining,
23 and Petitioner’s claim based on this alleged offer is denied.

24 **II. COUNSEL WAS NOT INEFFECTIVE**

25 The basis of all claims Petitioner raised in his Supplemental is ineffective assistance of
26 counsel. Specifically, Petitioner alleges that Counsel failed to: object to a text message on
27 grounds that it constituted evidence of uncharged bad acts; seek severance of trials for
28 Petitioner and co-defendant Wheeler; investigate and raise Petitioner’s alleged mental health

1 issues at trial; and raise Petitioner’s alleged mental health issues at sentencing as mitigation
2 evidence. SPWHC at 5-12. The final claim in Petitioner’s Supplemental Brief is that counsel
3 was ineffective during the appellate process. SPWHC at 12-15.

4 The Sixth Amendment to the United States Constitution provides that, “[i]n all criminal
5 prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his
6 defense.” The United States Supreme Court has long recognized that “the right to counsel is
7 the right to the effective assistance of counsel.” Strickland v. Washington, 466 U.S. 668, 686,
8 104 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323
9 (1993).

10 To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove
11 he was denied “reasonably effective assistance” of counsel by satisfying the two-prong test of
12 Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063–64; see also Love, 109 Nev. at 1138, 865
13 P.2d at 323. Under the Strickland test, a defendant must show first that his counsel's
14 representation fell below an objective standard of reasonableness, and second, that but for
15 counsel's errors, there is a reasonable probability that the result of the proceedings would have
16 been different. 466 U.S. at 687–88, 104 S. Ct. at 2065; Warden, Nevada State Prison v. Lyons,
17 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-part test). “[T]here
18 is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the
19 same order or even to address both components of the inquiry if the defendant makes an
20 insufficient showing on one.” Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

21 The court begins with the presumption of effectiveness and then must determine
22 whether the defendant has demonstrated by a preponderance of the evidence that counsel was
23 ineffective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). “Effective counsel
24 does not mean errorless counsel, but rather counsel whose assistance is ‘[w]ithin the range of
25 competence demanded of attorneys in criminal cases.’” Jackson v. Warden, 91 Nev. 430, 432,
26 537 P.2d 473, 474 (1975).

27 Counsel cannot be ineffective for failing to make futile objections or arguments. See
28 Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Trial counsel has the

1 “immediate and ultimate responsibility of deciding if and when to object, which witnesses, if
2 any, to call, and what defenses to develop.” Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167
3 (2002).

4 Based on the above law, the role of a court in considering allegations of ineffective
5 assistance of counsel is “not to pass upon the merits of the action not taken but to determine
6 whether, under the particular facts and circumstances of the case, trial counsel failed to render
7 reasonably effective assistance.” Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711
8 (1978). This analysis does not mean that the court should “second guess reasoned choices
9 between trial tactics nor does it mean that defense counsel, to protect himself against
10 allegations of inadequacy, must make every conceivable motion no matter how remote the
11 possibilities are of success.” Id. To be effective, the constitution “does not require that counsel
12 do what is impossible or unethical. If there is no bona fide defense to the charge, counsel
13 cannot create one and may disserve the interests of his client by attempting a useless charade.”
14 United States v. Cronin, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

15 “There are countless ways to provide effective assistance in any given case. Even the
16 best criminal defense attorneys would not defend a particular client in the same way.”
17 Strickland, 466 U.S. at 689, 104 S. Ct. at 2065. “Strategic choices made by counsel after
18 thoroughly investigating the plausible options are almost unchallengeable.” Dawson v. State,
19 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784
20 P.2d 951, 953 (1989). In essence, the court must “judge the reasonableness of counsel’s
21 challenged conduct on the facts of the particular case, viewed as of the time of counsel’s
22 conduct.” Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.

23 Even if a defendant can demonstrate that his counsel’s representation fell below an
24 objective standard of reasonableness, he must still demonstrate prejudice and show a
25 reasonable probability that, but for counsel’s errors, the result of the trial would have been
26 different. McNelson v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing
27 Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). “A reasonable probability is a probability
28 ///

1 sufficient to undermine confidence in the outcome.” Id. (citing Strickland, 466 U.S. at 694,
2 104 S. Ct. at 2068).

3 The Nevada Supreme Court has held “that a habeas corpus petitioner must prove the
4 disputed factual allegations underlying his ineffective-assistance claim by a preponderance of
5 the evidence.” Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). Furthermore,
6 claims of ineffective assistance of counsel asserted in a petition for post-conviction relief must
7 be supported with specific factual allegations, which if true, would entitle the petitioner to
8 relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). “Bare” and “naked”
9 allegations are not sufficient, nor are those belied and repelled by the record. Id. NRS
10 34.735(6) states in relevant part, “[Petitioner] must allege specific facts supporting the claims
11 in the petition[.] . . . Failure to allege specific facts rather than just conclusions may cause your
12 petition to be dismissed.” (emphasis added).

13 Additionally, Petitioner’s claims are not sufficiently pled pursuant to Hargrove, 100
14 Nev. at 502, 686 P.2d at 225, and Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987).
15 Indeed, a party seeking review bears the responsibility “to cogently argue, and present relevant
16 authority” to support his assertions. Edwards v. Emperor’s Garden Restaurant, 122 Nev. 317,
17 330 n.38, 130 P.3d 1280, 1288 n.38 (2006); Dept. of Motor Vehicles and Public Safety v.
18 Rowland, 107 Nev. 475, 479, 814 P.2d 80, 83 (1991) (defendant’s failure to present legal
19 authority resulted in no reason for the district court to consider defendant’s claim); Maresca
20 103 Nev. at 673, 748 P.2d at 6 (an arguing party must support his arguments with relevant
21 authority and cogent argument; “issues not so presented need not be addressed”); Randall v.
22 Salvation Army, 100 Nev. 466, 470-71, 686 P.2d 241, 244 (1984) (court may decline
23 consideration of issues lacking citation to relevant legal authority); Holland Livestock v. B &
24 C Enterprises, 92 Nev. 473, 533 P.2d 950 (1976) (issues lacking citation to relevant legal
25 authority do not warrant review on the merits). Claims for relief devoid of specific factual
26 allegations are “bare” and “naked,” and are insufficient to warrant relief, as are those claims
27 belied and repelled by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225. “[Petitioner]
28 *must* allege specific facts supporting the claims in the petition[.]...Failure to allege specific

1 facts rather than just conclusions may cause [the] petition to be dismissed.” NRS 34.735(6)
2 (emphasis added).

3 Here, Petitioner raises multiple claims of ineffective assistance of counsel, each of
4 which are “bare” and “naked,” and are insufficient to warrant relief, as are those claims belied
5 and repelled by the record.

6
7 **A. Petitioner Cannot Show Counsel Was Ineffective for Failing to Object to the
8 Message as Prior Bad Acts Evidence**

9 Petitioner alleges that Counsel was ineffective for failing to object to the text message
10 on the grounds that it constituted evidence of an uncharged bad act. SPWHC at 7. The message
11 in question read “Sace is in”. TT Day 2 at 316.

12 Before the admission of evidence of a prior bad act or collateral offense, the trial court
13 must conduct a hearing on the record and determine (1) that the evidence is relevant to the
14 crime charged; (2) that the other act is proven by clear and convincing evidence; and (3) that
15 the probative value of the other act is not substantially outweighed by the danger of unfair
16 prejudice. Qualls v. State, 114 Nev. 900, 902, 961 P.2d 765, 766 (1998) (citing Tinch v. State,
17 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997); Armstrong v. State, 110 Nev. 1322,
18 1323-24, 885 P.2d 600, 600-01 (1994)). However, when several crimes are intermixed or
19 blended with one another or connected such that they form an indivisible criminal transaction,
20 and when full proof by testimony, whether direct or circumstantial, of any one of them cannot
21 be given without showing the others, evidence of any or all of them is admissible against a
22 defendant on trial for any offense which is itself a detail of the whole criminal scheme. Allan
23 v. State, 92 Nev. 318, 549 P.2d 1402 (1976). Where the *res gestae* doctrine is applicable, the
24 determinative analysis is not a weighing of the prejudicial effect of evidence of other bad acts
25 against the probative value of that evidence. State v. Shade, 111 Nev. 887, 894, 900 P.2d 327,
26 331 (1995). That is, the Nevada Supreme Court has held evidence admissible under NRS
27 48.035(3) does not require the application of the three-pronged test required by *Petrocelli* and
28 its progeny. Lopez v. State, 2018 Nev. App. Unpub. LEXIS 409, *2-3.

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1 As Petitioner concedes, the State argued for the message’s admission by invoking the
2 doctrine of *res gestae* (codified by NRS 48.035(3)). TT Day 2 at 311. In addition to other
3 messages contained in the same thread, the message in question explained the purpose of the
4 foursome’s gathering and carrying firearms, as well as how they ultimately came to confront
5 and murder Mr. Valenzuela. Accordingly, even if trial counsel had objected to the message as
6 evidence of prior bad acts or an uncharged crime, no *Petrocelli* hearing would have been
7 conducted because the Court concurred the evidence was admissible under the *res gestae*
8 doctrine. Thus, the objection Petitioner asserts should have been made would have been futile.
9 Counsel cannot be ineffective for failing to make futile objections or arguments See Ennis v.
10 State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006).

11 Further, even if trial counsel could be deemed ineffective for the failure to raise a futile
12 objection, Petitioner cannot establish a reasonable probability that the proceedings would have
13 resulted in a different outcome if counsel had objected to the text message’s admission on the
14 grounds that it constituted evidence of an uncharged crime. Petitioner concludes without
15 substantiation that a *Petrocelli* hearing would have found that the text message was not
16 relevant. SPWHC at 7. NRS 48.015 reads:

17 As used in this chapter, “relevant evidence” means evidence having
18 any tendency to make the existence of any fact that is of consequence
19 to the determination of the action more or less probable than it would
be without the evidence.

