

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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RAEKWON ROBERTSON,

Appellant,

v.

STATE OF NEVADA,

Respondent.

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CASE NO: 85932

**APPELLANT'S APPENDIX**

**Volume 8**

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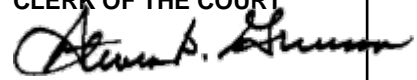
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DISTRICT COURT  
CLARK COUNTY, NEVADA

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

**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**

DATE OF HEARING: OCTOBER 13, 2022

TIME OF HEARING: 8:30 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through ALEXANDER CHEN, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Response to Petitioner's Petition for Writ Of Habeas Corpus (Post-Conviction) and Petitioner's Supplemental Post Conviction Petition for Writ of Habeas Corpus.

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

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1 **POINTS AND AUTHORITIES**

2 **STATEMENT OF THE CASE**

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

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

### **STATEMENT OF THE FACTS**

24 In accordance with his GPA, Deshawn Robinson (hereinafter “Robinson”) testified  
25 against Petitioner and Wheeler in exchange for not being charged with Murder with Use of a  
26 Deadly Weapon. Per his testimony, on August 8, 2017, Petitioner sent his brother co-defendant  
27 Lofton-Robinson a message inquiring as to whether the brothers were interested in joining him  
28

1 in robbing a house that evening, for participation in which burglary Wheeler had already  
2 accepted the invitation. The four men, Petitioner, Wheeler, Lofton-Robinson, and Robinson  
3 thusly agreed to rob a house. All men carried firearms, with the exception of Robinson. That  
4 evening, the group stopped at a convenience store wherein the clerk noticed the gun Wheeler  
5 carried in a holster on his hip. Just before midnight, the group drove to Dewey and Lindell  
6 Avenue in Lofton-Robinson's white Mercury Grand Marquis. At the same time, Mr. Robert  
7 Mason jogged past, noticed the men loitering in the area in the middle of the night, and made  
8 a mental note of their car's license plate. Shortly after midnight, young nursing student Gabriel  
9 Valenzuela had returned to his home at 5536 West Dewey. After retrieving the family's mail  
10 from his mailbox, Mr. Valenzuela walked past the group on his way into his home. Petitioner  
11 and his three accomplices demanded everything Mr. Valenzuela had, then shot him three times  
12 in the head and torso, leaving him to die alone in his driveway. The foursome then fled the  
13 scene without taking any of Mr. Valenzuela's property. Robinson also testified that Petitioner  
14 fired first with a .22 caliber gun. Mr. Valenzuela's wounds included a gunshot wound in his  
15 abdomen from a .22 caliber gun. On the evening of Mr. Valenzuela's slaying, Petitioner was  
16 the sole carrier of a .22 caliber firearm. In a search of Petitioner's home, police recovered a  
17 .22 caliber gun that retained Petitioner's DNA. A bullet recovered from Mr. Valenzuela's  
18 abdomen wound was too damaged to be matched to Petitioner's gun, but neither could the gun  
19 be eliminated as having fired said bullet. Finally, ballistics evidence matched Petitioner's gun  
20 to a cartridge case found at the crime scene.

## 21 ARGUMENT

### 22 **I. PETITIONER'S PRO PER PETITION IS LIMITED TO CLAIMS THAT ARE 23 NOT COGNIZABLE IN A PETITION FOR WRIT OF HABEAS CORPUS**

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

26 NRS 34.810(1) reads:

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

28 ///

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

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

6 . . .

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

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

18 Petitioner argues that the jury was not properly representative of the community, that  
19 the judge and the prosecutor were not fair. Not only does he lack support for either of these  
20 claims, but he also failed to raise them in a direct appeal. Therefore, in this petition, this court  
21 should consider the meritless claims that he raises in his pro per petition as waived.

22 **A. Petitioner Cannot Demonstrate Jury Venire Was Product of**  
23 **Systematic Exclusion**

24 Petitioner alleges that was "only one mixed African-American in the jury box when  
25 there should have been three" because the defendants are people of color. Petition at 5.  
26 Assuming that Petitioner's assertion is an attempt to argue that the jury venire failed to  
27 represent a fair cross section of the community, this allegation is bare and naked, as well as  
28 repelled by the record.



