IN THE SUPREME COURT OF THE STATE OF NEVADA

RAEKWON ROBERTSON, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 85932

RESPONDENT'S ANSWERING BRIEF

Appeal From Denial of Post-Conviction Habeas Petition
Eighth Judicial District Court, Clark County

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ROUTING STATEMENT

This appeal is presumptively retained by the Supreme Court pursuant to NRAP 17(b)(3) because it is an appeal from the denial of Appellant's Petition for Writ of Habeas Corpus (Post-Conviction) involving a Category A felony.

STATEMENT OF THE ISSUE(S)

I. The district court properly held that Counsel was not ineffective for failing to object to the message as prior bad act evidence.
II. The district court properly held that counsel was not ineffective for failing to seek severance.
III. The district court properly held that counsel was not ineffective for failing to investigate mental health issues or raising them at trial.
IV. The district court properly held that counsel was not ineffective for failing to raise mental health issues as mitigating evidence at sentencing.
V. The district court properly held that counsel was not ineffective on appeal.

STATEMENT OF THE CASE

On December 14, 2017, an Indictment was filed charging RAEKWON SETREY ROBERTSON ("Appellant") along with co-defendants DEMARIO LOFTON-ROBINSON aka DEMARIO LOFTONROBINSON ("Lofton-Robinson") and DAVONTAE AMARRI WHEELER ("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). I Appellant's Appendix ("AA") 1-4. On April 19, 2018, a Superseding Indictment was filed charging Appellant and both co-defendants with the same. I AA 23. On February 11, 2020, an Amended Superseding Indictment was filed charging Appellant 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). I AA 109. The same day, Appellant's jury trial commenced. I AA 113. On February 24, 2020, Appellant's jury trial concluded, and the jury found Appellant 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). VII AA 1572-1573. On March 12, 2020, Appellant 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). VII AA 1574.

On June 11, 2020, Appellant 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. VII AA 1601-1602.

Appellant's Judgment of Conviction was filed on June 17, 2020. VII AA 1600. On June 24, 2020, Appellant filed a Notice of Appeal. VII AA 1604. Appellant filed his appeal on November 12, 2020. VII AA 1670. On April 28, 2021, the Nevada Supreme Court affirmed Appellant's Judgment of Conviction. VII AA 1686. Remittitur issued on June 8, 2021. VII AA 1691. On October 29, 2020, Appellant filed a Pro Per Petition for Writ of Habeas Corpus ("PWHC"). VII AA 1606. Appellant filed a successive Pro Per PWHC on November 5, 2020. VIII AA 1771. Appellant filed a third PWHC on May 26, 2022. VII AA 1632. On June 7, 2022, an Order was filed appointing Steven S. Owens, Esq. as counsel. VII AA 1638. On August 18, 2022, Appellant filed a Supplemental brief in support of the Petition for Writ of Habeas Corpus ("SPWHC"). VII AA 1641. The State filed its Response to Appellant's Petition for Writ of Habeas Corpus (Post-Conviction) and Supplemental

Brief on October 5, 2022. VIII AA 1741. On November 17, 2022, this Court denied Appellant's PWHC and SPWHC. VIII AA 1790. Notice of Entry of Findings of Fact, Conclusions of Law and Order was filed on November, 17, 2022. VIII AA 1769. A Notice of Appeal was filed on January 6, 2023. VIII AA 1793. Appellant filed the instant Opening Brief on March 7, 2023. See Opening Brief.

STATEMENT OF THE FACTS

The underlying facts occurred as follows:

In accordance with his GPA, Deshawn Robinson ("Robinson") testified against [Appellant] and Wheeler in exchange for not being charged with Murder with Use of a Deadly Weapon. Per his testimony, on August 8, 2017, [Appellant] 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, [Appellant], 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. [Appellant] 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 [Appellant] 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, [Appellant] was the sole carrier of a .22 caliber firearm. In a search of [Appellant's] home, police recovered a .22 caliber gun that retained [Appellant's] DNA. A bullet recovered from Mr. Valenzuela's abdomen wound was too damaged to be matched to [Appellant's] gun,

but neither could the gun be eliminated as having fired said bullet. Finally, ballistics evidence matched [Appellant's] gun to a cartridge case found at the crime scene.

VIII AA 1772-1773.

SUMMARY OF THE ARGUMENT

In challenging the district court's denial of his petition, Appellant asserts several claims under a theory of ineffective assistance of counsel.

First, Appellant claims that his counsel was ineffective for failing to object to a text message as prior bad act evidence, but an objection would have been futile, as the evidence was admissible.

Second, Appellant claims that his counsel was ineffective for failing to seek severance from his co-defendant. However, Appellant cannot show that failure to sever resulted in prejudice.

Third, Appellant claims that his counsel was ineffective for failing to investigate and raise his mental health issues at trial. However, Appellant cannot show that this resulted from neglect rather than strategic decision. He also fails to establish that such an investigation would have resulted in a more favorable outcome given the evidence against him.

