IN THE SUPREME COURT OF THE STATE OF NEVADA

RAEKWON ROBERTSON,

Appellant,

v.

STATE OF NEVADA,

Respondent.

CASE NO: 85932

APPELLANT'S OPENING BRIEF

Appeal From Denial of Post-Conviction Habeas Petition

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IN THE SUPREME COURT OF THE STATE OF NEVADA

RAEKWON ROBERTSON, Appellant, v. STATE OF NEVADA, Respondent.	CASE NO: 85932

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal. Raekwon Robertson is represented by Steven S. Owens, Esq, of Steven S. Owens, LLC, who is a sole practitioner and there are no parent corporations for which disclosure is required pursuant to this rule.

DATED this 7th day of March, 2023.

/s/ Steven S. Owens
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JURISDICTIONAL STATEMENT

This appeal is from Findings of Fact, Conclusions of Law, and Order filed on December 8, 2022, which denied a petition for post-conviction relief from a criminal conviction pursuant to a jury verdict. 8 AA 1769. Notice of Entry of Findings of Fact, Conclusions of Law, and Order was filed on December 13, 2022. 8 AA 1768. Appellate jurisdiction in this case derives from NRAP 4(b)(1) and NRS 34.575(1). The Notice of Appeal was timely filed on January 6, 2023. 8 AA 1793.

ROUTING STATEMENT

This matter is not presumptively assigned to the Court of Appeals because it is a postconviction appeal that does involve a challenge to a judgment of conviction or sentence for offenses that are category A felonies. See NRAP 17(b)(3).

STATEMENT OF THE ISSUES

I. **INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO OBJECT TO OTHER BAD ACT EVIDENCE OF TEXT MESSAGE ABOUT "HITTING A HOUSE"**

II. **COUNSEL FAILED TO SEEK SEVERANCE OF TRIAL FROM CO-DEFENDANT WHEELER**

III. **COUNSEL FAILED COUNSEL FAILED TO INVESTIGATE AND RAISE APPELLANT'S MENTAL HEALTH ISSUES AT TRIAL AS DISPROVING SPECIFIC INTENT**

IV. **COUNSEL FAILED TO INVESTIGATE AND RAISE APPELLANT'S MENTAL HEALTH ISSUES AT SENTENCING IN MITIGATION**

V. COUNSEL PROVIDED INEFFECTIVE ASSISTANCE ON APPEAL

STATEMENT OF THE CASE

On December 14, 2017, Appellant Raekwon Robertson was charged by way of Indictment in Case C-17-328587-2 along with two other co-defendants, Demario Lofton-Robinson and Davontae Wheeler, with counts of Conspiracy to Commit Robbery, Attempt Robbery with use of a Deadly Weapon, and Murder with use of a Deadly Weapon for the killing of Victim Gabriel Valenzuela on August 9, 2017.[1] 1 AA 1-6. An initial trial date was set for July 30, 2018. 1 AA 7-14. Attorney Michael Sanft confirmed as attorney of record on February 13, 2018, and represented Robertson through jury trial, sentencing and direct appeal. 1 AA 15.

A Superseding Indictment with the same charges was filed on April 19, 2018, as a result of new ballistics evidence submitted to the Grand Jury. 1 AA 16-45. On June 14, 2018, the trial date was vacated and reset for January 22, 2019. 1 AA 52-61. On January 2, 2019, Robertson's counsel had no objection to a co-defendant's motion to sever the parties and the trial date was vacated and reset for June 25, 2019. 1 AA 70, 72-6. On May 15, 2019, the trial date was again vacated as to all defendants and was reset for November 19, 2019, because co-defendant Lofton-Robinson had

[1] Appellant was also charged alone in the same Indictment with counts of Burglary, Conspiracy and Armed Robbery for a separate and unrelated incident occurring on August 2, 2017, at the Fiesta Discount Market to which he later pleaded guilty.

just gotten back from Lakes Crossing. 1 AA 82-6. At calendar call on November 5, 2019, the trial date was again vacated because co-defendant Lofton-Robinson was sent back to Competency Court and the trial date was reset for February 10, 2020. 1 AA 91-9. When co-defendant Lofton-Robinson was unavailable at Lake's Crossing, Robertson proceeded to a joint jury trial together with co-defendant Wheeler. 1 AA 100-2, 103-8.