20 The message constitutes evidence of the parties’ shared intent to seek pecuniary gain
21 through criminal means, namely burglary. The existence of this intent makes it more probable
22 that Petitioner and his accomplices would subsequently establish a shared intent to seek
23 pecuniary gain by perpetrating robbery. Given that this shared intent is material to Count 1–
24 CONSPIRACY TO COMMIT ROBBERY, evidence thereof is necessarily relevant.
25 Moreover, while the State sought the admission of only a single message, a properly executed
26 search warrant recovered a litany of messages between the co-defendants that would establish
27 Conspiracy to Commit Burglary by clear and convincing evidence. TT Day 5 at 98-99. Finally,
28 even if the relative weights of probative and prejudicial value were considered under the

1 doctrine of *res gestae*, Petitioner has failed to assert let alone establish that the risk of unfair
2 prejudice to him posed by the message in question substantially outweighed the probative
3 value thereof. Therefore, this claim is denied.

4 **B. Petitioner Cannot Establish Counsel Was Ineffective for Failing to Seek Severance**

5 Petitioner claims that counsel was ineffective for failing to seek severance from co-
6 defendant Wheeler because the co-defendants had mutually antagonistic defenses. SPWHC at
7 8-9. However, Petitioner's claims are belied by the record in that the defenses were not
8 mutually antagonistic.

9 For purposes of supporting a defendant's motion to sever, the rule in Nevada is that
10 defenses must be antagonistic to the point that they are mutually exclusive before they are to
11 be considered prejudicial. Rowland v. State, 118 Nev. 31, 35, 39 P.3d 114, 116 (2002).
12 Defenses become mutually exclusive when the core of the co-defendant's defense is so
13 irreconcilable with the core of the defendant's own defense that the acceptance of the co-
14 defendant's theory by the jury precludes acquittal of the defendant. Id.

15 At trial, Petitioner's defense was that the State could not prove beyond a reasonable
16 doubt that Petitioner was responsible for the brutal slaying of Mr. Valenzuela. TT Day 3 at 37.
17 Co-defendant Wheeler's counsel argued that Wheeler was not a member of the foursome
18 responsible for killing Mr. Valenzuela because Wheeler abandoned the group approximately
19 forty-five (45) minutes before Mr. Valenzuela was slain. TT Day 3 at 39-40. These defenses
20 are not irreconcilable. A jury could have reasonably found both that co-defendant Wheeler had
21 been mistakenly identified and that there was insufficient evidence to convict Petitioner, and
22 ultimately acquitted both defendants. Accordingly, no mutual exclusivity exists between the
23 co-defendants' theories, and the defenses therefore cannot be mutually antagonistic.

24 Moreover, even if the defense theories were mutually antagonistic, Petitioner fails to
25 establish that the failure to sever his trial from co-defendant Wheeler's caused him to suffer
26 any prejudice. The decisive factor in any severance analysis remains prejudice to the
27 defendant. Marshall v. State, 118 Nev. 642, 646, 56 P.3d 376, 378 (2002). Petitioner implies
28 the disparities between his convictions and sentences and those of his accomplices constitute

1 evidence of the prejudice he allegedly suffered through the joint trial. SPWHC at 8-9.
2 However, Petitioner attempts to mislead this Court through this implication because these
3 disparities instead reflect the reality that Petitioner was differently situated than his
4 accomplices. Although a valid search warrant was properly executed on the residence of each
5 member of the foursome responsible for Mr. Valenzuela's death, the .22 caliber bullets with
6 the same headstamp as the cartridge case found at the murder scene and rifling characteristics
7 similar to those recovered from Mr. Valenzuela's wounds were recovered from Petitioner's
8 residence. TT Day 3 at 34. In addition, the Taurus .22 that testing confirmed fired the cartridge
9 case left at the murder scene was found in the bottom left drawer of Petitioner's residence. Id.
10 Finally, it was Petitioner's DNA that was recovered from the Taurus .22. Id. Given that
11 Petitioner's convictions and sentences reflect the enormity of the evidence against him, the
12 suggestion that Petitioner suffered any prejudice from his joint trial is a bare and naked
13 assertion that must be denied. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

14
15 **C. Petitioner Cannot Show Counsel Failed to Investigate Mental Health Issues or
Was Ineffective for Failing to Raise Them During Trial**

16 Petitioner asserts that trial counsel was ineffective for both failing to investigate and
17 raise Petitioner's alleged mental health issues at trial to disprove specific intent. SPWHC at 9-
18 10. However, these claims are bare and naked assertions that demand summary denial.
19 Hargrove, 100 Nev. at 502, 686 P.2d at 225.

20 Petitioner repeatedly states that trial counsel failed to investigate his mental health
21 issues. SPWHC at 9-10. However, the fact that counsel elected against raising these alleged
22 issues at trial does not constitute evidence that counsel was unaware of them and/or failed to
23 investigate them. Further, Petitioner fails to show how an investigation of his alleged mental
24 health issues would have produced a more favorable outcome given the strength of the
25 evidence against him. Pursuant to Molina v. State, such a claim cannot support post-conviction
26 relief. Molina v. State 120 Nev. 185, 192, 87 P.3d 533, 538 (2004) (stating that a defendant
27 who contends his attorney was ineffective because he did not adequately investigate must show
28 how a better investigation would have rendered a more favorable outcome probable).

Petitioner next takes issue with trial counsel's failure to call witness to attest to his alleged mental health issues and/or otherwise introduce said issues at trial to disprove specific intent. SPWHC at 9-10. However, which witness to call is a virtually unchallengeable strategic decision. "Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson, 108 Nev. at 117, 825 P.2d at 596; see also Ford, 105 Nev. at 853, 784 P.2d at 953. 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. Trial counsel has the "immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop." Rhyne, 118 Nev. at 8, 38 P.3d at 167. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Harrington v. Richter, 131 S. Ct. 770, 788 (2011) (citing Yarborough v. Gentry, 540 U.S. 1, 124 S. Ct. 1 (2003)). Petitioner fails to even assert that trial counsel's failure to raise his alleged mental health issues does not constitute a strategic decision. Furthermore, trial counsel's defense theory was clear from his opening statement: the State could not prove beyond a reasonable doubt that Petitioner was responsible for Mr. Valenzuela's murder. TT Day 3 at 37. In fact, on multiple occasions, Attorney Sanft sought to undermine the certainty of Petitioner's participation in the murder. For example, Attorney Sanft attempted to paint Robinson as a liar motivated by his desire to avoid adult custody. TT Day 4 at 157-173. Later, Attorney Sanft attempted to cast doubt on a photographic depiction of Petitioner. TT Day 6 at 64. The trial transcripts confirm that Petitioner's trial counsel sought to establish that there was insufficient evidence to convict him because Petitioner was not in fact responsible for Mr. Valenzuela's murder. Given that raising Petitioner's alleged mental health issues to disprove specific intent constitutes an affirmative defense inconsistent with trial counsel's defense theory at trial, Petitioner's assertion that it should have been raised is in fact an attempt to challenge trial counsel's strategic decision to offer a contrary defense theory. "Strategic choices made by counsel after thoroughly

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1 investigating the plausible options are almost unchallengeable.” Dawson 108 Nev. at 117, 825
2 P.2d at 596.

3 **D. Petitioner Cannot Show Counsel Was Ineffective for Failing to Raise Alleged**
4 **Mental Health Issues as Mitigation Evidence During Sentencing**

5 Petitioner also contends counsel was ineffective for his failure to raise Petitioner’s alleged
6 mental health issues as mitigation evidence at the sentencing hearing. SPWHC at 11. Petitioner
7 further takes issue with counsel’s failure to present any other form of mitigation evidence. Id.
8 However, counsel’s conduct in context is inconsistent with ineffective assistance of counsel.

9 When a convicted defendant complains of the ineffectiveness of counsel's assistance, the
10 defendant must show that counsel's representation fell below an objective standard of
11 reasonableness. Strickland 466 U.S. at 687-88, 104 S. Ct. at 2064. Regardless of whether
12 Petitioner is citing ineffective assistance of trial or appellate counsel, the inquiry should focus
13 on counsel’s “performance as a whole”. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102
14 (1996). Even if a defendant can demonstrate that his counsel's representation fell below an
15 objective standard of reasonableness, he must still demonstrate prejudice and show a
16 reasonable probability that the result would have been different but for counsel’s errors.
17 McNelson v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing Strickland, 466
18 U.S. at 687, 104 S. Ct. at 2064). “A reasonable probability is a probability sufficient to
19 undermine confidence in the outcome.” Id. (citing Strickland, 466 U.S. at 694, 104 S. Ct. at
20 2068).

21 First, this Court provided both counsel and Petitioner an opportunity to be heard at
22 sentencing. Sentencing Transcript at 4-5. Neither Petitioner nor counsel elected to offer
23 mitigation evidence or arguments, which forbearance counsel clarified to the Court:

24 We’re going to submit everything to the Court. And the reason for that
25 is this, Mr. Robertson is intent on filing an appeal, is intent on going
26 forward with that aspect of it. I believe that ultimately what we have
27 here is a situation where Mr. Robertson’s in a position where the
28 reason why he’s not talking to the Court or saying anything to the
Court is because he wants to reserve that -- that right.

Sentencing Transcript at 5-6.

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1 Petitioner was present while his counsel offered this explanation, yet he permitted the
2 hearing to proceed without demur. Clearly, Petitioner and counsel had engaged in a prior
3 discussion during which they jointly made the strategic decision to withhold mitigation
4 evidence or other argument. “Strategic choices made by counsel after thoroughly investigating
5 the plausible options are almost unchallengeable.” Dawson, 108 Nev. at 117, 825 P.2d 596;
6 see also Jones v. State, 95 Nev. 613, 617, 600 P.2d 247, 250 (1979) (recognizing that when a
7 defendant participates in an alleged error, he is estopped from objecting to it on appeal).