1       The Sixth and Fourteenth Amendments of the United States Constitution guarantee a  
2 jury venire that is selected from a fair cross section of the community. Morgan v. State, 134  
3 Nev. 200, 200, 416 P.3d 212, 217 (2018). A prima facie violation of the fair-cross-section  
4 requirement necessitates that the defendant establish: (1) that the group alleged to be excluded  
5 is a "distinctive" group in the community; (2) that the representation of this group in venires  
6 from which juries are selected is not fair and reasonable in relation to the number of such  
7 persons in the community; and (3) that this underrepresentation is due to systematic exclusion  
8 of the group in the jury-selection process. Id. Valentine v. State established that the system of  
9 selecting jurors by sending an equal number of jury summonses in each jurisdiction without  
10 ascertaining the percentage of the population in each zip code, if true, could establish the  
11 underrepresentation of a distinctive group based on systematic exclusion. 135 Nev. 463, 466,  
12 454 P.3d 709, 714-15 (2019). However, Petitioner has failed to establish that the system  
13 described in Valentine was the same system utilized to compose the jury venire for his trial.  
14 In fact, a Batson hearing held on the second day of Petitioner's trial confirmed that challenged  
15 system in Valentine was in fact not used to compose Petitioner's jury venire. TT Day 2 at 50.  
16 Thus, the suggestion that the State engaged in the systematic exclusion of any group in the  
17 composition of the jury venire is meritless.

18                   **B. Petitioner Cannot Establish Jury Misconduct Nor That He Was**  
19                   **Prejudiced Thereby**

20       Petitioner alleges that juror #11 appeared to have been falling asleep during trial. Pet.  
21 At 5. However, this is a bare and naked allegation that demands summary denial. Hargrove,  
22 100 Nev. at 502, 686 P.2d at 225.

23       The Sixth Amendment of the United States Constitution guarantees criminal defendants  
24 the right to a trial with a fair and impartial jury. Burnside v. State, 131 Nev. 371, 410, 352 P.3d  
25 627, 654 (2015) (citing Irvin v. Dowd, 366 U.S. 717, 722, 81 S. Ct. 1639, 6 L. Ed. 2d 751  
26 (1961)). A defendant could be deprived of the Fifth Amendment right to due process or the  
27 Sixth Amendment right to an impartial jury if jurors fall asleep and are unable to fairly consider  
28 the defendant's case. See United States v. Freitag, 230 F.3d 1019, 1023 (7th Cir. 2000); United

1 States v. Springfield, 829 F.2d 860, 864 (9th Cir. 1987). Generally, juror misconduct, such as  
2 inattentiveness or sleeping, does not warrant a new trial absent a showing of prejudice—i.e.,  
3 that the defendant did not receive a fair trial. See United States v. Lawrence, 405 F.3d 888,  
4 903 (10th Cir. 2005).

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

8 Second, even if there were any basis for Petitioner's allegation, Petitioner must  
9 nevertheless demonstrate that he was prejudiced by this alleged misconduct. However, there  
10 was ample evidence to support Petitioner's convictions, his trial was conducted with a fair and  
11 impartial jury, and Petitioner has failed to even assert otherwise.

12 **C. Petitioner Cannot Establish Any Personal Relationship between the**  
13 **Prosecutor and Judge**

14 Petitioner alleges that a personal relationship between Chief Deputy District Attorney  
15 Giancarlo Pesci and District Court Judge Michelle Leavitt may have substantially affected his  
16 trial and sentencing. Pet. at 5. However, there is no suggestion of any such relationship  
17 between Chief Deputy District Attorney Giancarlo Pesci and District Court Judge Michelle  
18 Leavitt beyond Petitioner's unsupported assertion thereof. Accordingly, this claim is a bare  
and naked assertion suitable only for summary denial.