On the first day of trial, an Amended Superseding Indictment was filed removing co-defendant Lofton-Robinson. 1 AA 109-12. The trial proceeded for eight days from February 11th through 24th, 2020. 1 AA 113 – 7 AA 1571. The jury returned a verdict of guilty on all three counts including First Degree Murder with use of a Deadly Weapon. 7 AA 1563-71, 1572-3. On March 12, 2020, Robertson pleaded guilty to two additional counts of Conspiracy and Armed Robbery for the unrelated crime at Fiesta Discount Market which were run concurrent. 7 AA 1574-85. Robertson was sentenced on all counts on June 11, 2020, and received an aggregate sentence of 28 years to Life in prison.[2] 7 AA 1586-99. The judgment of conviction was filed on June 17, 2020. 7 AA 1600-3.

[2] In contrast, co-defendant Wheeler was only found guilty of Conspiracy and Second Degree Murder (without a deadly weapon) and received an aggregate sentence of 144 months (or 12 years) to Life in prison. 7 AA 1659-61. After his return from Lake's Crossing, Co-defendant Lofton-Robinson pleaded guilty to Second Degree

Robertson's counsel filed a timely direct appeal on June 24, 2020, which was docketed as SC#81400. 7 AA 1604-5, 1667-8. Counsel filed an Opening Brief on November 12, 2020. 7 AA 1670-84. The Nevada Supreme Court filed its Order of Affirmance on May 14, 2021. 7 AA 1686-90. Remittitur issued on June 8, 2021. 7 AA 1691.

Meanwhile, Robertson filed premature pro se petitions for writ of habeas corpus in the instant case, A-20-823892-W, on October 29th and again on November 5th, 2020, which were stayed pending the outcome of the direct appeal. 7 AA 1606-16, 1617-22, 1623. On May 26, 2022, Robertson filed another timely petition along with a motion to appoint counsel which the district court granted on June 2, 2022. 7 AA 1624-31, 1632-6, 1637. Counsel's Supplemental Brief with exhibits was filed on August 19, 2022. 7 AA 1641-1740. The State's Response was filed on October 5, 2022. 8 AA 1741-62. The matter was heard and argued in court on November 17, 2022, at which time the habeas petition was denied. 8 AA 1763-7. Notice of Entry of Findings of Fact, Conclusions of Law and Order was filed on December 13, 2022. 8 AA 1777-92. A timely Notice of Appeal to this Court was filed on January 6, 2023. 8 AA 1793-4.

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Murder with use of a Deadly Weapon and Attempt Robbery and received a stipulated aggregate sentence of 18 to 45 years in prison. 7 AA 1663-5.

STATEMENT OF THE FACTS

At trial, the State presented evidence that on August 8th, 2017, and into the morning of the August 9th, 2017, Appellant Raekwon Robertson, with his co-defendants Demario Lofton-Robinson, Davonte Wheeler, and Deshawn Robinson attempted to carry out an armed robbery. 4 AA 982-3. They arrived in the neighborhood of Dewey Avenue and Lindell Avenue just before midnight where they and their car, a white Mercury Grand Marquis, were observed by a passing jogger, Robert Mason who took note of the suspicious activity. 3 AA 653-8. Shortly after, they saw Gabrielle Valenzuela pull into his driveway and check his mail. 5 AA 1005-6.

The four men quickly approached him, grabbed him, and told him to give them everything he had. 5 AA 1005-6. Within a couple of seconds Valenzuela lay dying in his driveway, shot in his head and torso. 5 AA 1024. The four men fled the scene without taking any of Valenzuela's property. 5 AA 1007.

