IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
Clerk of Supreme Court

RAEKWON ROBERTSON,

Appellant,

v.

STATE OF NEVADA,

Respondent.

CASE NO: 85932

APPELLANT'S APPENDIX

Volume 8

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ALPHABETICAL INDEX TO APPELLANT'S APPENDIX

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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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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On December 14, 2017, an Indictment was filed charging RAEKWON SETREY ROBERTSON aka RAEKWON ROBERTSON (hereinafter "Petitioner") along with co-defendants DEMARIO LOFTON-ROBINSON aka DEMARIO LOFTONROBINSON (hereinafter "Lofton-Robinson") and DAVONTAE AMARRI WHEELER (hereinafter "Wheeler") with seven (7) counts: Count 1– BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON (Category B Felony – NRS 205.060); Count 2– CONSPIRACY TO COMMIT ROBBERY (Category B Felony – NRS 200.380); Count 3– ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony – NRS 200.380, 199.480); Count 4– ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony – NRS 200.380, 199.480); Count 5– CONSPIRACY TO COMMIT ROBBERY (Category B Felony – NRS 200.380, 199.480); Count 6– ATTEMPT ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony – NRS 200.380, 193.165); and Count 7 - MURDER WITH USE OF A DEADLY WEAPON (Category A Felony – NRS 200.010, 200.030, 193.165). On April 19, 2018, a Superseding Indictment was filed charging Petitioner and both co-defendants with the same. On January 2, 2019, Lofton-Robinson moved to sever his trial and the State did not oppose this motion. On February 11, 2020, an Amended Superseding Indictment was filed charging Petitioner and Wheeler with Count 1– CONSPIRACY TO COMMIT ROBBERY (Category B Felony – NRS 200.380); Count 2– ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony – NRS 200.380, 199.480); and Count 3– MURDER WITH USE OF A DEADLY WEAPON (Category A Felony – NRS 200.010, 200.030, 193.165). The same day, Petitioner's jury trial commenced. On February 24, 2020, Petitioner's jury trial concluded, and the jury found Petitioner guilty of Count 1– CONSPIRACY TO COMMIT ROBBERY (Category B Felony – NRS 200.380); guilty of Count 2– ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony – NRS 200.380, 199.480); and guilty of Count 3– MURDER WITH USE OF A DEADLY WEAPON (Category A Felony – NRS 200.010, 200.030, 193.165). On March 12, 2020, a Guilty Plea Agreement was filed and Petitioner pled

guilty to: Count 4– CONSPIRACY TO COMMIT ROBBERY (Category B Felony – NRS 200.380, 199.480) and Count 5– ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony – NRS 200.380, 199.480). On June 11, 2020, Petitioner was adjudged guilty and sentenced to the Nevada Department of Corrections ("NDOC") as follows: as to Count 1 – a maximum of seventy-two (72) months with a minimum parole eligibility of twenty four (24) months; as to Count 2 – a maximum of one hundred twenty (120) months with a minimum parole eligibility of forty-eight (48) months, plus a consecutive term of one hundred twenty (120) months with a minimum parole eligibility of forty-eight (48) months for the use of a deadly weapon; as to Count 3 – life with a minimum parole eligibility of twenty (20) years, plus a consecutive term of twenty (20) years with a minimum parole eligibility of eight (8) years for the use of a deadly weapon; as to Count 4 – a maximum of seventy-two (72) months with a minimum parole eligibility of twenty-four (24) months; and as to Count 5 – a maximum of one hundred eighty (180) months with a minimum parole eligibility of forty-eight (48) months, plus a consecutive term of one hundred eighty (180) months with a minimum parole eligibility of forty-eight (48) months for the use of a deadly weapon, all counts to run concurrent. Petitioner's Judgment of Conviction was filed on June 17, 2020. On June 24, 2020, Petitioner filed a Notice of Appeal. Petitioner filed his appeal on November 12, 2020. On April 28, 2021, the Nevada Supreme Court affirmed Petitioner's Judgment of Conviction. Remittitur issued on June 8, 2021. On October 29, 2020, Petitioner filed a Pro Per Petition for Writ of Habeas Corpus ("PWHC"). Petitioner filed a successive Pro Per PWHC on November 5, 2020. Petitioner filed a third PWHC on May 26, 2022. On June 7, 2022, an Order was filed appointing Steven S. Owens, Esq as counsel. On August 18, 2022, Petitioner filed a Supplemental brief in support of the Petition for Writ of Habeas Corpus ("SPWHC").