8 Moreover, even if Petitioner could challenge trial counsel’s failure to offer mitigation
9 evidence and establish that said failure was unreasonable, Petitioner is unable to demonstrate
10 the requisite prejudice for a valid ineffective assistance of counsel claim. This Court heard the
11 disturbing facts of this case. The State introduced evidence that Petitioner and his accomplices
12 had assembled on August 8, 2017, with the intent to “hit a house”. TT Day 3 at 24. This Court
13 also learned that all but one member of the foursome were carrying firearms. Finally, this
14 Court heard how the group agreed to rob 24-year-old Gabriel Valenzuela whose promising
15 future as a nurse was snuffed out when Petitioner and his accomplices ruthlessly discharged
16 multiple bullets into him and left him to die alone in his own driveway. TT Day 3 at 26-27.
17 Moreover, Mr. Valenzuela’s mother provided the Court with a devastating account of the
18 suffering she continued to endure since the death of her only child. Victim Impact Statement.
19 Given the strength of State’s evidence against Petitioner, the aggravating factors in the
20 multiple, violent offenses of which Petitioner was convicted, and Petitioner’s own failure to
21 express any remorse during sentencing, even if counsel had offered mitigation evidence, there
22 is no reasonable probability that this offer would have resulted in this Court’s imposition of a
23 lighter sentence. This claim is therefore denied.

24 **E. Petitioner Cannot Show Counsel Was Ineffective During the Appellate Process**

25 **i. Petitioner cannot establish counsel was ineffective for his alleged failure to**
26 **communicate with him**

27 A defendant is not entitled to a particular “relationship” with her attorney. Morris v.
28 Slappy, 461 U.S. 1, 14, 103 S. Ct. 1610, 1617 (1983). There is no requirement for any specific

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1 amount of communication as long as counsel is reasonably effective in his or her
2 representation. See Id.

3 Petitioner alleges that counsel failed to communicate with him during the appellate
4 process. SPWHC at 13. However, Petitioner fails to establish that this alleged lack of
5 communication at all compromised counsel's effectiveness during the appellate process. Not
6 only has Petitioner failed to establish that his input would have had any impact on the appellate
7 process, but he has also failed to even suggest that he had any input to provide. Therefore, his
8 claim that counsel's alleged lack of communication with him constitutes ineffectiveness is
9 bare and naked, and thus denied. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

10 **ii. Petitioner cannot establish counsel's appellate brief was inadequate**

11 Petitioner alleges that counsel's appellate briefing was "wholly deficient and
12 inadequate" in part for failing to articulate the specific facts that demonstrate the insufficiency
13 of the evidence that convicted Petitioner. SPWHC at 14. Petitioner further alleges that, in
14 raising the insufficiency of evidence argument, counsel should have provided the details that
15 exhibit the alleged weakness of the State's case. SPWHC at 14. Finally, Petitioner alleges that
16 appellate counsel should have raised on appeal the allegations that the jury venire failed to
17 represent a fair cross-section of the community and the text message constituted evidence of
18 uncharged bad acts. SPWHC at 14-15.

19 There is a strong presumption that appellate counsel's performance was reasonable and
20 fell within "the wide range of reasonable professional assistance." See United States v.
21 Aguirre, 912 F.2d 555, 560 (2nd Cir. 1990); citing Strickland, 466 U.S. at 689, 104 S. Ct. at
22 2065. The United States Supreme Court has held that there is a constitutional right to effective
23 assistance of counsel in a direct appeal from a judgment of conviction. Evitts v. Lucey, 469
24 U.S. 387, 396-97, 105 S. Ct. 830, 835-37 (1985); see also Burke v. State, 110 Nev. 1366, 1368,
25 887 P.2d 267, 268 (1994). This Court has held that all appeals must be "pursued in a manner
26 meeting high standards of diligence, professionalism and competence." Burke, 110 Nev. at
27 1368, 887 P.2d at 268.

28 A claim of ineffective assistance of appellate counsel must satisfy the two-prong test

1 set forth by Strickland. Kirksey, 112 Nev. at 998, 923 P.2d at 1114. To satisfy Strickland's
2 second prong, the defendant must show the omitted issue would have had a reasonable
3 probability of success on appeal. Duhamel v. Collins, 955 F.2d 962, 967 (5th Cir. 1992);
4 Heath, 941 F.2d at 1132; Lara v. State, 120 Nev. 177, 184, 87 P.3d 528, 532 (2004); Kirksey,
5 112 Nev. at 498, 923 P.2d at 1114.

6 Appellate counsel is not required to raise every issue that a defendant felt was pertinent
7 to the case. The professional diligence and competence required on appeal involves
8 "winnowing out weaker arguments on appeal and focusing on one central issue if possible, or
9 at most on a few key issues." Jones v. Barnes, 463 U.S. 745, 751-52, 103 S. Ct. 3308, 3313
10 (1983). In particular, a "brief that raises every colorable issue runs the risk of burying good
11 arguments . . . in a verbal mound made up of strong and weak contentions." Id. at 753, 103 S.
12 Ct. at 3313. For judges to second-guess reasonable professional judgments and impose on
13 appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve
14 the very goal of vigorous and effective advocacy." Id. at 754, 103 S. Ct. at 3314. The Nevada
15 Supreme Court has similarly concluded that appellate counsel may well be more effective by
16 not raising every conceivable issue on appeal. Ford, 105 Nev. at 853, 784 P.2d at 953.

17 The defendant has the ultimate authority to make fundamental decisions regarding his
18 case. Jones, 463 U.S. at 751, 103 S. Ct. at 3312. However, the defendant does not have a
19 constitutional right to "compel appointed counsel to press nonfrivolous points requested by
20 the client, if counsel, as a matter of professional judgment, decides not to present those points."
21 Id.

22 First, appellate counsel exercised his discretion by not submitting a brief rife with issues
23 lacking in substance, and Petitioner has failed to establish a legitimate basis for questioning
24 this exercise.

25 Second, as indicated above, there was ample evidence to support Petitioner's
26 convictions. Petitioner was in possession of the bullets that bore similar characteristics to the
27 cartridge found at the murder scene and the bullets recovered from Mr. Valenzuela's injuries.
28 TT Day 3 at 34. Petitioner was also in possession of the Taurus .22 gun that was traced to the

1 cartridge case at the scene. TT Day 3 at 34. The DNA found on the Taurus .22 belonged to
2 Petitioner. TT Day 3 at 34.

3 Third, as discussed hereinabove, while “random selection” of jurors could potentially
4 establish systematic exclusion of a distinctive group, Petitioner has provided no evidence that
5 this method was utilized in the composition of the jury venire for his trial. Accordingly,
6 appellate counsel did not have to raise the fair-cross-section argument on appeal because
7 counsel is not required to raise futile arguments. Ennis, 122 Nev. at 706, 137 P.3d at 1103.

8 Finally, Petitioner provides no grounds for why the admissibility of the text message
9 would have made the appellate brief more likely to succeed. Instead, Petitioner merely
10 continues to imply that the prejudicial effect of the message outweighed the probative value.
11 SPWHC at 15. However, as discussed hereinabove, the message was admitted under the
12 doctrine of *res gestae*. Accordingly, the determinative analysis is not a weighing of the
13 prejudicial effect of evidence of other bad acts against the probative value of that evidence.
14 Shade, 111 Nev. at 894, 900 P.2d at 331. Thus, this argument would have been futile and
15 counsel cannot be ineffective for failing to raise it. Ennis, 122 Nev. at 706, 137 P.3d at 1103.

16 **ORDER**

17 THEREFORE, IT IS HEREBY ORDERED that the Petition for Writ of Habeas Corpus
18 (Post-Conviction) and Supplemental Brief in Support of Post Conviction Petition for Writ of
19 Habeas Corpus (Post-Conviction) are hereby DENIED.

20 Dated this 8th day of December, 2022

21 

22 069 FC6 36EA E9D4
23 Michelle Leavitt
24 District Court Judge

25 STEVEN B. WOLFSON
26 DISTRICT ATTORNEY
27 Nevada Bar #001565

28 BY /s/ ALEXANDER CHEN

ALEXANDER CHEN
Chief Deputy District Attorney
Nevada Bar #010539

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 6th day of December 2022, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

RAEKWON SETREY ROBERTSON, BAC #1235056
ELY STATE PRISON
4569 N. STATE ROUTE 490
ELY, NEVADA 89301

BY /s/ Janet Hayes
Secretary for the District Attorney's Office

201760536C/AC/ed/jh/MVU

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Raekwon Robertson, Plaintiff(s) | CASE NO: A-20-823892-W
7 vs. | DEPT. NO. Department 12
8 State of Nevada, Defendant(s)
9

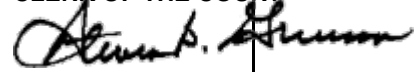
10 **AUTOMATED CERTIFICATE OF SERVICE**

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

14 Service Date: 12/8/2022

15 Steven Owens owenscrimlaw@gmail.com

16 Dept 12 Law Clerk dept12lc@clarkcountycourts.us
17
18
19
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21
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1 NEFF

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

5 RAEKWON ROBERTSON,

6 Petitioner,

7 vs.

8 STATE OF NEVADA,

9 Respondent,

Case No: A-20-823892-W

Dept No: XII

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

11 PLEASE TAKE NOTICE that on December 8, 2022, the court entered a decision or order in this matter,
12 a true and correct copy of which is attached to this notice.

13 You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you
14 must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is mailed
to you. This notice was mailed on December 13, 2022.

15 STEVEN D. GRIERSON, CLERK OF THE COURT

16 /s/ Amanda Hampton

17 Amanda Hampton, Deputy Clerk

18
19 CERTIFICATE OF E-SERVICE / MAILING

20 I hereby certify that on this 13 day of December 2022, I served a copy of this Notice of Entry on the
21 following:

22 ☒ By e-mail:

23 Clark County District Attorney's Office
Attorney General's Office – Appellate Division-

24 ☒ The United States mail addressed as follows:

25 Raekwon Robertson # 1235056 Steven S. Owens, Esq.
26 P.O. Box 1989 1000 N. Green Valley, #440-529
Ely, NV 89301 Henderson, NV 89074

27 /s/ Amanda Hampton

28 Amanda Hampton, Deputy Clerk

FFCO
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
ALEXANDER CHEN
Chief Deputy District Attorney
Nevada Bar #010539
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

RAEKWON SETREY ROBERTSON,
aka, Raekwon Robertson, ID #825804,

Petitioner,

-vs-

THE STATE OF NEVADA,

Respondent.