The State used accomplice DeShawn Robinson to validate the facts of the events. 5 AA 1019. Robinson agreed to this only after the State offered to remove the charge of Murder with use of a Deadly Weapon in exchange for his testimony against Robertson and Wheeler. 5 AA 1019. Robinson testified that Appellant Robertson carried a gun and participated in the attempted robbery and murder. 4 AA 990; 5 AA 1006. The State also presented a text message Robertson sent to

another accomplice on the day of the incident asking if he wanted to "hit a house," surveillance video showing Robertson in a car identified by a witness as being in the immediate vicinity of the crime scene at the time the crimes occurred, evidence of Robertson's fingerprints on that car, and a gun found at Robertson's house that had his DNA on it and contained bullets that matched casings found at the crime scene. 7 AA 1687-8.

SUMMARY OF THE ARGUMENT

The district court below erred in denying Robertson's habeas claims of ineffective assistance of counsel both at trial and on appeal without conducting an evidentiary hearing and erred in its application of law and determination of facts not supported by substantial evidence in the record. Specifically, counsel's failure to object on grounds of other bad act evidence to a text message between defendants which referenced "hitting a house" when the actual crime was one of robbery, not burglary, was deficient and prejudicial to Robertson. Counsel failed to seek severance of trial from co-defendant Wheeler who had an antagonistic defense which sought to shift blame away from himself to Robertson's brother which undermined Robertson's defense and resulted in grossly disparate outcomes. Counsel failed to investigate and raise Robertson's substantial mental health issues of a learning disability, mild mental retardation, bipolar disorder, schizophrenia, and ADHD either at trial to negate the specific intent crimes or at sentencing in

mitigation. Finally, counsel was ineffective on appeal for failing to communicate with Robertson and for failing to raise several meritorious issues. But for these errors, the outcome of Robertson's trial and appeal would have been different.

ARGUMENT

An indigent defendant possesses a constitutional right to reasonably effective assistance of counsel at trial and on appeal. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984) (trial); *Evitts v. Lucey*, 469 U.S. 387, 391, 105 S. Ct. 830, 833 (1985) (appeal); *Warden v. Lyons*, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984), *cert. denied*, 471 U.S. 1004, 105 S. Ct. 1865 (1985). To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a convicted defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that he was prejudiced as a result of counsel's performance. *Strickland*, 466 U.S. at 687-88, 692, 104 S. Ct. at 2064-65, 2067. Prejudice is demonstrated where counsel's errors were so severe that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id*. at 694, 104 S. Ct. at 2068. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome of trial. *Id*. The defendant carries the affirmative burden of establishing prejudice. 466 U.S. at 693, 104 S. Ct. at 2067-68.

A claim of ineffective assistance of counsel presents a mixed question of law and fact that is subject to independent review. *Kirksey v. State*, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996). However, a district court's factual findings will be given deference by this court on appeal, so long as they are supported by substantial evidence and are not clearly wrong. *Riley v. State*, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994). This Court reviews the court's application of the law to those facts de novo. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005). Appellant Robertson was denied his right to effective assistance of counsel under the Sixth Amendment to the U.S. Constitution as set forth in the following claims for relief, which the district court erred in denying.

I. INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO OBJECT TO OTHER BAD ACT EVIDENCE OF TEXT MESSAGE ABOUT "HITTING A HOUSE"

Before the start of testimony, the parties discussed the admissibility of evidence which the State intended to reference in its opening statement to the jury and elicit through witnesses at trial. 3 AA 596-605. Specifically, the day before the murder there was a posting via Messenger from Raekwon Robertson's Facebook account to DeShawn Robinson's cell phone: "Ask DJ if he trying hit a house tonight Me, you, Sace and him. Sace already said yeah." *Id*. The State argued for admissibility as *res gestae* because the victim was caught, in essence, in the middle

of the efforts to "hit his house" and the statement showed intent. *Id*. Attorney Sanft objected on Robertson's behalf, but only on grounds that the message should not be referenced in opening statement out of an abundance of caution until such time as the State had laid proper foundation through a proper witness. *Id*. The State responded it had a good faith basis for admissibility and further argued the message was made in furtherance of the conspiracy to commit robbery as charged in this case. *Id*. The judge allowed the message to be referenced in the prosecutor's opening statement. *Id*.