19 **D. Petitioner Cannot Establish the Existence of Any Contingent Plea**  
20 **Agreement**

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

27 Moreover, if a contingent plea deal had been offered to Petitioner and co-defendant  
28

1 Wheeler, there is no evidence that Petitioner was inclined to accept said offer. Even if  
2 Petitioner were so inclined, Appellant has no right to a plea negotiation and the State has  
3 significant discretion regarding both the content and conditions of any offers it chooses to  
4 extend. Lafler v. Cooper, 566 U.S. 156, 168, 132 S. Ct. 1376, 1387 (2012). NRS 174.063 sets  
5 forth a written statutory form for plea agreements. When addressing NRS 174.063, the Nevada  
6 Supreme Court has noted that the language of the statute was “specifically crafted so that the  
7 parties “retain some discretion as to the form of the written agreement, to facilitate the various  
8 ‘fact patterns’ that arise in criminal law.”” Sparks v. State, 110 P.3d 486 (2005) (quoting  
9 Hearing on S.B. 549 Before the Senate Judiciary Comm., 68th Leg. (Nev., June 9, 1995)  
10 (summarizing statement of Clark County Chief Deputy District Attorney Ben Graham)). As  
11 such, the State had the discretion to make any plea offer extended to Appellant contingent on  
12 Harlan accepting his plea agreement as well.

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

26 ///

27 ///

## II. COUNSEL WAS NOT INEFFECTIVE

The basis of all claims Petitioner raised in his Supplemental is ineffective assistance of counsel. Specifically, Petitioner alleges that Counsel failed to: object to a text message on grounds that it constituted evidence of uncharged bad acts; seek severance of trials for Petitioner and co-defendant Wheeler; investigate and raise Petitioner's alleged mental health issues at trial; and raise Petitioner's alleged mental health issues at sentencing as mitigation evidence. Supp. at 5-12. The final claim in Petitioner's Supplemental Brief is that counsel was ineffective during the appellate process. Supp. at 12-15.

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

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

The court begins with the presumption of effectiveness and then must determine whether the defendant has demonstrated by a preponderance of the evidence that counsel was ineffective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). "Effective counsel

1 does not mean errorless counsel, but rather counsel whose assistance is “[w]ithin the range of  
2 competence demanded of attorneys in criminal cases.” Jackson v. Warden, 91 Nev. 430, 432,  
3 537 P.2d 473, 474 (1975).

4 Counsel cannot be ineffective for failing to make futile objections or arguments. See  
5 Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Trial counsel has the  
6 “immediate and ultimate responsibility of deciding if and when to object, which witnesses, if  
7 any, to call, and what defenses to develop.” Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167  
8 (2002).

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

19 “There are countless ways to provide effective assistance in any given case. Even the  
20 best criminal defense attorneys would not defend a particular client in the same way.”  
21 Strickland, 466 U.S. at 689, 104 S. Ct. at 2065. “Strategic choices made by counsel after  
22 thoroughly investigating the plausible options are almost unchallengeable.” Dawson v. State,  
23 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784  
24 P.2d 951, 953 (1989). In essence, the court must “judge the reasonableness of counsel's  
25 challenged conduct on the facts of the particular case, viewed as of the time of counsel's  
26 conduct.” Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.

27 ///

1 Even if a defendant can demonstrate that his counsel's representation fell below an  
2 objective standard of reasonableness, he must still demonstrate prejudice and show a  
3 reasonable probability that, but for counsel's errors, the result of the trial would have been  
4 different. McNelson v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing  
5 Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). "A reasonable probability is a probability  
6 sufficient to undermine confidence in the outcome." Id. (citing Strickland, 466 U.S. at 694,  
7 104 S. Ct. at 2068).

8 The Nevada Supreme Court has held "that a habeas corpus petitioner must prove the  
9 disputed factual allegations underlying his ineffective-assistance claim by a preponderance of  
10 the evidence." Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). Furthermore,  
11 claims of ineffective assistance of counsel asserted in a petition for post-conviction relief must  
12 be supported with specific factual allegations, which if true, would entitle the petitioner to  
13 relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked"  
14 allegations are not sufficient, nor are those belied and repelled by the record. Id. NRS  
15 34.735(6) states in relevant part, "[Petitioner] must allege specific facts supporting the claims  
16 in the petition[.] . . . Failure to allege specific facts rather than just conclusions may cause your  
17 petition to be dismissed." (emphasis added).