Fourth, Appellant claims that his counsel was ineffective for failing to raise his mental health issues as mitigating evidence at sentencing. However, Appellant fails to demonstrate a reasonable probability that such evidence would have resulted in a more lenient sentence.

Lastly, Appellant claims that his appellate counsel was ineffective for various reasons. However, Appellant fails to show that his counsel's representation was objectively unreasonable. Therefore, the district court's denial of his petition should be affirmed.

ARGUMENT

This Court reviews the district court's application of the law de novo and gives deference to a district court's factual findings in habeas matters. State v. Huebler, 128 Nev. 192, 197, 275 P.3d 91, 95 (2012), cert. denied, 133 S. Ct. 988 (2013). A claim of ineffective assistance of counsel presents a mixed question of law and fact that is subject to independent review. However, a district court's factual findings will be given deference by this Court on appeal, so long as they are supported by substantial evidence and are not clearly wrong. Lader v. Warden, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005). While this Court gives deference to the district court's factual findings if supported by substantial evidence and not clearly erroneous, this Court reviews the district court's application of the law to those facts de novo. Id.

Appellant alleges that his trial counsel was ineffective for failing to object to other bad act evidence of the text message about "hitting a house." Opening Brief at 8. He then argues that his trial counsel was ineffective for failing to seek severance from his co-defendant. Opening Brief at 12. Next, Appellant claims that his trial counsel was ineffective for failing to investigate and raise his mental health issues

both at trial to disprove specific intent and as mitigating evidence at sentencing. Opening Brief at 14, 17. Finally, Appellant asserts that his appellate counsel was ineffective on appeal. Opening Brief at 19

I. INEFFECTIVE ASSISTANCE OF COUNSEL STANDARD OF REVIEW

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. Strickland, 466 U.S. at 687-88, 694, 104 S. Ct. at 2065, 2068; Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-part test). "[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).

"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 689. "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). Likewise, the decision not to call witnesses is within the discretion of trial counsel and will not be questioned unless it was a plainly unreasonable decision. Rhyne v. State, 118 Nev. 1, 38 P.3d 163 (2002); Dawson, 108 Nev. 112, 825 P.2d 593.

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. A defendant is not entitled to a particular "relationship" with his 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 representation. Id.

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).

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 687-89, 694, 104 S. Ct. at 2064–65, 2068).

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). "A petitioner for post-conviction relief cannot rely on conclusory claims for relief but must make specific factual allegations that if true would entitle him to relief. 'Bare' and 'naked' allegations are not sufficient to warrant post-conviction relief, nor are those belied and repelled by the record." Id. "A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." Mann v. State, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002). A habeas corpus petitioner must prove disputed factual allegations by a preponderance of the evidence. Means, 120 Nev. at 1011, 103 P.3d at 32. The burden rests on Appellant to "allege specific facts supporting the claims in the petition." NRS 34.735(6).

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 v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (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).

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, 118 Nev. at 8, 38 P.3d at 167.

The Appellant is not entitled to an evidentiary hearing if the record belies or repels the allegations." Colwell v. State, 118 Nev. 807, 813, 59 P.3d 463, 467 (2002) (*citing* Evans v. State, 117 Nev. 609, 621, 28 P.3d 498, 507 (2001)).

"The rule is well established that it is the function of the jury, not the appellate court, to weigh the evidence and pass upon the credibility of the witness." Walker v. State, 91 Nev. 724, 726, 542 P.2d 438, 438-39 (1975).

There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects tactics rather than "sheer neglect." Harrington, 131 S. Ct. at 788. Although courts may not indulge *post hoc* rationalization for counsel's decision-making that contradicts the available evidence of counsel's actions, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. Id.

In considering whether counsel has met this standard, the court should first determine whether counsel made a "sufficient inquiry into the information that is pertinent to his client's case." Doleman v State, 112 Nev. 843, 846, 921 P.2d 278, 280 (1996); *citing* Strickland, 466 U.S. at 690-691, 104 S.Ct. at 2066. Once such a reasonable inquiry has been made by counsel, the court should consider whether counsel made "a reasonable strategy decision on how to proceed with his client's case." Doleman, 112 Nev. at 846, 921 P.2d at 280, *citing* Strickland, 466 U.S. at 690-691, 104 S.Ct. at 2066. Finally, counsel's strategy is a "tactical" decision and will be "virtually unchallengeable absent extraordinary circumstances." Doleman, 112 Nev. at 846, 921 P.2d at 280; Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990); Strickland, 466 U.S. at 691, 104 S.Ct. at 2066.

II. THE DISTRICT COURT PROPERLY HELD THAT COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO MESSAGE AS PRIOR BAD ACT EVIDENCE

Appellant 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. VIII AA 1781. The message in question read "Sace is in". Id.

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).

As Appellant concedes, the State argued for the message's admission by invoking the doctrine of *res gestae* (codified by NRS 48.035(3)). VIII AA 1782. 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 Appellant 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, Appellant 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. Appellant concludes without substantiation that a *Petrocelli* hearing would have found that the text message was not relevant. VIII AA 1782. 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 Appellant 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. Id. Finally, even if the relative weights of probative and prejudicial value were considered under the doctrine of *res gestae*, Appellant 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 was properly denied.