The State then told the jury about the message in its opening statement and presented its theory of the case: "Why were they there? They went to hit a house that night, but instead, something else happened. They saw an opportunity to hit Gabriel Valenzuela . . . ." 3 AA 634-5, 646. The State then elicited the message about robbing or hitting a house through the cooperating co-defendant DeShawn Robinson and again through Det. Dosch without further objection from Robertson's counsel, Sanft. 4 AA 991-1000; 5 AA 1001-2; 6 AA 1383-4.

The district court denied this claim on grounds that the text message constituted *res gestae*, was not subject to a *Petrocelli* hearing, and so counsel was not ineffective. 8 AA 1781-2. However, the State could have elicited the four defendants getting together outside on the street without referencing the text message regarding other crimes. Under NRS 48.035(3), a witness may only testify

to an uncharged act or crime if it is so closely related to the act in controversy that the witness cannot describe the act without referring to the other uncharged act or crime. *Bellon v. State*, 121 Nev. 436, 444, 117 P.3d 176, 181 (2005). The encounter, robbery, and murder of the victim in the case could all have been described to the jury without specifically referring to the defendants' intention of getting together that night in order for "hitting a house."

The use of uncharged bad act evidence to convict a defendant is heavily disfavored in our criminal justice system because bad acts are often irrelevant and prejudicial and force the accused to defend against vague and unsubstantiated charges. *Tavares v. State*, 117 Nev. 725, 730, 30 P.3d 1128, 1131 (2001); NRS 48.045. The principal concern with admitting such acts is that the jury will be unduly influenced by the evidence, and thus convict the accused because it believes the accused is a bad person. *Id*. In *Armstrong v. State*, 110 Nev. 1322, 1323, 885 P.2d 600, 600-01 (1994) (citing *Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503 (1985)), this court has stated:

> Before admitting evidence of a prior bad act or collateral offense, the district court must conduct a hearing outside the presence of the jury. During the hearing, the state must present its justification for admission of the evidence, . . . [and] prove by clear and convincing evidence that the defendant committed the collateral offense, and the district court must weigh the probative value of the proffered evidence against its prejudicial effect.

Armstrong, 110 Nev. at 1323-24, 885 P.2d at 601. The *Petrocelli* hearing must be conducted on the record to allow this court a meaningful opportunity to review the district court's exercise of discretion. *Id*.

Counsel was ineffective in failing to specifically object to the text message on grounds that it constituted evidence of an uncharged crime, namely, a conspiracy to burglarize or "hit" a house. But Robertson and the other defendants were not charged with burglary or home invasion. See NRS 205.060, 205.067. Instead, the conspiracy as charged was to rob a person outside on the street. 1 AA 110. The State even conceded in its opening statement that defendants supposedly got together that night to commit one crime, a residential burglary or home invasion, but when they saw the victim, they spontaneously took advantage of that new opportunity and committed an entirely different type of crime, a robbery of the person. 3 AA 634-5, 646. Accordingly, had there been a *Petrocelli* hearing, the text message would not have been admitted because it was not relevant to a conspiracy or intent to rob the victim in this case. The text message was extraordinarily prejudicial in that defendants were labeled as having pre-planned a residential burglary or home invasion as opposed to simply committing a crime of opportunity. Because there was no *Tavares* instruction on other bad acts, the risk is too great that the jury punished Robertson for his bad character and convicted him of the charged offenses based on propensity. The district court erred in denying this claim as *res gestae* did

not apply and the prejudicial other bad act evidence would have been excluded had counsel objected on those grounds.