18 Additionally, Petitioner's claims are not sufficiently pled pursuant to Hargrove, 100  
19 Nev. at 502, 686 P.2d at 225, and Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987).  
20 Indeed, a party seeking review bears the responsibility "to cogently argue, and present relevant  
21 authority" to support his assertions. Edwards v. Emperor's Garden Restaurant, 122 Nev. 317,  
22 330 n.38, 130 P.3d 1280, 1288 n.38 (2006); Dept. of Motor Vehicles and Public Safety v.  
23 Rowland, 107 Nev. 475, 479, 814 P.2d 80, 83 (1991) (defendant's failure to present legal  
24 authority resulted in no reason for the district court to consider defendant's claim); Maresca  
25 103 Nev. at 673, 748 P.2d at 6 (an arguing party must support his arguments with relevant  
26 authority and cogent argument; "issues not so presented need not be addressed"); Randall v.  
27 Salvation Army, 100 Nev. 466, 470-71, 686 P.2d 241, 244 (1984) (court may decline  
28 consideration of issues lacking citation to relevant legal authority); Holland Livestock v. B &

1 C Enterprises, 92 Nev. 473, 533 P.2d 950 (1976) (issues lacking citation to relevant legal  
2 authority do not warrant review on the merits). Claims for relief devoid of specific factual  
3 allegations are “bare” and “naked,” and are insufficient to warrant relief, as are those claims  
4 belied and repelled by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225. “[Petitioner]  
5 *must* allege specific facts supporting the claims in the petition[.]...Failure to allege specific  
6 facts rather than just conclusions may cause [the] petition to be dismissed.” NRS 34.735(6)  
7 (emphasis added).

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

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

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

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

1 against the probative value of that evidence. State v. Shade, 111 Nev. 887, 894, 900 P.2d 327,  
2 331 (1995). That is, the Nevada Supreme Court has held evidence admissible under NRS  
3 48.035(3) does not require the application of the three-pronged test required by *Petrocelli* and  
4 its progeny. Lopez v. State, 2018 Nev. App. Unpub. LEXIS 409, \*2-3.

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

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

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

23 The message constitutes evidence of the parties' shared intent to seek pecuniary gain  
24 through criminal means, namely burglary. The existence of this intent makes it more probable  
25 that Petitioner and his accomplices would subsequently establish a shared intent to seek  
26 pecuniary gain by perpetrating robbery. Given that this shared intent is material to the Count  
27 1– CONSPIRACY TO COMMIT ROBBERY, evidence thereof is necessarily relevant.



Moreover, while the State sought the admission of only a single message, a properly executed search warrant recovered a litany of messages between the co-defendants that would establish Conspiracy to Commit Burglary by clear and convincing evidence. TT Day 5 at 98-99. Finally, even if the relative weights of probative and prejudicial value were considered under the doctrine of *res gestae*, Petitioner has failed to assert let alone establish that the risk of unfair prejudice to him posed by the message in question substantially outweighed the probative value thereof.

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

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

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

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

Moreover, even if the defense theories were mutually antagonistic, Petitioner fails to