CASE NO: A-20-823892-W

C-17-328587-2

DEPT NO: XII

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DENYING
PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) AND
SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS (POST-
CONVICTION)**

DATE OF HEARING: November 17, 2022
TIME OF HEARING: 8:30 AM

THIS CAUSE having come on for hearing before the Honorable MICHELLE LEAVITT, District Judge, on the 17TH day of NOVEMBER, 2022, RAEKWON SETREY ROBERTSON (hereinafter "Petitioner") not being present, being represented by STEVEN S. OWENS, ESQ. and the Respondent being represented by STEVEN B. WOLFSON, District Attorney, by and through GIANCARLO PESCI, Chief Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, testimony of witnesses, arguments of counsel, and/or documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law and order.

///

1 **FINDINGS OF FACT, CONCLUSIONS OF LAW**

2 **PROCEDURAL HISTORY**

3 On December 14, 2017, an Indictment was filed charging RAEKWON SETREY
4 ROBERTSON aka RAEKWON ROBERTSON (hereinafter “Petitioner”) along with co-
5 defendants DEMARIO LOFTON-ROBINSON aka DEMARIO LOFTONROBINSON
6 (hereinafter “Lofton-Robinson”) and DAVONTAE AMARRI WHEELER (hereinafter
7 “Wheeler”) with seven (7) counts: Count 1– BURGLARY WHILE IN POSSESSION OF A
8 DEADLY WEAPON (Category B Felony – NRS 205.060); Count 2– CONSPIRACY TO
9 COMMIT ROBBERY (Category B Felony – NRS 200.380); Count 3– ROBBERY WITH
10 USE OF A DEADLY WEAPON (Category B Felony – NRS 200.380, 199.480); Count 4–
11 ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony – NRS 200.380,
12 199.480); Count 5– CONSPIRACY TO COMMIT ROBBERY (Category B Felony – NRS
13 200.380, 199.480); Count 6– ATTEMPT ROBBERY WITH USE OF A DEADLY WEAPON
14 (Category B Felony – NRS 200.380, 193.165); and Count 7 - MURDER WITH USE OF A
15 DEADLY WEAPON (Category A Felony – NRS 200.010, 200.030, 193.165).

16 On April 19, 2018, a Superseding Indictment was filed charging Petitioner and both co-
17 defendants with the same. On January 2, 2019, Lofton-Robinson moved to sever his trial and
18 the State did not oppose this motion. On February 11, 2020, an Amended Superseding
19 Indictment was filed charging Petitioner and Wheeler with Count 1– CONSPIRACY TO
20 COMMIT ROBBERY (Category B Felony – NRS 200.380); Count 2– ROBBERY WITH
21 USE OF A DEADLY WEAPON (Category B Felony – NRS 200.380, 199.480); and Count
22 3– MURDER WITH USE OF A DEADLY WEAPON (Category A Felony – NRS 200.010,
23 200.030, 193.165). The same day, Petitioner’s jury trial commenced. On February 24, 2020,
24 Petitioner’s jury trial concluded, and the jury found Petitioner guilty of Count 1–
25 CONSPIRACY TO COMMIT ROBBERY (Category B Felony – NRS 200.380); guilty of
26 Count 2– ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony – NRS
27 200.380, 199.480); and guilty of Count 3– MURDER WITH USE OF A DEADLY WEAPON
28 (Category A Felony – NRS 200.010, 200.030, 193.165). On March 12, 2020, a Guilty Plea

1 guilty to: Count 4– CONSPIRACY TO COMMIT ROBBERY (Category B Felony – NRS
2 200.380, 199.480) and Count 5– ROBBERY WITH USE OF A DEADLY WEAPON
3 (Category B Felony – NRS 200.380, 199.480). On June 11, 2020, Petitioner was adjudged
4 guilty and sentenced to the Nevada Department of Corrections (“NDOC”) as follows: as to
5 Count 1 – a maximum of seventy-two (72) months with a minimum parole eligibility of twenty
6 four (24) months; as to Count 2 – a maximum of one hundred twenty (120) months with a
7 minimum parole eligibility of forty-eight (48) months, plus a consecutive term of one hundred
8 twenty (120) months with a minimum parole eligibility of forty-eight (48) months for the use
9 of a deadly weapon; as to Count 3 – life with a minimum parole eligibility of twenty (20)
10 years, plus a consecutive term of twenty (20) years with a minimum parole eligibility of eight
11 (8) years for the use of a deadly weapon; as to Count 4 – a maximum of seventy-two (72)
12 months with a minimum parole eligibility of twenty-four (24) months; and as to Count 5 – a
13 maximum of one hundred eighty (180) months with a minimum parole eligibility of forty-
14 eight (48) months, plus a consecutive term of one hundred eighty (180) months with a
15 minimum parole eligibility of forty-eight (48) months for the use of a deadly weapon, all
16 counts to run concurrent.

17 Petitioner’s Judgment of Conviction was filed on June 17, 2020. On June 24, 2020,
18 Petitioner filed a Notice of Appeal. Petitioner filed his appeal on November 12, 2020. On April
19 28, 2021, the Nevada Supreme Court affirmed Petitioner’s Judgment of Conviction. Remittitur
20 issued on June 8, 2021. On October 29, 2020, Petitioner filed a Pro Per Petition for Writ of
21 Habeas Corpus (“PWHC”). Petitioner filed a successive Pro Per PWHC on November 5, 2020.
22 Petitioner filed a third PWHC on May 26, 2022. On June 7, 2022, an Order was filed
23 appointing Steven S. Owens, Esq as counsel. On August 18, 2022, Petitioner filed a
24 Supplemental brief in support of the Petition for Writ of Habeas Corpus (“SPWHC”). The
25 State filed its Response to Petitioner’s Petition for Writ of Habeas Corpus (Post-Conviction)
26 and Supplemental Brief on October 5, 2022. On November 17, 2022, this Court denied
27 Petitioner’s PWHC and SPWHC.

28 ///

1 **FACTUAL SYNOPSIS¹**

2 In accordance with his GPA, Deshawn Robinson (hereinafter “Robinson”) testified against
3 Petitioner and Wheeler in exchange for not being charged with Murder with Use of a Deadly
4 Weapon. Per his testimony, on August 8, 2017, Petitioner sent his brother co-defendant
5 Lofton-Robinson a message inquiring as to whether the brothers were interested in joining him
6 in robbing a house that evening, for participation in which burglary Wheeler had already
7 accepted the invitation. The four men, Petitioner, Wheeler, Lofton-Robinson, and Robinson
8 thusly agreed to rob a house. All men carried firearms, with the exception of Robinson. That
9 evening, the group stopped at a convenience store wherein the clerk noticed the gun Wheeler
10 carried in a holster on his hip. Just before midnight, the group drove to Dewey and Lindell
11 Avenue in Lofton-Robinson’s white Mercury Grand Marquis.

12 At the same time, Mr. Robert Mason jogged past, noticed the men loitering in the area
13 in the middle of the night, and made a mental note of their car’s license plate. Shortly after
14 midnight, young nursing student Gabriel Valenzuela had returned to his home at 5536 West
15 Dewey. After retrieving the family’s mail from his mailbox, Mr. Valenzuela walked past the
16 group on his way into his home. Petitioner and his three accomplices demanded everything
17 Mr. Valenzuela had, then shot him three times in the head and torso, leaving him to die alone
18 in his driveway. The foursome then fled the scene without taking any of Mr. Valenzuela’s
19 property.

20 Robinson also testified that Petitioner fired first with a .22 caliber gun. Mr.
21 Valenzuela’s wounds included a gunshot wound in his abdomen from a .22 caliber gun. On
22 the evening of Mr. Valenzuela’s slaying, Petitioner was the sole carrier of a .22 caliber firearm.
23 In a search of Petitioner’s home, police recovered a .22 caliber gun that retained Petitioner’s
24 DNA. A bullet recovered from Mr. Valenzuela’s abdomen wound was too damaged to be
25 matched to Petitioner’s gun, but neither could the gun be eliminated as having fired said bullet.
26 Finally, ballistics evidence matched Petitioner’s gun to a cartridge case found at the crime

27 _____
28 ¹ The factual synopsis was acquired from Respondent’s Response to Petition for Writ of
Habeas Corpus (Post-Conviction) and Supplemental Brief in Support of Petition for Writ of
Habeas Corpus. (October 5, 2022).

1 scene.

2 ANALYSIS

3 Petitioner alleges the jury in his trial lacked a requisite number of people of color and
4 there was jury misconduct due to a sleeping juror. PWHC at 5.

5 Petitioner alleges that a personal relationship between Chief Deputy District Attorney
6 Giancarlo Pesci and District Court Judge Michelle Leavitt may have substantially affected his
7 trial and sentencing. PWHC at 5. Petitioner alleges that he was willing to accept a guilty plea
8 agreement but was unable to do so because the offered deal was contingent on acceptance by
9 both Petitioner and co-defendant Wheeler. PWHC at 5. Specifically, Petitioner alleges that
10 Counsel failed to: object to a text message on grounds that it constituted evidence of uncharged
11 bad acts; seek severance of trials for Petitioner and co-defendant Wheeler; investigate and raise
12 Petitioner's alleged mental health issues at trial; and raise Petitioner's alleged mental health
13 issues at sentencing as mitigation evidence. SPWHC at 5-12. The final claim in Petitioner's
14 Supplemental Brief is that counsel was ineffective during the appellate process. SPWHC at
15 12-15.

16 **I. PETITIONER'S PRO PER PETITION IS LIMITED TO CLAIMS THAT ARE** 17 **NOT COGNIZABLE IN A PETITION FOR WRIT OF HABEAS CORPUS**

18 Petitioner attempts to make arguments that should have been raised on his direct appeal
19 and are not appropriate for a post-conviction petition for writ of habeas corpus.

20 NRS 34.810(1) reads:

21 The court shall dismiss a petition if the court determines that:

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

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

28 . . .

///

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

3 The Nevada Supreme Court has held that “challenges to the validity of a guilty plea and
4 claims of ineffective assistance of trial and appellate counsel must first be pursued in post-
5 conviction proceedings.... [A]ll other claims that are appropriate for a direct appeal must be
6 pursued on direct appeal, or they will be *considered waived in subsequent proceedings.*”
7 Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added)
8 (disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)). “A
9 court must dismiss a habeas petition if it presents claims that either were or could have been
10 presented in an earlier proceeding, unless the court finds both cause for failing to present the
11 claims earlier or for raising them again and actual prejudice to the petitioner.” Evans v. State,
12 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001).