II. COUNSEL FAILED TO SEEK SEVERANCE OF TRIAL FROM CO-DEFENDANT WHEELER

While there were four defendants charged with this crime, they all received disparate outcomes and sentences in large part because Appellant was tried jointly with his co-defendant Wheeler. Counsel was ineffective in failing to seek severance from Wheeler, but the district court denied this claim finding that their defenses were not mutually antagonistic and there was no prejudice. 8 AA 1783-4. The district court's ruling is not supported by the record or the law.

Co-defendant Demario Lofton-Robinson escaped a joint trial because he was at Lake's Crossing at the time. 1 AA 100-2, 103-8. Upon his return, he accepted a plea bargain for Second Degree Murder with use of a Deadly Weapon and received an aggregate sentence of 18 to 45 years in prison. 7 AA 1663-5. His younger brother, co-defendant DeShawn Robinson entirely escaped a murder charge by agreeing to testify for the State against the other defendants and eventually received probation. 7 AA 1693. Even co-defendant Davontae Wheeler was only found guilty of Second Degree Murder and was given an aggregate sentence of 12 years to life. 7 AA 1659. In contrast, Appellant was the only one of the four to be convicted of

First Degree Murder with use of a Deadly Weapon and received the most severe sentence of an aggregate 28 years to life. 7 AA 1600-3.

If two or more defendants participated in the same unlawful act or transaction, the State may charge the defendants in the same indictment or information. NRS 173.135. But "[i]f it appears that a defendant . . . is prejudiced by a joinder . . . of defendants . . . for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires." NRS 174.165(1). However, joinder is not preferable if it will compromise a defendant's right to a fair trial. *Marshall v. State*, 118 Nev. 642, 646-47, 56 P.3d 376, 379 (2002). "The decisive factor in any severance analysis remains prejudice to the defendant." *Id*. More specifically, severance should be granted "if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Id*., quoting *Safiro v. United States*, 506 U.S. 534, 539 (1993).

Appellant was prejudiced in his association and joint trial with co-defendant Wheeler who was open-carrying a firearm at the convenience store shortly before the murder, yet was not convicted of using a deadly weapon. Wheeler's theory of defense was that he was no longer present at the time of the crime and he was mistaken for another suspect, Adrian Robinson, who was Appellant's brother. 3 AA 648-51; 7 AA 1513-29. Appellant's defense on the other hand was that there was

insufficient evidence to corroborate DeShawn Robinson's testimony. 3 AA 646-7; 6 AA 1495 — 7 AA 1513. Wheeler successfully used his joint trial with Appellant to his advantage to minimize his own culpability and shift blame to Appellant. These mutually antagonistic defenses prejudiced Appellant resulting in a more severe conviction and sentence, which could have been alleviated by severing his case from Wheeler.

Additionally, Appellant would have accepted the plea bargain offered by the State but was prevented from doing so because Wheeler refused the offer which was contingent on both accepting because they were being tried jointly. 1 AA 120-4. There had already been a de facto severance of co-defendant Demario Lofton-Robinson, so trying Appellant and Wheeler separately would not have impaired the efficient administration of justice. Counsel was ineffective in failing to seek severance from co-defendant Wheeler in the trial of this case and the district court erred in finding otherwise.

III. COUNSEL FAILED TO INVESTIGATE AND RAISE APPELLANT'S MENTAL HEALTH ISSUES AT TRIAL AS DISPROVING SPECIFIC INTENT

Appellant's counsel called no witnesses at trial and Appellant himself did not testify. So, the jury heard nothing at all about Appellant's mental health issues and how they might have affected his behavior and intent the night of the robbery.

Without hearing any testimony, the district court denied this habeas claim of ineffective assistance of counsel on grounds that it was a reasonable strategic decision virtually unchallengeable. 8 AA 1784-6. While true that counsel pursued a theory of defense that the evidence was insufficient to convict beyond a reasonable doubt, presenting this mental health evidence was not inconsistent with such an argument and the failure to present it was both deficient and prejudicial to Appellant as it would have changed the outcome of the case.