III. THE DISTRICT COURT PROPERLY HELD THAT COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO SEEK SEVERANCE

Appellant claims that counsel was ineffective for failing to seek severance from co-defendant Wheeler because the co-defendants had mutually antagonistic defenses. VIII AA 1783. However, Appellant'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, Appellant's defense was that the State could not prove beyond a reasonable doubt that Appellant was responsible for the brutal slaying of Mr. Valenzuela VIII AA 1783. 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. Id. 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 Appellant, 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, Appellant 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). Appellant 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. VIII AA at 1784. However, Appellant attempts to mislead this Court through this implication because these disparities instead reflect the reality that Appellant 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 Appellant's residence. Id. 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 Appellant's residence. Id. Finally, it was Appellant's DNA that was recovered from the Taurus .22. Id. Given that Appellant's convictions and sentences reflect the enormity of the evidence against him, the suggestion that Appellant 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.

IV. THE DISTRICT COURT PROPERLY HELD THAT COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO INVESTIGATE MENTAL HEALTH ISSUES OR RAISING THEM AT TRIAL

Appellant asserts that trial counsel was ineffective for both failing to investigate and raise Appellant's alleged mental health issues at trial to disprove specific intent. VIII AA 1784. However, these claims are bare and naked assertions that demand summary denial. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

Appellant repeatedly states that trial counsel failed to investigate his mental health issues. VIII AA 1784. 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, Appellant 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). Appellant 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. VIII AA 1785. 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)). Appellant 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 Appellant was responsible for Mr. Valenzuela's murder. VIII AA 1785. In fact, on multiple occasions, Attorney Sanft sought to undermine the certainty of Appellant's participation in the murder. For example, Attorney Sanft attempted to paint Robinson as a liar motivated by his desire to avoid adult custody. Id. Later, Attorney Sanft attempted to cast doubt on a photographic depiction of Appellant. Id. The trial transcripts confirm that Appellant's trial counsel sought to establish that there was insufficient evidence to convict him because Appellant was not in fact responsible for Mr. Valenzuela's murder. Given that raising Appellant's alleged mental health issues to disprove

specific intent constitutes an affirmative defense inconsistent with trial counsel's defense theory at trial, Appellant'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.

V. THE DISTRICT COURT PROPERLY HELD THAT COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE ALLEGED MENTAL HEALTH ISSUES AS MITIGATION EVIDENCE AT SENTENCING

Appellant also contends counsel was ineffective for failing to raise Appellant's alleged mental health issues as mitigation evidence at the sentencing hearing. VIII AA 1786. Appellant 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 Appellant 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 Appellant an opportunity to be heard at sentencing. VIII AA 1786. Neither Appellant 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.

Id.

Appellant was present while his counsel offered this explanation, yet he permitted the hearing to proceed without demur. Clearly, Appellant 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 Appellant could challenge trial counsel's failure to offer mitigation evidence and establish that said failure was unreasonable, Appellant 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 Appellant and his accomplices had assembled on August 8, 2017 with the intent to "hit a house". VIII AA 1787. 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 Appellant and his accomplices ruthlessly discharged multiple bullets into him, and left him to die alone in his own driveway. Id. 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. Id. Given the strength of State's evidence against Appellant, the aggravating factors in the multiple, violent offenses of which Appellant was convicted, and Appellant'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 was therefore properly denied.

VI. THE DISTRICT COURT PROPERLY HELD THAT COUNSEL WAS NOT INEFFECTIVE DURING THE APPELLATE PROCESS

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.

Appellant alleges that counsel failed to communicate with him during the appellate process. VIII AA 1788. However, Appellant fails to establish that this alleged lack of communication at all compromised counsel's effectiveness during the appellate process. Not only has Appellant 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.

Appellant 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 Appellant. VIII AA 1788. Appellant 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. Id. Finally, Appellant 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. Id.

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 Appellant has failed to establish a legitimate basis for questioning this exercise.

Second, as indicated above, there was ample evidence to support Appellant's convictions. Appellant 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. VIII AA 1789. Appellant was also in possession of the Taurus .22 gun that was traced to the cartridge case at the scene. VIII AA 1790. The DNA found on the Taurus .22 belonged to Appellant. Id.

Third, as discussed hereinabove, while "random selection" of jurors could potentially establish systematic exclusion of a distinctive group, Appellant 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, Appellant provides no grounds for why the admissibility of the text message would have made the appellate brief more likely to succeed. Instead, Appellant merely continues to imply that the prejudicial effect of the message outweighed the probative value. VIII AA 1790. 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.

CONCLUSION

Based on the foregoing, the State respectfully requests that the Court AFFIRM the district court's denial of Appellant's Petition for Writ of Habeas Corpus (Post-Conviction).

Dated this 5th day of April, 2023.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page and type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, contains 6,538 words and does not exceed 30 pages.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 5th day of April, 2023.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on April 5, 2023. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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