13 Petitioner argues that the jury was not properly representative of the community, that
14 the judge and the prosecutor were not fair. Not only does he lack support for either of these
15 claims, but he also failed to raise them in a direct appeal. Therefore, in this petition, this court
16 deems the meritless claims that he raises in his pro per PWHC waived.

17 **A. Petitioner Cannot Demonstrate Jury Venire Was Product of** 18 **Systematic Exclusion**

19 Petitioner alleges that was “only one mixed African-American in the jury box when
20 there should have been three” because the defendants are people of color. PWHC at 5.
21 Assuming that Petitioner’s assertion is an attempt to argue that the jury venire failed to
22 represent a fair cross section of the community, this allegation is bare and naked, as well as
23 repelled by the record.

24 The Sixth and Fourteenth Amendments of the United States Constitution guarantee a
25 jury venire that is selected from a fair cross section of the community. Morgan v. State, 134
26 Nev. 200, 200, 416 P.3d 212, 217 (2018). A prima facie violation of the fair-cross-section
27 requirement necessitates that the defendant establish: (1) that the group alleged to be excluded
28 is a "distinctive" group in the community; (2) that the representation of this group in venires

1 from which juries are selected is not fair and reasonable in relation to the number of such
2 persons in the community; and (3) that this underrepresentation is due to systematic exclusion
3 of the group in the jury-selection process. Id. Valentine v. State established that the system of
4 selecting jurors by sending an equal number of jury summonses in each jurisdiction without
5 ascertaining the percentage of the population in each zip code, if true, could establish the
6 underrepresentation of a distinctive group based on systematic exclusion. 135 Nev. 463, 466,
7 454 P.3d 709, 714-15 (2019). However, Petitioner has failed to establish that the system
8 described in Valentine was the same system utilized to compose the jury venire for his trial.
9 In fact, a Batson hearing held on the second day of Petitioner's trial confirmed that challenged
10 system in Valentine was in fact not used to compose Petitioner's jury venire. TT Day 2 at 50.
11 Thus, the suggestion that the State engaged in the systematic exclusion of any group in the
12 composition of the jury venire is meritless.

13 **B. Petitioner Cannot Establish Jury Misconduct Nor That He Was**
14 **Prejudiced Thereby**

15 Petitioner alleges that juror #11 appeared to have been falling asleep during trial.
16 PWHC. At 5. However, this is a bare and naked allegation that must be summarily denied.
17 Hargrove, 100 Nev. at 502, 686 P.2d at 225.

18 The Sixth Amendment of the United States Constitution guarantees criminal defendants
19 the right to a trial with a fair and impartial jury. Burnside v. State, 131 Nev. 371, 410, 352 P.3d
20 627, 654 (2015) (citing Irvin v. Dowd, 366 U.S. 717, 722, 81 S. Ct. 1639, 6 L. Ed. 2d 751
21 (1961)). A defendant could be deprived of the Fifth Amendment right to due process or the
22 Sixth Amendment right to an impartial jury if jurors fall asleep and are unable to fairly consider
23 the defendant's case. See United States v. Freitag, 230 F.3d 1019, 1023 (7th Cir. 2000); United
24 States v. Springfield, 829 F.2d 860, 864 (9th Cir. 1987). Generally, juror misconduct, such as
25 inattentiveness or sleeping, does not warrant a new trial absent a showing of prejudice—i.e.,
26 that the defendant did not receive a fair trial. See United States v. Lawrence, 405 F.3d 888,
27 903 (10th Cir. 2005).

28 ///

1 First, an extensive search of the record confirms that there is nothing to suggest that a
2 single juror fell asleep at any point during Petitioner's trial beyond his unsubstantiated
3 insistence that this occurred.

4 Second, even if there were any basis for Petitioner's allegation, Petitioner must
5 nevertheless demonstrate that he was prejudiced by this alleged misconduct. However, there
6 was ample evidence to support Petitioner's convictions, his trial was conducted with a fair and
7 impartial jury, and Petitioner has failed to even assert otherwise. This claim is therefore denied.

8 **C. Petitioner Cannot Establish Any Personal Relationship between the**
9 **Prosecutor and Judge**

10 Petitioner alleges that a personal relationship between Chief Deputy District Attorney
11 Giancarlo Pesci and District Court Judge Michelle Leavitt may have substantially affected his
12 trial and sentencing. PWHC at 5. However, there is no suggestion of any such relationship
13 between Chief Deputy District Attorney Giancarlo Pesci and District Court Judge Michelle
14 Leavitt beyond Petitioner's unsupported assertion thereof. Accordingly, this claim is a bare
15 and naked assertion that is denied.

16 **D. Petitioner Cannot Establish the Existence of Any Contingent Plea**
17 **Agreement**

18 Petitioner alleges that he was willing to accept a guilty plea agreement but was unable
19 to do so because the offered deal was contingent on acceptance by both Petitioner and co-
20 defendant Wheeler. PWHC at 5. However, there is no evidence in the record that the State
21 ever offered any such deal. Accordingly, assuming that Petitioner cites the inability to enter
22 into a guilty plea agreement as evidence of the prejudice he suffered by his joint trial, there is
23 nothing in the record to substantiate even the possibility of said prejudice.

24 Moreover, if a contingent plea deal had been offered to Petitioner and co-defendant
25 Wheeler, there is no evidence that Petitioner was inclined to accept said offer. Even if
26 Petitioner were so inclined, Appellant has no right to a plea negotiation and the State has
27 significant discretion regarding both the content and conditions of any offers it chooses to
28 extend. Lafler v. Cooper, 566 U.S. 156, 168, 132 S. Ct. 1376, 1387 (2012). NRS 174.063 sets

1 forth a written statutory form for plea agreements. When addressing NRS 174.063, the Nevada
2 Supreme Court has noted that the language of the statute was “specifically crafted so that the
3 parties “retain some discretion as to the form of the written agreement, to facilitate the various
4 ‘fact patterns’ that arise in criminal law.” Sparks v. State, 110 P.3d 486 (2005) (quoting
5 Hearing on S.B. 549 Before the Senate Judiciary Comm., 68th Leg. (Nev., June 9, 1995)
6 (summarizing statement of Clark County Chief Deputy District Attorney Ben Graham)). As
7 such, the State had the discretion to make any plea offer extended to Appellant contingent on
8 Harlan accepting his plea agreement as well.

9 Finally, the Nevada Supreme Court has never concluded that making a defendant’s
10 offer of negotiation contingent on a co-defendant’s acceptance of the same offer is an
11 impermissible exercise of prosecutorial discretion, let alone a due process violation. Although
12 the Nevada Supreme Court has never addressed whether a prosecutor may validly make any
13 plea offer contingent on both defendants accepting said offer, Tennessee courts, for example,
14 have consistently held that prosecutors have the discretion “to make an offer of settlement
15 contingent upon all of the defendants accepting the offer and pleading guilty.” Parham v. State,
16 885 S.W.2d 375, 382 (Tenn.Crim. App. 1994) (citing State v. Street, 768 S.W.2d 703, 711
17 (Tenn.Crim.App.1988); Hodges v. State, 491 S.W.2d 624, 627–628 (Tenn.Crim.App.1973);
18 See State v. Turner, 713 S.W.2d 327, 329 (Tenn.Crim.App.), cert. denied, 479 U.S. 933, 107
19 S.Ct. 407, 93 L.Ed.2d 360 (1986)). Tennessee courts have further elaborated that not only do
20 prosecutors have the discretion to extend an offer of negotiation, but they also have the
21 discretion to revoke plea agreements and that such agreements are revocable until accepted by
22 the court. Id. As such, contingent plea negotiations are an accepted form of plea bargaining,
23 and Petitioner’s claim based on this alleged offer is denied.

24 **II. COUNSEL WAS NOT INEFFECTIVE**

25 The basis of all claims Petitioner raised in his Supplemental is ineffective assistance of
26 counsel. Specifically, Petitioner alleges that Counsel failed to: object to a text message on
27 grounds that it constituted evidence of uncharged bad acts; seek severance of trials for
28 Petitioner and co-defendant Wheeler; investigate and raise Petitioner’s alleged mental health

1 issues at trial; and raise Petitioner’s alleged mental health issues at sentencing as mitigation
2 evidence. SPWHC at 5-12. The final claim in Petitioner’s Supplemental Brief is that counsel
3 was ineffective during the appellate process. SPWHC at 12-15.

4 The Sixth Amendment to the United States Constitution provides that, “[i]n all criminal
5 prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his
6 defense.” The United States Supreme Court has long recognized that “the right to counsel is
7 the right to the effective assistance of counsel.” Strickland v. Washington, 466 U.S. 668, 686,
8 104 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323
9 (1993).

10 To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove
11 he was denied “reasonably effective assistance” of counsel by satisfying the two-prong test of
12 Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063–64; see also Love, 109 Nev. at 1138, 865
13 P.2d at 323. Under the Strickland test, a defendant must show first that his counsel's
14 representation fell below an objective standard of reasonableness, and second, that but for
15 counsel's errors, there is a reasonable probability that the result of the proceedings would have
16 been different. 466 U.S. at 687–88, 104 S. Ct. at 2065; Warden, Nevada State Prison v. Lyons,
17 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-part test). “[T]here
18 is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the
19 same order or even to address both components of the inquiry if the defendant makes an
20 insufficient showing on one.” Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

21 The court begins with the presumption of effectiveness and then must determine
22 whether the defendant has demonstrated by a preponderance of the evidence that counsel was
23 ineffective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). “Effective counsel
24 does not mean errorless counsel, but rather counsel whose assistance is ‘[w]ithin the range of
25 competence demanded of attorneys in criminal cases.’” Jackson v. Warden, 91 Nev. 430, 432,
26 537 P.2d 473, 474 (1975).