STATEMENT OF THE FACTS

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

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

ARGUMENT

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

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

NRS 34.810(1) reads:

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

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> (a) The petitioner's conviction was upon a plea of guilty or guilty but mentally ill and the petition is not based upon an allegation that the plea was involuntarily or unknowingly or that the plea was entered without effective assistance of counsel.
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> (b) The petitioner's conviction was the result of a trial and the grounds for the petition could have been:
>
> . . .
>
> (2) Raised in a direct appeal or a prior petition for a writ of habeas corpus or postconviction relief.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> As used in this chapter, "relevant evidence" means evidence having 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.

The message constitutes evidence of the parties' shared intent to seek pecuniary gain through criminal means, namely burglary. The existence of this intent makes it more probable that Petitioner and his accomplices would subsequently establish a shared intent to seek pecuniary gain by perpetrating robbery. Given that this shared intent is material to the Count 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

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

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

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

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

evidence against him. Pursuant to Molina v. State, such a claim cannot support post-conviction relief. 120 Nev. 185, 192, 87 P.3d 533, 538 (2004) (stating that a defendant 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).

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

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

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

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

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

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

> We're going to submit everything to the Court. And the reason for that 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

> here is a situation where Mr. Robertson's in a position where the 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.

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

Moreover, even if Petitioner could challenge trial counsel's failure to offer mitigation evidence and establish that said failure was unreasonable, Petitioner is unable to demonstrate the requisite prejudice for a valid ineffective assistance of counsel claim. The Court heard the disturbing facts of this case. The State introduced evidence that Petitioner and his accomplices had assembled on August 8, 2017 with the intent to "hit a house". TT Day 3 at 24. The Court also learned that all but one member of the foursome were carrying firearms. Finally, the Court heard how the group agreed to rob 24-year-old Gabriel Valenzuela whose promising future as a nurse was snuffed out when Petitioner and his accomplices ruthlessly discharged multiple bullets into him and left him to die alone in his own driveway. TT Day 3 at 26-27. Moreover, Mr. Valenzuela's mother provided the Court with a devastating account of the suffering she continued to endure due to the death of her only child. Victim Impact Statement. Given the strength of State's evidence against Petitioner, the aggravating factors in the multiple, violent offenses of which Petitioner was convicted, and Petitioner's own failure to express any remorse during sentencing, even if counsel had offered mitigation 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

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

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

Appellate counsel is not required to raise every issue that a defendant felt was pertinent to the case. The professional diligence and competence required on appeal involves "winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Jones v. Barnes, 463 U.S. 745, 751-52, 103 S. Ct. 3308, 3313 (1983). In particular, a "brief that raises every colorable issue runs the risk of burying good arguments . . . in a verbal mound made up of strong and weak contentions." Id. at 753, 103 S. Ct. at 3313. For judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy." Id. at 754, 103 S. Ct. at 3314. The Nevada 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.

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

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

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

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

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

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

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CONCLUSION

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

DATED this 5th day of October, 2022.

Respectfully submitted,

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

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 5th day of October 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

17328040B/AC/jh/MVU

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1/18/2023 3:43 PM
Steven D. Grierson
CLERK OF THE COURT

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

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

* * * * *

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: But it was felony murder, right?

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

THE COURT: Anything else?

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

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

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

THE COURT: Thank you very much.

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

THE COURT: Absolutely. Absolutely. You're appointed for the appeal. 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

SARA RICHARDSON
Court Recorder/Transcriber

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12/13/2022 9:18 AM
Steven D. Grierson
CLERK OF THE COURT

NEFF

DISTRICT COURT
CLARK COUNTY, NEVADA

RAEKWON ROBERTSON,

Petitioner,

vs.

STATE OF NEVADA,

Respondent,

Case No: A-20-823892-W

Dept No: XII

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

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

You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you 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.

STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk

CERTIFICATE OF E-SERVICE / MAILING

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

☑ By e-mail:
Clark County District Attorney's Office
Attorney General's Office – Appellate Division-

☑ The United States mail addressed as follows:
Raekwon Robertson # 1235056
P.O. Box 1989
Ely, NV 89301

Steven S. Owens, Esq.
1000 N. Green Valley, #440-529
Henderson, NV 89074

/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk

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

DISTRICT COURT
CLARK COUNTY, NEVADA

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

Petitioner,

-vs-

THE STATE OF NEVADA,

Respondent.

CASE NO: A-20-823892-W
C-17-328587-2

DEPT NO: XII

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

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

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

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FINDINGS OF FACT, CONCLUSIONS OF LAW

PROCEDURAL HISTORY

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

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

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

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

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FACTUAL SYNOPSIS[1]

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

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

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

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

scene.

ANALYSIS

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

Petitioner alleges that a personal relationship between Chief Deputy District Attorney Giancarlo Pesci and District Court Judge Michelle Leavitt may have substantially affected his trial and sentencing. PWHC at 5. Petitioner alleges that he was willing to accept a guilty plea agreement but was unable to do so because the offered deal was contingent on acceptance by both Petitioner and co-defendant Wheeler. PWHC at 5. 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. SPWHC at 5-12. The final claim in Petitioner's Supplemental Brief is that counsel was ineffective during the appellate process. SPWHC at 12-15.