Evidence of a mental disorder or defect not raising to the level required for an insanity instruction may be considered in determining whether a defendant had the requisite intent at the time of the offense. See *Fox v. State*, 73 Nev. 241, 247, 316 P.2d 924, 927 (1957); *United States v. Brown*, 326 F.3d 1143, 1146 (10th Cir. 2003) (Evidence of a defendant's mental condition is admissible for the purpose of disproving specific intent).

Prior to trial, Appellant had undergone a couple competency evaluations by Dr. Lawrence Kapel and Dr. John Paglini. 7 AA 1698-1710. These reports confirmed that although Appellant was competent to stand trial, he suffered from "bipolar disorder, schizophrenia, and ADHD." *Id*. Although Appellant was receiving treatment and medication while in custody, at the time of the instant offense he had been off his medications for over a year. *Id*. When off his medications, he reported hearing voices, paranoia, and blackouts and had no memory

of the offense. *Id*. Appellant dropped out of school in 11th grade where he had been in special education for a "learning disability" and he received social security. *Id*.

Appellant's mother, Erika Loyd, gave a voluntary statement to police on August 15, 2017, and she confirmed that he has mental illnesses for which he receives social security benefits. 7 AA 1712-36. Specifically, she explained that Appellant has been diagnosed with schizophrenia, bipolar, mild mental retardation, learning disability, and sickle cell trait. *Id*. Appellant was prescribed and took several medications to include Adderall and Abilify but she had him stop taking them because it made him "like a zombie." *Id*.

Appellant's counsel did not investigate nor present any of this mental health evidence at trial as a defense to the specific intent crimes of Conspiracy to Commit Robbery, Attempt Robbery with use of a Deadly Weapon, and First Degree Murder. *Washington v. State*, 132 Nev. 655, 664, 376 P.3d 802, 809 (2016) (Conspiracy is a specific intent crime); *Johnson v. State*, 123 Nev. 139, 142, 159 P.3d 1096, 1097 (2007) (An attempt crime is a specific intent crime); *Hancock v. State*, 80 Nev. 581, 583, 397 P.2d 181, 182 (1964) (First degree murder is a specific intent crime). Had the jurors heard the evidence of Appellant's various mental health conditions and that he had not been taking his medications at the time, there is a reasonable probability they would not have found that he possessed the *mens rea* necessary for

the specific intent crimes charged and he would have been acquitted or convicted of lesser offenses. The district court erred in denying this claim.

IV. COUNSEL FAILED TO INVESTIGATE AND RAISE APPELLANT'S MENTAL HEALTH ISSUES AT SENTENCING IN MITIGATION

The district court denied this claim of ineffective counsel at sentencing on grounds that it did not rise to the level of *Strickland*, that Appellant himself intentionally decided to withhold mitigating evidence, and that reasonable strategic decisions by counsel are virtually unchallengeable. 8 AA 1757-8. The district court erred as such determination could not have been made on the record alone and would have required an evidentiary hearing which did not occur.

At sentencing on June 11, 2020, Appellant informed the court that he had to go to the extraordinary length of personally contacting the prosecutor by letter to get a copy of his PSI because he could not get in contact with his own counsel. 7 AA 1589. He only received the PSI the day before sentencing. *Id*. Arguing on his behalf, counsel asked that all counts run concurrent but otherwise submitted the sentencing determination to the judge because she had heard the trial testimony and was familiar with the case. 7 AA 1590-1. But the prosecutor had asked for extra time on the deadly weapon enhancement and counsel failed to respond to this argument. 7 AA 1588-91. Counsel erred in failing to argue for a fixed term of 50

years on the murder charge as opposed to a life sentence and further erred in failing to argue for a 12-month minimum sentence on the deadly weapon enhancement. *Id*. In fact, counsel failed to present any mitigation evidence or argument at all. *Id*. As a result, and without being given any reason to reduce the sentence, the judge imposed a life term for the murder and gave the maximum possible sentence on the deadly weapon enhancement of 8 to 20 years consecutive. 7 AA 1591-2.