27 Counsel cannot be ineffective for failing to make futile objections or arguments. See
28 Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Trial counsel has the

1 “immediate and ultimate responsibility of deciding if and when to object, which witnesses, if
2 any, to call, and what defenses to develop.” Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167
3 (2002).

4 Based on the above law, the role of a court in considering allegations of ineffective
5 assistance of counsel is “not to pass upon the merits of the action not taken but to determine
6 whether, under the particular facts and circumstances of the case, trial counsel failed to render
7 reasonably effective assistance.” Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711
8 (1978). This analysis does not mean that the court should “second guess reasoned choices
9 between trial tactics nor does it mean that defense counsel, to protect himself against
10 allegations of inadequacy, must make every conceivable motion no matter how remote the
11 possibilities are of success.” Id. To be effective, the constitution “does not require that counsel
12 do what is impossible or unethical. If there is no bona fide defense to the charge, counsel
13 cannot create one and may disserve the interests of his client by attempting a useless charade.”
14 United States v. Cronin, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

15 “There are countless ways to provide effective assistance in any given case. Even the
16 best criminal defense attorneys would not defend a particular client in the same way.”
17 Strickland, 466 U.S. at 689, 104 S. Ct. at 2065. “Strategic choices made by counsel after
18 thoroughly investigating the plausible options are almost unchallengeable.” Dawson v. State,
19 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784
20 P.2d 951, 953 (1989). In essence, the court must “judge the reasonableness of counsel’s
21 challenged conduct on the facts of the particular case, viewed as of the time of counsel’s
22 conduct.” Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.

23 Even if a defendant can demonstrate that his counsel’s representation fell below an
24 objective standard of reasonableness, he must still demonstrate prejudice and show a
25 reasonable probability that, but for counsel’s errors, the result of the trial would have been
26 different. McNelson v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing
27 Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). “A reasonable probability is a probability
28 ///

1 sufficient to undermine confidence in the outcome.” Id. (citing Strickland, 466 U.S. at 694,
2 104 S. Ct. at 2068).

3 The Nevada Supreme Court has held “that a habeas corpus petitioner must prove the
4 disputed factual allegations underlying his ineffective-assistance claim by a preponderance of
5 the evidence.” Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). Furthermore,
6 claims of ineffective assistance of counsel asserted in a petition for post-conviction relief must
7 be supported with specific factual allegations, which if true, would entitle the petitioner to
8 relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). “Bare” and “naked”
9 allegations are not sufficient, nor are those belied and repelled by the record. Id. NRS
10 34.735(6) states in relevant part, “[Petitioner] must allege specific facts supporting the claims
11 in the petition[.] . . . Failure to allege specific facts rather than just conclusions may cause your
12 petition to be dismissed.” (emphasis added).

13 Additionally, Petitioner’s claims are not sufficiently pled pursuant to Hargrove, 100
14 Nev. at 502, 686 P.2d at 225, and Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987).
15 Indeed, a party seeking review bears the responsibility “to cogently argue, and present relevant
16 authority” to support his assertions. Edwards v. Emperor’s Garden Restaurant, 122 Nev. 317,
17 330 n.38, 130 P.3d 1280, 1288 n.38 (2006); Dept. of Motor Vehicles and Public Safety v.
18 Rowland, 107 Nev. 475, 479, 814 P.2d 80, 83 (1991) (defendant’s failure to present legal
19 authority resulted in no reason for the district court to consider defendant’s claim); Maresca
20 103 Nev. at 673, 748 P.2d at 6 (an arguing party must support his arguments with relevant
21 authority and cogent argument; “issues not so presented need not be addressed”); Randall v.
22 Salvation Army, 100 Nev. 466, 470-71, 686 P.2d 241, 244 (1984) (court may decline
23 consideration of issues lacking citation to relevant legal authority); Holland Livestock v. B &
24 C Enterprises, 92 Nev. 473, 533 P.2d 950 (1976) (issues lacking citation to relevant legal
25 authority do not warrant review on the merits). Claims for relief devoid of specific factual
26 allegations are “bare” and “naked,” and are insufficient to warrant relief, as are those claims
27 belied and repelled by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225. “[Petitioner]
28 *must* allege specific facts supporting the claims in the petition[.]...Failure to allege specific

1 facts rather than just conclusions may cause [the] petition to be dismissed.” NRS 34.735(6)
2 (emphasis added).

3 Here, Petitioner raises multiple claims of ineffective assistance of counsel, each of
4 which are “bare” and “naked,” and are insufficient to warrant relief, as are those claims belied
5 and repelled by the record.

6
7 **A. Petitioner Cannot Show Counsel Was Ineffective for Failing to Object to the
8 Message as Prior Bad Acts Evidence**

9 Petitioner alleges that Counsel was ineffective for failing to object to the text message
10 on the grounds that it constituted evidence of an uncharged bad act. SPWHC at 7. The message
11 in question read “Sace is in”. TT Day 2 at 316.

12 Before the admission of evidence of a prior bad act or collateral offense, the trial court
13 must conduct a hearing on the record and determine (1) that the evidence is relevant to the
14 crime charged; (2) that the other act is proven by clear and convincing evidence; and (3) that
15 the probative value of the other act is not substantially outweighed by the danger of unfair
16 prejudice. Qualls v. State, 114 Nev. 900, 902, 961 P.2d 765, 766 (1998) (citing Tinch v. State,
17 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997); Armstrong v. State, 110 Nev. 1322,
18 1323-24, 885 P.2d 600, 600-01 (1994)). However, when several crimes are intermixed or
19 blended with one another or connected such that they form an indivisible criminal transaction,
20 and when full proof by testimony, whether direct or circumstantial, of any one of them cannot
21 be given without showing the others, evidence of any or all of them is admissible against a
22 defendant on trial for any offense which is itself a detail of the whole criminal scheme. Allan
23 v. State, 92 Nev. 318, 549 P.2d 1402 (1976). Where the *res gestae* doctrine is applicable, the
24 determinative analysis is not a weighing of the prejudicial effect of evidence of other bad acts
25 against the probative value of that evidence. State v. Shade, 111 Nev. 887, 894, 900 P.2d 327,
26 331 (1995). That is, the Nevada Supreme Court has held evidence admissible under NRS
27 48.035(3) does not require the application of the three-pronged test required by *Petrocelli* and
28 its progeny. Lopez v. State, 2018 Nev. App. Unpub. LEXIS 409, *2-3.

///

1 As Petitioner concedes, the State argued for the message's admission by invoking the
2 doctrine of *res gestae* (codified by NRS 48.035(3)). TT Day 2 at 311. In addition to other
3 messages contained in the same thread, the message in question explained the purpose of the
4 foursome's gathering and carrying firearms, as well as how they ultimately came to confront
5 and murder Mr. Valenzuela. Accordingly, even if trial counsel had objected to the message as
6 evidence of prior bad acts or an uncharged crime, no *Petrocelli* hearing would have been
7 conducted because the Court concurred the evidence was admissible under the *res gestae*
8 doctrine. Thus, the objection Petitioner asserts should have been made would have been futile.
9 Counsel cannot be ineffective for failing to make futile objections or arguments See Ennis v.
10 State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006).

11 Further, even if trial counsel could be deemed ineffective for the failure to raise a futile
12 objection, Petitioner cannot establish a reasonable probability that the proceedings would have
13 resulted in a different outcome if counsel had objected to the text message's admission on the
14 grounds that it constituted evidence of an uncharged crime. Petitioner concludes without
15 substantiation that a *Petrocelli* hearing would have found that the text message was not
16 relevant. SPWHC at 7. NRS 48.015 reads:

17 As used in this chapter, "relevant evidence" means evidence having
18 any tendency to make the existence of any fact that is of consequence
19 to the determination of the action more or less probable than it would
be without the evidence.

20 The message constitutes evidence of the parties' shared intent to seek pecuniary gain
21 through criminal means, namely burglary. The existence of this intent makes it more probable
22 that Petitioner and his accomplices would subsequently establish a shared intent to seek
23 pecuniary gain by perpetrating robbery. Given that this shared intent is material to Count 1—
24 CONSPIRACY TO COMMIT ROBBERY, evidence thereof is necessarily relevant.
25 Moreover, while the State sought the admission of only a single message, a properly executed
26 search warrant recovered a litany of messages between the co-defendants that would establish
27 Conspiracy to Commit Burglary by clear and convincing evidence. TT Day 5 at 98-99. Finally,
28 even if the relative weights of probative and prejudicial value were considered under the

1 doctrine of *res gestae*, Petitioner has failed to assert let alone establish that the risk of unfair
2 prejudice to him posed by the message in question substantially outweighed the probative
3 value thereof. Therefore, this claim is denied.

4 **B. Petitioner Cannot Establish Counsel Was Ineffective for Failing to Seek Severance**

5 Petitioner claims that counsel was ineffective for failing to seek severance from co-
6 defendant Wheeler because the co-defendants had mutually antagonistic defenses. SPWHC at
7 8-9. However, Petitioner's claims are belied by the record in that the defenses were not
8 mutually antagonistic.

9 For purposes of supporting a defendant's motion to sever, the rule in Nevada is that
10 defenses must be antagonistic to the point that they are mutually exclusive before they are to
11 be considered prejudicial. Rowland v. State, 118 Nev. 31, 35, 39 P.3d 114, 116 (2002).
12 Defenses become mutually exclusive when the core of the co-defendant's defense is so
13 irreconcilable with the core of the defendant's own defense that the acceptance of the co-
14 defendant's theory by the jury precludes acquittal of the defendant. Id.

15 At trial, Petitioner's defense was that the State could not prove beyond a reasonable
16 doubt that Petitioner was responsible for the brutal slaying of Mr. Valenzuela. TT Day 3 at 37.
17 Co-defendant Wheeler's counsel argued that Wheeler was not a member of the foursome
18 responsible for killing Mr. Valenzuela because Wheeler abandoned the group approximately
19 forty-five (45) minutes before Mr. Valenzuela was slain. TT Day 3 at 39-40. These defenses
20 are not irreconcilable. A jury could have reasonably found both that co-defendant Wheeler had
21 been mistakenly identified and that there was insufficient evidence to convict Petitioner, and
22 ultimately acquitted both defendants. Accordingly, no mutual exclusivity exists between the
23 co-defendants' theories, and the defenses therefore cannot be mutually antagonistic.