1 establish that the failure to sever his trial from co-defendant Wheeler's caused him to suffer  
2 any prejudice. The decisive factor in any severance analysis remains prejudice to the  
3 defendant. Marshall v. State, 118 Nev. 642, 646, 56 P.3d 376, 378 (2002). Petitioner implies  
4 the disparities between his convictions and sentences and those of his accomplices constitute  
5 evidence of the prejudice he allegedly suffered through the joint trial. Supp at 8-9. However,  
6 Petitioner misleads the Court through this implication because these disparities instead reflect  
7 the reality that Petitioner was differently situated than his accomplices. Although a valid search  
8 warrant was properly executed on the residence of each member of the foursome responsible  
9 for Mr. Valenzuela's death, the .22 caliber bullets with the same headstamp as the cartridge  
10 case found at the murder scene and rifling characteristics similar to those recovered from Mr.  
11 Valenzuela's wounds were recovered from Petitioner's residence. TT Day 3 at 34. In addition,  
12 the Taurus .22 that testing confirmed fired the cartridge case left at the murder scene was found  
13 in the bottom left drawer of Petitioner's residence. Id. Finally, it was Petitioner's DNA that  
14 was recovered from the Taurus .22. Id. Given that Petitioner's convictions and sentences  
15 reflect the enormity of the evidence against him, the suggestion that Petitioner suffered any  
16 prejudice from his joint trial is a bare and naked assertion suitable only for summary dismissal.  
Hargrove, 100 Nev. at 502, 686 P.2d at 225.

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

19 Petitioner asserts that trial counsel was ineffective for both failing to investigate and  
20 raise Petitioner's alleged mental health issues at trial to disprove specific intent. Supp. at 9-10.  
21 However, these claims are bare and naked assertions that demand summary denial. Hargrove,  
22 100 Nev. at 502, 686 P.2d at 225.

23 Petitioner repeatedly states that trial counsel failed to investigate his mental health  
24 issues. Supp. at 9-10. However, the fact that counsel elected against raising these alleged issues  
25 at trial does not constitute evidence that counsel was unaware of them and/or failed to  
26 investigate them. Further, Petitioner fails to show how an investigation of his alleged mental  
27 health issues would have produced a more favorable outcome given the strength of the  
28

1 evidence against him. Pursuant to Molina v. State, such a claim cannot support post-conviction  
2 relief. 120 Nev. 185, 192, 87 P.3d 533, 538 (2004) (stating that a defendant who contends his  
3 attorney was ineffective because he did not adequately investigate must show how a better  
4 investigation would have rendered a more favorable outcome probable).

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

1 defense inconsistent with trial counsel's defense theory at trial, Petitioner's assertion that it  
2 should have been raised is in fact an attempt to challenge trial counsel's strategic decision to  
3 offer a contrary defense theory. "Strategic choices made by counsel after thoroughly  
4 investigating the plausible options are almost unchallengeable." Dawson 108 Nev. at 117, 825  
5 P.2d at 596.

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

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

12 When a convicted defendant complains of the ineffectiveness of counsel's assistance, the  
13 defendant must show that counsel's representation fell below an objective standard of  
14 reasonableness. Strickland 466 U.S. at 687-88, 104 S. Ct. at 2064. Regardless of whether  
15 Petitioner is citing ineffective assistance of trial or appellate counsel, the inquiry should  
16 focus on counsel's "performance as a whole". Kirksey v. State, 112 Nev. 980, 998, 923 P.2d  
17 1102 (1996). Even if a defendant can demonstrate that his counsel's representation fell below  
18 an objective standard of reasonableness, he must still demonstrate prejudice and show a  
19 reasonable probability that the result would have been different but for counsel's errors.  
20 McNelson v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing Strickland, 466  
21 U.S. at 687, 104 S. Ct. at 2064). "A reasonable probability is a probability sufficient to  
22 undermine confidence in the outcome." Id. (citing Strickland, 466 U.S. at 694, 104 S. Ct. at  
23 2068).

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

27 We're going to submit everything to the Court. And the reason for that  
28 is this, Mr. Robertson is intent on filing an appeal, is intent on going  
forward with that aspect of it. I believe that ultimately what we have

1 here is a situation where Mr. Robertson's in a position where the  
2 reason why he's not talking to the Court or saying anything to the  
Court is because he wants to reserve that -- that right.