Counsel failed to communicate with Appellant in advance of sentencing and had no discernible plan or strategy for presenting mitigating evidence or arguments to rebut the prosecutor. Evidence of Appellant's mental health issues including bipolar disorder, schizophrenia, paranoia and ADHD as set forth in the argument above and in the competency evaluations and mother's statement to police are compelling mitigation evidence. 7 AA 1698-1710, 1712-36. Yet, the sentencing transcript is devoid of any reference to Appellant's serious mental health conditions either from his own counsel or the judge in pronouncing the sentence. Had the judge been made aware of this evidence and had it been persuasively argued, there is a reasonable probability that she would have imposed a sentence somewhat less than the maximum allowed by law. The district court's ruling to the contrary is not supported by the evidence or the law.

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V. COUNSEL PROVIDED INEFFECTIVE ASSISTANCE ON APPEAL

The district court judge below found that appellate counsel's performance on appeal was reasonably effective and resulted in no prejudice, both in terms of counsel's communication with Appellant and the issues he strategically chose to raise on appeal. But this is contrary to the record which shows that Appellant was completely unaware that an appeal had been filed on his behalf and the issues counsel failed to raise were meritorious and would resulted in a different outcome.

The constitutional right to effective assistance of counsel extends to a direct appeal. *Burke v. State*, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). A claim of ineffective assistance of appellate counsel is reviewed under the "reasonably effective assistance" test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). To state a claim of ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness and resulting prejudice such that the omitted issue would have a reasonable probability of success on appeal. *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).

Appellant continued to be represented by counsel Michael Sanft on direct appeal of his conviction, however counsel utterly failed to keep in touch and communicate with Appellant about the appeal. Appellant was so unaware of the appeal that he filed a pro se habeas petition in this case on October 29, 2020, which

raised an appeal deprivation claim under the mistaken belief that no appeal had been filed. 7 AA 1611-2. Unbeknownst to Appellant, the appeal had been filed and was pending at that time. 7 AA 1667-8. Even as late as May 22, 2022, Appellant was still trying to contact Attorney Sanft regarding the appeal to no avail. 7 AA 1738-9.

Pursuant to the Nevada Supreme Court Performance Standards for Indigent Defense (ADKT No. 411), Standard 3-5: Duty to Confer and Communicate With Client in preparing and processing the appeal, counsel should:

> (a) assure that the client is able to contact appellate counsel telephonically during the pendency of the appeal including arrangements for the acceptance of collect telephone calls. Promptly after appointment or assignment to the appeal, counsel shall provide advice to the client, in writing, as to the method(s) which the client can employ to discuss the appeal with counsel; (b) discuss the merits, strategy, and ramifications of the proposed appeal with each client prior to the perfection and completion thereof. When possible, appellate counsel should meet in person with the client, and in all instances, counsel should provide a written summary of the merits and strategy to be employed in the appeal along with a statement of the reasons certain issues will not be raised, if any. It is the obligation of the appellate counsel to provide the client with his or her best professional judgment as to whether the appeal should be pursued in view of the possible consequences and strategic considerations; (c) inform the client of the status of the case at each step in the appellate process, explain any delays, and provide general information to the client regarding the process and procedures that will be taken in the matter, and the anticipated timeframe for such processing; (d) provide the client with a copy of each substantive document filed in the case by both the prosecution and defense; (e) respond in a timely manner to all correspondence from clients, provided that the client correspondence is of a reasonable number and at a reasonable interval; and (f) promptly and accurately inform the client of the courses of action that may be pursued as a result of any disposition of the appeal and the scope of any further representation counsel will provide.

None of this communication occurred in the present case. See also, Rules of Professional Conduct, Rule 1.4 on Communication. This prevented Appellant from having any input into the appeal process.