24 Moreover, even if the defense theories were mutually antagonistic, Petitioner fails to
25 establish that the failure to sever his trial from co-defendant Wheeler's caused him to suffer
26 any prejudice. The decisive factor in any severance analysis remains prejudice to the
27 defendant. Marshall v. State, 118 Nev. 642, 646, 56 P.3d 376, 378 (2002). Petitioner implies
28 the disparities between his convictions and sentences and those of his accomplices constitute

1 evidence of the prejudice he allegedly suffered through the joint trial. SPWHC at 8-9.
2 However, Petitioner attempts to mislead this Court through this implication because these
3 disparities instead reflect the reality that Petitioner was differently situated than his
4 accomplices. Although a valid search warrant was properly executed on the residence of each
5 member of the foursome responsible for Mr. Valenzuela's death, the .22 caliber bullets with
6 the same headstamp as the cartridge case found at the murder scene and rifling characteristics
7 similar to those recovered from Mr. Valenzuela's wounds were recovered from Petitioner's
8 residence. TT Day 3 at 34. In addition, the Taurus .22 that testing confirmed fired the cartridge
9 case left at the murder scene was found in the bottom left drawer of Petitioner's residence. Id.
10 Finally, it was Petitioner's DNA that was recovered from the Taurus .22. Id. Given that
11 Petitioner's convictions and sentences reflect the enormity of the evidence against him, the
12 suggestion that Petitioner suffered any prejudice from his joint trial is a bare and naked
13 assertion that must be denied. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

14
15 **C. Petitioner Cannot Show Counsel Failed to Investigate Mental Health Issues or**
16 **Was Ineffective for Failing to Raise Them During Trial**

17 Petitioner asserts that trial counsel was ineffective for both failing to investigate and
18 raise Petitioner's alleged mental health issues at trial to disprove specific intent. SPWHC at 9-
19 10. However, these claims are bare and naked assertions that demand summary denial.
20 Hargrove, 100 Nev. at 502, 686 P.2d at 225.

21 Petitioner repeatedly states that trial counsel failed to investigate his mental health
22 issues. SPWHC at 9-10. However, the fact that counsel elected against raising these alleged
23 issues at trial does not constitute evidence that counsel was unaware of them and/or failed to
24 investigate them. Further, Petitioner fails to show how an investigation of his alleged mental
25 health issues would have produced a more favorable outcome given the strength of the
26 evidence against him. Pursuant to Molina v. State, such a claim cannot support post-conviction
27 relief. Molina v. State 120 Nev. 185, 192, 87 P.3d 533, 538 (2004) (stating that a defendant
28 who contends his attorney was ineffective because he did not adequately investigate must show
how a better investigation would have rendered a more favorable outcome probable).

1 Petitioner next takes issue with trial counsel's failure to call witness to attest to his
2 alleged mental health issues and/or otherwise introduce said issues at trial to disprove specific
3 intent. SPWHC at 9-10. However, which witness to call is a virtually unchallengeable strategic
4 decision. "Strategic choices made by counsel after thoroughly investigating the plausible
5 options are almost unchallengeable." Dawson, 108 Nev. at 117, 825 P.2d at 596; see also Ford,
6 105 Nev. at 853, 784 P.2d at 953. In essence, the court must "judge the reasonableness of
7 counsel's challenged conduct on the facts of the particular case, viewed as of the time of
8 counsel's conduct." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. Trial counsel has the
9 "immediate and ultimate responsibility of deciding if and when to object, which witnesses, if
10 any, to call, and what defenses to develop." Rhyne, 118 Nev. at 8, 38 P.3d at 167. There is a
11 "strong presumption" that counsel's attention to certain issues to the exclusion of others
12 reflects trial tactics rather than "sheer neglect." Harrington v. Richter, 131 S. Ct. 770, 788
13 (2011) (citing Yarborough v. Gentry, 540 U.S. 1, 124 S. Ct. 1 (2003)). Petitioner fails to even
14 assert that trial counsel's failure to raise his alleged mental health issues does not constitute a
15 strategic decision. Furthermore, trial counsel's defense theory was clear from his opening
16 statement: the State could not prove beyond a reasonable doubt that Petitioner was responsible
17 for Mr. Valenzuela's murder. TT Day 3 at 37. In fact, on multiple occasions, Attorney Sanft
18 sought to undermine the certainty of Petitioner's participation in the murder. For example,
19 Attorney Sanft attempted to paint Robinson as a liar motivated by his desire to avoid adult
20 custody. TT Day 4 at 157-173. Later, Attorney Sanft attempted to cast doubt on a photographic
21 depiction of Petitioner. TT Day 6 at 64. The trial transcripts confirm that Petitioner's trial
22 counsel sought to establish that there was insufficient evidence to convict him because
23 Petitioner was not in fact responsible for Mr. Valenzuela's murder. Given that raising
24 Petitioner's alleged mental health issues to disprove specific intent constitutes an affirmative
25 defense inconsistent with trial counsel's defense theory at trial, Petitioner's assertion that it
26 should have been raised is in fact an attempt to challenge trial counsel's strategic decision to
27 offer a contrary defense theory. "Strategic choices made by counsel after thoroughly

28 ///

1 investigating the plausible options are almost unchallengeable.” Dawson 108 Nev. at 117, 825
2 P.2d at 596.

3 **D. Petitioner Cannot Show Counsel Was Ineffective for Failing to Raise Alleged**
4 **Mental Health Issues as Mitigation Evidence During Sentencing**

5 Petitioner also contends counsel was ineffective for his failure to raise Petitioner’s alleged
6 mental health issues as mitigation evidence at the sentencing hearing. SPWHC at 11. Petitioner
7 further takes issue with counsel’s failure to present any other form of mitigation evidence. Id.
8 However, counsel’s conduct in context is inconsistent with ineffective assistance of counsel.

9 When a convicted defendant complains of the ineffectiveness of counsel's assistance, the
10 defendant must show that counsel's representation fell below an objective standard of
11 reasonableness. Strickland 466 U.S. at 687-88, 104 S. Ct. at 2064. Regardless of whether
12 Petitioner is citing ineffective assistance of trial or appellate counsel, the inquiry should focus
13 on counsel’s “performance as a whole”. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102
14 (1996). Even if a defendant can demonstrate that his counsel's representation fell below an
15 objective standard of reasonableness, he must still demonstrate prejudice and show a
16 reasonable probability that the result would have been different but for counsel’s errors.
17 McNelson v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing Strickland, 466
18 U.S. at 687, 104 S. Ct. at 2064). “A reasonable probability is a probability sufficient to
19 undermine confidence in the outcome.” Id. (citing Strickland, 466 U.S. at 694, 104 S. Ct. at
20 2068).

21 First, this Court provided both counsel and Petitioner an opportunity to be heard at
22 sentencing. Sentencing Transcript at 4-5. Neither Petitioner nor counsel elected to offer
23 mitigation evidence or arguments, which forbearance counsel clarified to the Court:

24 We’re going to submit everything to the Court. And the reason for that
25 is this, Mr. Robertson is intent on filing an appeal, is intent on going
26 forward with that aspect of it. I believe that ultimately what we have
27 here is a situation where Mr. Robertson’s in a position where the
28 reason why he’s not talking to the Court or saying anything to the
Court is because he wants to reserve that -- that right.

Sentencing Transcript at 5-6.

///

1 Petitioner was present while his counsel offered this explanation, yet he permitted the
2 hearing to proceed without demur. Clearly, Petitioner and counsel had engaged in a prior
3 discussion during which they jointly made the strategic decision to withhold mitigation
4 evidence or other argument. “Strategic choices made by counsel after thoroughly investigating
5 the plausible options are almost unchallengeable.” Dawson, 108 Nev. at 117, 825 P.2d 596;
6 see also Jones v. State, 95 Nev. 613, 617, 600 P.2d 247, 250 (1979) (recognizing that when a
7 defendant participates in an alleged error, he is estopped from objecting to it on appeal).

8 Moreover, even if Petitioner could challenge trial counsel’s failure to offer mitigation
9 evidence and establish that said failure was unreasonable, Petitioner is unable to demonstrate
10 the requisite prejudice for a valid ineffective assistance of counsel claim. This Court heard the
11 disturbing facts of this case. The State introduced evidence that Petitioner and his accomplices
12 had assembled on August 8, 2017, with the intent to “hit a house”. TT Day 3 at 24. This Court
13 also learned that all but one member of the foursome were carrying firearms. Finally, this
14 Court heard how the group agreed to rob 24-year-old Gabriel Valenzuela whose promising
15 future as a nurse was snuffed out when Petitioner and his accomplices ruthlessly discharged
16 multiple bullets into him and left him to die alone in his own driveway. TT Day 3 at 26-27.
17 Moreover, Mr. Valenzuela’s mother provided the Court with a devastating account of the
18 suffering she continued to endure since the death of her only child. Victim Impact Statement.
19 Given the strength of State’s evidence against Petitioner, the aggravating factors in the
20 multiple, violent offenses of which Petitioner was convicted, and Petitioner’s own failure to
21 express any remorse during sentencing, even if counsel had offered mitigation evidence, there
22 is no reasonable probability that this offer would have resulted in this Court’s imposition of a
23 lighter sentence. This claim is therefore denied.

24 **E. Petitioner Cannot Show Counsel Was Ineffective During the Appellate Process**

25 **i. Petitioner cannot establish counsel was ineffective for his alleged failure to**
26 **communicate with him**

27 A defendant is not entitled to a particular “relationship” with her attorney. Morris v.
28 Slappy, 461 U.S. 1, 14, 103 S. Ct. 1610, 1617 (1983). There is no requirement for any specific

///

1 amount of communication as long as counsel is reasonably effective in his or her
2 representation. See Id.