3 Sentencing Transcript at 5-6.

4 Petitioner was present while his counsel offered this explanation, yet he permitted the  
5 hearing to proceed without demur. Clearly, Petitioner and counsel had engaged in a prior  
6 discussion during which they jointly made the strategic decision to withhold mitigation  
7 evidence or other argument. "Strategic choices made by counsel after thoroughly  
8 investigating the plausible options are almost unchallengeable." Dawson, 108 Nev. at 117,  
9 825 P.2d 596; see also Jones v. State, 95 Nev. 613, 617, 600 P.2d 247, 250 (1979)  
10 (recognizing that when a defendant participates in an alleged error, he is estopped from  
11 objecting to it on appeal).

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

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

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

A defendant is not entitled to a particular “relationship” with her attorney. Morris v. Slappy, 461 U.S. 1, 14, 103 S. Ct. 1610, 1617 (1983). There is no requirement for any specific amount of communication as long as counsel is reasonably effective in his or her representation. See Id.

Petitioner alleges that Counsel failed to communicate with him during the appellate process. Supp at 13. However, Petitioner fails to establish that this alleged lack of communication at all compromised Counsel’s effectiveness during the appellate process. Not only has Petitioner failed to establish that his input would have had any impact on the appellate process, but he has also failed to even suggest that he had any input to provide. Therefore, his claim that Counsel’s alleged lack of communication with him constitutes ineffectiveness is bare and naked, suitable only for summary denial. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

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

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

There is a strong presumption that appellate counsel's performance was reasonable and fell within “the wide range of reasonable professional assistance.” See United States v. Aguirre, 912 F.2d 555, 560 (2nd Cir. 1990); citing Strickland, 466 U.S. at 689, 104 S. Ct. at 2065. The United States Supreme Court has held that there is a constitutional right to effective assistance of counsel in a direct appeal from a judgment of conviction. Evitts v. Lucey, 469

1 U.S. 387, 396-97, 105 S. Ct. 830, 835-37 (1985); see also Burke v. State, 110 Nev. 1366, 1368,  
2 887 P.2d 267, 268 (1994). This Court has held that all appeals must be “pursued in a manner  
3 meeting high standards of diligence, professionalism and competence.” Burke, 110 Nev. at  
4 1368, 887 P.2d at 268.

5 A claim of ineffective assistance of appellate counsel must satisfy the two-prong test  
6 set forth by Strickland. Kirksey, 112 Nev. at 998, 923 P.2d at 1114. To satisfy Strickland’s  
7 second prong, the defendant must show the omitted issue would have had a reasonable  
8 probability of success on appeal. Duhamel v. Collins, 955 F.2d 962, 967 (5th Cir. 1992);  
9 Heath, 941 F.2d at 1132; Lara v. State, 120 Nev. 177, 184, 87 P.3d 528, 532 (2004); Kirksey,  
10 112 Nev. at 498, 923 P.2d at 1114.

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

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

26 However, Petitioner’s claims are belied by the record and suitable only for summary  
27 denial under Hargrove. 100 Nev. at 502, 686 P.2d at 225.

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

4 Second, as indicated above, there was ample evidence to support Petitioner's  
5 convictions. Petitioner was in possession of the bullets that bore similar characteristics to the  
6 cartridge found at the murder scene and the bullets recovered from Mr. Valenzuela's injuries.  
7 TT Day 3 at 34. Petitioner was also in possession of the Taurus .22 gun that was traced to the  
8 cartridge case at the scene. TT Day 3 at 34. The DNA found on the Taurus .22 belonged to  
9 Petitioner. TT Day 3 at 34.

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

15 Finally, Petitioner provides no grounds for why the admissibility of the text message  
16 would have made the appellate brief more likely to succeed. Instead, Petitioner merely  
17 continues to imply that the prejudicial effect of the message outweighed the probative. Supp.  
18 at 15. However, as discussed hereinabove, the message was admitted under the doctrine of *res*  
19 *gestae*. Accordingly, the determinative analysis is not a weighing of the prejudicial effect of  
20 evidence of other bad acts against the probative value of that evidence. Shade, 111 Nev. at  
21 894, 900 P.2d at 331. Thus, this argument would have been futile and counsel cannot be  
22 ineffective for failing to raise it. Ennis, 122 Nev. at 706, 137 P.3d at 1103.