Additionally, although Attorney Sanft did file a direct appeal, the Opening Brief consisted of just two issues raising a *Batson* challenge and arguing lack of sufficient evidence for co-conspirator corroboration. 7 AA 1670-84. Counsel did not file a Reply Brief. 7 AA 1667-8. Considering this was a direct appeal from an eight-day jury trial with a life sentence, such appellate briefing was wholly deficient and inadequate.

Appellate counsel briefly cited the law on sufficiency of the evidence but failed to articulate for the appellate court the facts and circumstances which raise a reasonable doubt about Appellant's guilt. 7 AA 1670-84. Although a .22 caliber firearm was found in Appellant's possession which was similar to one discharged during the murder, this was a week after the crime and the State had no evidence that the firearm was not acquired or had come into Appellant's possession sometime after the murder. See 5 AA 1192-5. The rifling on the .22 bullet was at best only similar to the rifling characteristics of the firearm found in Appellant's apartment. 6 AA 1304. Also, that particular firearm bore DNA not just from Appellant, but from some other unidentified person who could have committed the murder. 4 AA 754-60. That unknown DNA was found on the clip of the gun itself. *Id*. DNA from the

clip is more probative of someone who loaded a firearm with the intention to use it, as opposed to DNA on the outside of the firearm which simply indicates Appellant had touched the gun at some point. Even if Appellant was present at the convenience store before the robbery, such is not suspicious as he actually lived nearby and it does not indicate that he subsequently must have travelled with the others to the nearby murder scene. 4 AA 839; 5 AA 1007-9. The only independent eyewitness, jogger Robert Mason, could not identify Appellant as being present. 3 AA 674, 681-2.

Also, counsel should have raised a fair-cross section argument on appeal as this had been the subject of an objection and testimony from the jury commissioner at the beginning of the trial and the district court judge had denied the motion. 2 AA 289-338. There were only two African Americans on the sixty-member jury venire which constituted an under-representation of African Americans and denied Robertson a fair trial by a jury composed of a representative fair cross-section of the community. *Id*. Co-defendant Wheeler's counsel made a motion to strike the venire and Attorney Sanft on behalf of Robertson joined the motion but offered no other argument or support. 2 AA 291, 338. The district court judge found there was an absolute disparity of 7% and a comparative disparity of 58%. 2 AA 302. After testimony by the jury commissioner, the judge denied the motion for failing to show that underrepresentation was due to systematic exclusion. 2 AA 338.

In *Morgan v. State*, 416 P.3d 212, 221 (Nev. 2018), the Court set forth a three-prong test that trial courts must follow in order to address the question of whether the venire is a representative cross section of the community: (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this under representation is due to the systematic exclusion of the group in the jury selection process. *Id*., citing *Williams v. State*, 121 Nev. 934, 939, 125 P.3d 627, 631 (2005). In *Valentine*, the Court found that the "random selection" practice of sending an equal number of jury summonses to each postal zip code without ascertaining the percentage of the population in each zip code which constituted a distinctive group, could establish a prima facie case of systematic exclusion of that group. *Valentine v. State*, 135 Nev. 463, 466, 454 P.3d 709 (2019).

Finally, appellate counsel also should have raised on appeal admission of the text message about "hitting a house" which implicated other bad acts for which Appellant had not been charged as raised in Claim 1 above which is incorporated herein. Had counsel raised all the issues above, there is a reasonable probability that one or more of them would have been successful on appeal resulting in a different outcome. The district court's legal conclusions are contrary to established law and

the factual findings on these issues should not be given deference by this court on appeal because they are not supported by substantial evidence and are clearly wrong.

CONCLUSION

Wherefore, Robertson respectfully requests this Court reverse the judgment of the district court below and direct that the petition for post-conviction relief be granted.

DATED this 7th day of March, 2023.

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 5,488 words and 24 pages.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 7th day of March, 2023.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on March 7, 2023. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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Chief Deputy District Attorney

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