3 Petitioner alleges that counsel failed to communicate with him during the appellate
4 process. SPWHC at 13. However, Petitioner fails to establish that this alleged lack of
5 communication at all compromised counsel's effectiveness during the appellate process. Not
6 only has Petitioner failed to establish that his input would have had any impact on the appellate
7 process, but he has also failed to even suggest that he had any input to provide. Therefore, his
8 claim that counsel's alleged lack of communication with him constitutes ineffectiveness is
9 bare and naked, and thus denied. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

10 **ii. Petitioner cannot establish counsel's appellate brief was inadequate**

11 Petitioner alleges that counsel's appellate briefing was "wholly deficient and
12 inadequate" in part for failing to articulate the specific facts that demonstrate the insufficiency
13 of the evidence that convicted Petitioner. SPWHC at 14. Petitioner further alleges that, in
14 raising the insufficiency of evidence argument, counsel should have provided the details that
15 exhibit the alleged weakness of the State's case. SPWHC at 14. Finally, Petitioner alleges that
16 appellate counsel should have raised on appeal the allegations that the jury venire failed to
17 represent a fair cross-section of the community and the text message constituted evidence of
18 uncharged bad acts. SPWHC at 14-15.

19 There is a strong presumption that appellate counsel's performance was reasonable and
20 fell within "the wide range of reasonable professional assistance." See United States v.
21 Aguirre, 912 F.2d 555, 560 (2nd Cir. 1990); citing Strickland, 466 U.S. at 689, 104 S. Ct. at
22 2065. The United States Supreme Court has held that there is a constitutional right to effective
23 assistance of counsel in a direct appeal from a judgment of conviction. Evitts v. Lucey, 469
24 U.S. 387, 396-97, 105 S. Ct. 830, 835-37 (1985); see also Burke v. State, 110 Nev. 1366, 1368,
25 887 P.2d 267, 268 (1994). This Court has held that all appeals must be "pursued in a manner
26 meeting high standards of diligence, professionalism and competence." Burke, 110 Nev. at
27 1368, 887 P.2d at 268.

28 A claim of ineffective assistance of appellate counsel must satisfy the two-prong test

1 set forth by Strickland. Kirksey, 112 Nev. at 998, 923 P.2d at 1114. To satisfy Strickland's
2 second prong, the defendant must show the omitted issue would have had a reasonable
3 probability of success on appeal. Duhamel v. Collins, 955 F.2d 962, 967 (5th Cir. 1992);
4 Heath, 941 F.2d at 1132; Lara v. State, 120 Nev. 177, 184, 87 P.3d 528, 532 (2004); Kirksey,
5 112 Nev. at 498, 923 P.2d at 1114.

6 Appellate counsel is not required to raise every issue that a defendant felt was pertinent
7 to the case. The professional diligence and competence required on appeal involves
8 "winnowing out weaker arguments on appeal and focusing on one central issue if possible, or
9 at most on a few key issues." Jones v. Barnes, 463 U.S. 745, 751-52, 103 S. Ct. 3308, 3313
10 (1983). In particular, a "brief that raises every colorable issue runs the risk of burying good
11 arguments . . . in a verbal mound made up of strong and weak contentions." Id. at 753, 103 S.
12 Ct. at 3313. For judges to second-guess reasonable professional judgments and impose on
13 appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve
14 the very goal of vigorous and effective advocacy." Id. at 754, 103 S. Ct. at 3314. The Nevada
15 Supreme Court has similarly concluded that appellate counsel may well be more effective by
16 not raising every conceivable issue on appeal. Ford, 105 Nev. at 853, 784 P.2d at 953.

17 The defendant has the ultimate authority to make fundamental decisions regarding his
18 case. Jones, 463 U.S. at 751, 103 S. Ct. at 3312. However, the defendant does not have a
19 constitutional right to "compel appointed counsel to press nonfrivolous points requested by
20 the client, if counsel, as a matter of professional judgment, decides not to present those points."
21 Id.

22 First, appellate counsel exercised his discretion by not submitting a brief rife with issues
23 lacking in substance, and Petitioner has failed to establish a legitimate basis for questioning
24 this exercise.

25 Second, as indicated above, there was ample evidence to support Petitioner's
26 convictions. Petitioner was in possession of the bullets that bore similar characteristics to the
27 cartridge found at the murder scene and the bullets recovered from Mr. Valenzuela's injuries.
28 TT Day 3 at 34. Petitioner was also in possession of the Taurus .22 gun that was traced to the

1 cartridge case at the scene. TT Day 3 at 34. The DNA found on the Taurus .22 belonged to
2 Petitioner. TT Day 3 at 34.

3 Third, as discussed hereinabove, while “random selection” of jurors could potentially
4 establish systematic exclusion of a distinctive group, Petitioner has provided no evidence that
5 this method was utilized in the composition of the jury venire for his trial. Accordingly,
6 appellate counsel did not have to raise the fair-cross-section argument on appeal because
7 counsel is not required to raise futile arguments. Ennis, 122 Nev. at 706, 137 P.3d at 1103.

8 Finally, Petitioner provides no grounds for why the admissibility of the text message
9 would have made the appellate brief more likely to succeed. Instead, Petitioner merely
10 continues to imply that the prejudicial effect of the message outweighed the probative value.
11 SPWHC at 15. However, as discussed hereinabove, the message was admitted under the
12 doctrine of *res gestae*. Accordingly, the determinative analysis is not a weighing of the
13 prejudicial effect of evidence of other bad acts against the probative value of that evidence.
14 Shade, 111 Nev. at 894, 900 P.2d at 331. Thus, this argument would have been futile and
15 counsel cannot be ineffective for failing to raise it. Ennis, 122 Nev. at 706, 137 P.3d at 1103.

16 **ORDER**

17 THEREFORE, IT IS HEREBY ORDERED that the Petition for Writ of Habeas Corpus
18 (Post-Conviction) and Supplemental Brief in Support of Post Conviction Petition for Writ of
19 Habeas Corpus (Post-Conviction) are hereby DENIED.

20 Dated this 8th day of December, 2022

21 

22 069 FC6 36EA E9D4
23 Michelle Leavitt
24 District Court Judge

25 STEVEN B. WOLFSON
26 DISTRICT ATTORNEY
27 Nevada Bar #001565

28 BY /s/ ALEXANDER CHEN

ALEXANDER CHEN
Chief Deputy District Attorney
Nevada Bar #010539

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 6th day of December 2022, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

RAEKWON SETREY ROBERTSON, BAC #1235056
ELY STATE PRISON
4569 N. STATE ROUTE 490
ELY, NEVADA 89301

BY /s/ Janet Hayes
Secretary for the District Attorney's Office

201760536C/AC/ed/jh/MVU

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Raekwon Robertson, Plaintiff(s) | CASE NO: A-20-823892-W
7 vs. | DEPT. NO. Department 12
8 State of Nevada, Defendant(s)
9

10 **AUTOMATED CERTIFICATE OF SERVICE**

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

14 Service Date: 12/8/2022

15 Steven Owens owenscrimlaw@gmail.com

16 Dept 12 Law Clerk dept12lc@clarkcountycourts.us
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**DISTRICT COURT
CLARK COUNTY, NEVADA**

Writ of Habeas Corpus

COURT MINUTES

December 22, 2020

A-20-823892-W Raekwon Robertson, Plaintiff(s)
vs.
State of Nevada, Defendant(s)

December 22, 2020 10:15 AM At Request of Court Inmate filed Petition

HEARD BY: Leavitt, Michelle **COURTROOM:** RJC Courtroom 14D

COURT CLERK: Haly Pannullo

RECORDER: Sara Richardson

REPORTER:

PARTIES

PRESENT: Zadrowski, Bernard B. Attorney

JOURNAL ENTRIES

- Michael Sanft, Esq., present on behalf of the Petitioner. Petitioner not present.

Court noted the concern of this matter and ORDERED, Petition STAYED as Mr. Sanft has filed the direct appeal.

NDC

June 02, 2022

Minutes Date: December 22, 2020

DISTRICT COURT
CLARK COUNTY, NEVADA

Writ of Habeas Corpus

COURT MINUTES

July 07, 2022

A-20-823892-W Raekwon Robertson, Plaintiff(s)
vs.
State of Nevada, Defendant(s)

July 07, 2022	8:30 AM	Status Check	Status Check: Briefing Schedule
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HEARD BY: Leavitt, Michelle **COURTROOM:** RJC Courtroom 14D

COURT CLERK: Haly Pannullo

RECORDER: Sara Richardson

REPORTER:

PARTIES

PRESENT: Owens, Steven S. Attorney
Zadrowski, Bernard B. Attorney

JOURNAL ENTRIES

- COURT ORDERED, opening brief due 08/22/22; Response due 10/05/22; Hearing on the Petition for Writ of Habeas Corpus SET.

10/13/22 8:30 AM HEARING: PETITION FOR WRIT

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Writ of Habeas Corpus

COURT MINUTES

November 17, 2022

A-20-823892-W	Raekwon Robertson, Plaintiff(s) vs. State of Nevada, Defendant(s)
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November 17, 2022	8:30 AM	Hearing	Respondent's Motion to Dismiss Appeal for Lack of Jurisdiction
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HEARD BY: Leavitt, Michelle

COURTROOM: RJC Courtroom 14D

COURT CLERK: Haly Pannullo

RECORDER: Sara Richardson

REPORTER:

PARTIES

PRESENT:	Owens, Steven S. Pesci, Giancarlo	Attorney Attorney
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JOURNAL ENTRIES

- Following arguments by counsel, COURT ORDERED, Petition for Writ of Habeas Corpus DENIED.
At request of Mr. Owens, COURT FURTHER ORDERED, Mr. Owens APPOINTED for the Appeal.

Certification of Copy

State of Nevada }
County of Clark } SS:

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

NOTICE OF APPEAL; CASE APPEAL STATEMENT; DISTRICT COURT DOCKET ENTRIES; CIVIL COVER SHEET; FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) AND SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION); NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER; DISTRICT COURT MINUTES

RAEKWON SETREY ROBERTSON,

Plaintiff(s),

vs.

STATE OF NEVADA,

Defendant(s),

Case No: A-20-823892-W

Dept No: XII

now on file and of record in this office.

IN WITNESS THEREOF, I have hereunto
Set my hand and Affixed the seal of the
Court at my office, Las Vegas, Nevada
This 9 day of January 2023.

Steven D. Grierson, Clerk of the Court



Amanda Hampton, Deputy Clerk