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1 **CONCLUSION**

2 Based on the foregoing, the State respectfully requests Petitioner's Petition for Writ of  
3 Habeas Corpus (Post-Conviction) and Supplemental Post Conviction Petition for Writ of  
4 Habeas Corpus be denied.

5 DATED this 5th day of October, 2022.

6 Respectfully submitted,

7 STEVEN B. WOLFSON  
8 Clark County District Attorney  
Nevada Bar #01565

9 BY /s/ ALEXANDER CHEN  
10 ALEXANDER CHEN  
11 Chief Deputy District Attorney  
Nevada Bar #010539

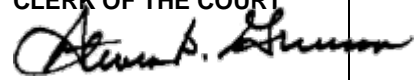
12 **CERTIFICATE OF MAILING**

13 I hereby certify that service of the above and foregoing was made this 5th day of  
14 October 2022, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

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

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

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27 17328040B/AC/jh/MVU  
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DISTRICT COURT  
CLARK COUNTY, NEVADA

RAEKWON ROBERTSON,

Plaintiff,

vs.

STATE OF NEVADA,

Defendant..

CASE NO. A-20-823892-W

DEPT. NO. XII

BEFORE THE HONORABLE MICHELLE LEAVITT, DISTRICT COURT JUDGE

THURSDAY, NOVEMBER 17, 2022

**RECORDER'S TRANSCRIPT OF PROCEEDINGS**  
**HEARING RE: PETITION FOR WRIT OF HABEAS CORPUS**

APPEARANCES:

For the Plaintiff:

STEVEN S. OWENS, ESQ.  
*via teleconference*

For the Defendant:

GIANCARLO PESCI  
PARKER P. BROOKS  
Chief Deputy District Attorneys

RECORDED BY: SARA RICHARDSON, COURT RECORDER

1 LAS VEGAS, NEVADA, THURSDAY, NOVEMBER 17, 2022, 8:48 A.M.

2 \* \* \* \* \*

3 THE COURT: Page 4, case A823892, Raekwon Robertson.

4 Mr. Owens, do you want to make your appearance?

5 MR. OWENS: Steve Owens for Mr. Raekwon Robertson, bar number 4352.

6 MR. PESCI: Giancarlo Pesci on behalf of the State.

7 THE COURT: All right. Mr. Owens, do you want to be heard?

8 MR. OWENS: Yes, absolutely. I've raised five different issues in this habeas  
9 petition. In the interest of time there's really just two that I want to focus on and that  
10 has to do with failure to raise evidence of defendant's mental illness both in guilt  
11 phase, that's issue number three, and at sentencing, that's number four.

12 This defendant is bipolar, schizophrenic. He suffers from intellectual  
13 disability. He dropped out of high school where he had a learning disability, did not  
14 complete high school. And most importantly, he was off his medications at the time  
15 of this crime and, remarkably, none of this evidence was known by the jury. He was  
16 convicted of three crimes that are all specific intent crimes, first degree murder,  
17 conspiracy, and an attempt robbery. And I think if the jury had known about his  
18 mental deficiencies they could have factored that into what was going on in his mind  
19 at the time of this offense. It's a big difference whether it was a reflex, an accidental  
20 shooting, or whether it was truly with malice and that he knew what he was doing.

21 It's a multiple defendant case and there was an avenue here of who  
22 was the instigator really, the ring leader in this -- in this crime that was committed  
23 and with his mental deficiencies, it clearly could have made him out to be less  
24 responsible and as it was, this information didn't even come out at sentencing and  
25 he got a life sentence and 8-to-20 on the use of deadly weapon, the maximum that

1 you could give him on the deadly weapon and I don't think any of this was  
2 considered and it could have reduced the offenses, could have reduced the penalty  
3 if it had been taken into account.

4 But I know the State is -- in their brief said, well, this was a matter of  
5 strategy to keep this out. I can't conceive of a rational strategic decision reason why  
6 you would not want the jury and the judge at sentencing to know about this kind of  
7 mental issues going on with the defendant. That's the most glaring issue that I saw.  
8 The others I think also have merit. But I will submit the other ones on my -- on my  
9 briefing.