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

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

NRS 34.810(1) reads:

> The court shall dismiss a petition if the court determines that:
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> (a) The petitioner's conviction was upon a plea of guilty or guilty but mentally ill and the petition is not based upon an allegation that the plea was involuntarily or unknowingly or that the plea was entered without effective assistance of counsel.
>
> (b) The petitioner's conviction was the result of a trial and the grounds for the petition could have been:
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> . . .

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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. SPWHC at 5-12. The final claim in Petitioner's Supplemental Brief is that counsel was ineffective during the appellate process. SPWHC 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 does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v. Warden, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> As used in this chapter, "relevant evidence" means evidence having 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.

The message constitutes evidence of the parties' shared intent to seek pecuniary gain through criminal means, namely burglary. The existence of this intent makes it more probable that Petitioner and his accomplices would subsequently establish a shared intent to seek pecuniary gain by perpetrating robbery. Given that this shared intent is material to Count 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. Therefore, this claim is denied.

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. SPWHC 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 co-defendant's defense is so irreconcilable with the core of the defendant's own defense that the acceptance of the co-defendant'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 establish that the failure to sever his trial from co-defendant Wheeler's caused him to suffer any prejudice. The decisive factor in any severance analysis remains prejudice to the defendant. Marshall v. State, 118 Nev. 642, 646, 56 P.3d 376, 378 (2002). Petitioner implies the disparities between his convictions and sentences and those of his accomplices constitute

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

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

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

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

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

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

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

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

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

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

> We're going to submit everything to the Court. And the reason for that 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 here is a situation where Mr. Robertson's in a position where the 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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Petitioner was present while his counsel offered this explanation, yet he permitted the hearing to proceed without demur. Clearly, Petitioner and counsel had engaged in a prior discussion during which they jointly made the strategic decision to withhold mitigation evidence or other argument. "Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson, 108 Nev. at 117, 825 P.2d 596; see also Jones v. State, 95 Nev. 613, 617, 600 P.2d 247, 250 (1979) (recognizing that when a defendant participates in an alleged error, he is estopped from objecting to it on appeal).

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

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

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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. SPWHC 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, and thus denied. 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. SPWHC at 14. 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. SPWHC 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. SPWHC 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 U.S. 387, 396-97, 105 S. Ct. 830, 835-37 (1985); see also Burke v. State, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). This Court has held that all appeals must be "pursued in a manner meeting high standards of diligence, professionalism and competence." Burke, 110 Nev. at 1368, 887 P.2d at 268.

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

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

Appellate counsel is not required to raise every issue that a defendant felt was pertinent to the case. The professional diligence and competence required on appeal involves "winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Jones v. Barnes, 463 U.S. 745, 751-52, 103 S. Ct. 3308, 3313 (1983). In particular, a "brief that raises every colorable issue runs the risk of burying good arguments . . . in a verbal mound made up of strong and weak contentions." Id. at 753, 103 S. Ct. at 3313. For judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy." Id. at 754, 103 S. Ct. at 3314. The Nevada 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.

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

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

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

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

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

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

ORDER

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

Dated this 8th day of December, 2022

069 FC6 36EA E9D4
Michelle Leavitt
District Court Judge

STEVEN B. WOLFSON
DISTRICT ATTORNEY
Nevada Bar #001565

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

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Raekwon Robertson, Plaintiff(s)	CASE NO: A-20-823892-W
vs.	DEPT. NO. Department 12
State of Nevada, Defendant(s)	

AUTOMATED CERTIFICATE OF SERVICE

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

Service Date: 12/8/2022

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Attorney for Petitioner Raekwon Robertson

DISTRICT COURT
CLARK COUNTY, NEVADA

RAEKWON ROBERTSON,

Petitioner,

vs.

STATE OF NEVADA.

Respondent.

CASE NO.: A-20-823892-W
DEPT NO.: XII

NOTICE OF APPEAL

TO: THE STATE OF NEVADA, Respondent.

TO: DEPARTMENT XII OF EIGHTH JUDICIAL DISTRICT COURT

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

DATED this 6th day of January, 2023.

/s/ Steven S. Owens, Esq.
STEVEN S. OWENS, ESQ.
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Henderson, Nevada 89074
(702) 595-1171
Attorney for Petitioner
RAEKWON ROBERTSON

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of January, 2023, I served a true and correct copy of the foregoing document entitled **NOTICE OF APPEAL** to the Clark County District Attorney's Office by sending a copy via electronic mail to:

CLARK COUNTY DISTRICT ATTORNEY'S OFFICE
Steve Wolfson
Motions@clarkcountyda.com

BY:

/s/ Steven S. Owens, Esq.
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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.