10 MR. PESCI: So, Judge, what I would add is that the case itself, the trial, the  
11 evidence that you got to see as far as the meeting at the convenience store  
12 beforehand and the meeting at the actual victim's home and the planning as to who  
13 was going to be doing what all belies the allegations of the mental deficiencies. I  
14 would also note that defense counsel during trial, pretrial vigorously motion worked  
15 this case quite a bit and there was much to-do and so I believe that it's by the fact  
16 that it was belied by the record that bringing this up would have not served the  
17 defense interests.

18 THE COURT: Well, and wasn't his defense "it wasn't me"?

19 MR. PESCI: He was saying someone else was the shooter, yes.

20 THE COURT: Okay. But he never admitted that he was there?

21 MR. PESCI: No, that's not my recollection. And then there's always concerns  
22 that other crimes that might have become relevant to try to rebut the idea that  
23 somehow he did not have the capacity mentally to do this.

24 THE COURT: Okay. Anything else, Mr. Owens?

25 MR. OWENS: Well, Judge, I think he had the mental capacity, we're talking

1 about whether it -- evidence would have reduced the -- his level of culpability from  
2 first degree to, say, something like second degree. None of the other defendants  
3 were convicted of first degree murder.

4 THE COURT: But it was felony murder, right?

5 MR. OWENS: And so I don't know that this evidence was belied by the  
6 record. I've got two psychologists that documented this as well as a statement from  
7 his mother. That's all attached as exhibits to my supplemental petition. So I think  
8 it's persuasive. I think it would have made a difference and it should have come in  
9 in some manner. Despite whatever defense theory they went with, this is one that  
10 any reasonable attorney would have latched on and would have been, I think,  
11 required under the law to -- to present some of this to the jury. You can't just ignore  
12 this when you've got this in a case.

13 THE COURT: Anything else?

14 MR. PESCI: No. I'll submit it, Judge.

15 THE COURT: Okay. At this time the Court's going to deny the petition and  
16 the State can prepare the order.

17 MR. PESCI: Yes, Judge. Thank you very much.

18 THE COURT: Thank you very much.

19 MR. OWENS: Can I stay on for the appeal, Judge?

20 THE COURT: Absolutely. Absolutely. You're appointed for the appeal.  
21 Thank you.

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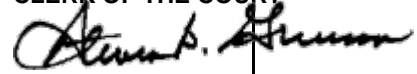
MR. OWENS: Thank you very much.

PROCEEDING CONCLUDED AT 8:53 A.M.

\* \* \* \* \*

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio-video recording of this proceeding in the above-entitled case.

  
\_\_\_\_\_  
SARA RICHARDSON  
Court Recorder/Transcriber



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.  
P.O. Box 1989 1000 N. Green Valley, #440-529  
26 Ely, NV 89301 Henderson, NV 89074

27 /s/ Amanda Hampton

28 Amanda Hampton, Deputy Clerk

**FFCO**  
STEVEN B. WOLFSON  
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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.

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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.

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1 **FACTUAL SYNOPSIS<sup>1</sup>**

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 <sup>1</sup> 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.

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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

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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

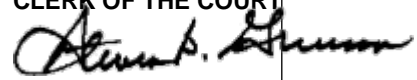
10 **AUTOMATED CERTIFICATE OF SERVICE**

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

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8 *Attorney for Petitioner Raekwon Robertson*

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 6<sup>th</sup> day of January, 2023.

21 /s/ Steven S. Owens, Esq.  
22 STEVEN S. OWENS, ESQ.  
23 Nevada Bar No. 4352  
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27 Attorney for Petitioner  
28 RAEKWON ROBERTSON



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Attorney for Petitioner  
RAEKWON ROBERTSON

## **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:

AARON FORD  
Nevada Attorney General

ALEXANDER CHEN  
Chief Deputy District Attorney

/s/ Steven S. Owens  
STEVEN S. OWENS, ESQ.