



**EIGHTH JUDICIAL DISTRICT COURT  
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Elizabeth A. Brown  
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February 21, 2023

Elizabeth A. Brown  
Clerk of the Court  
201 South Carson Street, Suite 201  
Carson City, Nevada 89701-4702

RE: DAVONTAE WHEELER vs. WARDEN NAJERA

**S.C. CASE: 86086**

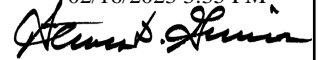
D.C. CASE: A-22-857575-W

Dear Ms. Brown:

Pursuant to your Order Directing Entry and Transmission of Written Order, dated February 14, 2023, enclosed is a certified copy of the Findings of Fact, Conclusions of Law and Order filed February 16, 2023 in the above referenced case. If you have any questions regarding this matter, please do not hesitate to contact me at (702) 671-0512.

Sincerely,  
STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Heather Ungermann  
Heather Ungermann, Deputy Clerk

  
CLERK OF THE COURT

**FFCO**  
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DISTRICT COURT  
CLARK COUNTY, NEVADA

DAVONTAE WHEELER,  
#5909081

Petitioner,

-vs-

THE STATE OF NEVADA

Respondent.

CASE NO: A-22-857575-W  
(C-17-328587-3)  
DEPT NO: XII

**FINDINGS OF FACT, CONCLUSIONS OF  
LAW AND ORDER**

DATE OF HEARING: NOVEMBER 3, 2022  
TIME OF HEARING: 8:30 AM

THIS CAUSE having been decided before the Honorable Michelle Leavitt, District Judge, pursuant to an evidentiary hearing, the Petitioner not being present and representing himself, the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through HALEY ANN JARAMILLO, Deputy District Attorney, and the Court having considered the matter, the Court makes the following findings of fact and conclusions of law:

**FINDINGS OF FACT**

The following procedural history is relevant to this case. On December 14, 2017, Petitioner, Davontae Wheeler ("Petitioner") was charged with 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, 193.330,

1 193.165); and Count 7 — Murder with Use of a Deadly Weapon (Category A Felony — NRS  
2 200.010, 200.030, 193.165). Petitioner was charged for having committed these crimes with  
3 Demario Lofton-Robinson (“Lofton-Robinson”), DeShawn Robinson (“Robinson”), and  
4 Raekwon Robertson (“Robertson”).

5 Petitioner and Robertson’s jury trial regarding Counts 5 through 7 began on February  
6 11, 2020. On February 12, 2020, Petitioner moved to strike the jury panel and requested an  
7 evidentiary hearing. The trial court granted Appellant’ request, held an evidentiary hearing  
8 that same day, and denied Appellant’s motion to strike.

9 On February 24, 2020, the jury found Petitioner and Robertson guilty of Conspiracy to  
10 Commit Robbery and Second-Degree Murder. The jury found Petitioner not guilty Attempt  
11 Robbery With use of a Deadly Weapon.

12 On June 11, 2020, the district court sentenced Petitioner to Count 1 – 24 to 72 months;  
13 Count 2 – dismissed pursuant to verdict; and Count 3 – 10 years to life in the Nevada  
14 Department of Corrections. Petitioner’s aggregate sentence was 144 months to life in the  
15 NDOC. Petitioner’s Judgment of Conviction was filed on June 17, 2020.

16 On June 18, 2020, Petitioner filed its notice of appeal. On January 5, 2021, Petitioner  
17 filed his opening brief with the Supreme Court of Nevada. On April 4, 2021, the State filed its  
18 answer. On May 28, 2021, Petitioner filed its reply. On August 18, 2021, the judgement was  
19 affirmed.

20 On August 29, 2022, Petitioner filed the instant Petition for Writ of Habeas Corpus  
21 (Post-Conviction Relief). The State filed a response on October 12, 2022. On November 3,  
22 2022, this Court considered the matter on the pleadings.

23 This Court also considered the following facts of Petitioner’s underlying trial. In the early  
24 morning hours of August 9, 2017, just after midnight, Gabriel Valenzuela ("Mr. Valenzuela")  
25 was coming home from nursing school when he was shot in the driveway of his own home,  
26 located at 5536 Dewey Drive, in Las Vegas, Nevada. Dr. Corneal testified that Mr. Valenzuela  
27 suffered from a gunshot wound to the head, left lower chest, right ankle, and left ankle. Based  
28 on these injuries, she concluded that the gunshot wounds to the ankles would have made

1 moving incredibly painful, and that either the gunshot wound to the abdomen or the gunshot  
2 wound to the head could have been fatal. She further opined that Mr. Valenzuela was shot first  
3 in the stomach and then in the head. Ultimately, Dr. Corneal concluded that Mr. Valenzuela's  
4 cause of death was multiple gunshot wounds, and the manner of death was homicide.

5 Immediately prior to the shooting, Robert Mason was jogging in his and Mr.  
6 Valenzuela's neighborhood when he noticed four suspicious individuals standing in front of  
7 Mr. Valenzuela's home. Mr. Mason described these individuals as black males wearing dark  
8 colored sweatshirts. As seeing people meandering on street corners around midnight was  
9 unusual, Mr. Mason decided to run down the street rather than run through the group. Mr.  
10 Mason rounded the corner and saw what looked to be a white Crown Victoria with NV license  
11 plate of 473YZB.

12 As Mr. Mason continued down the street, he began to worry that he left the front door  
13 to his home unlocked, so he called his wife and told her what he saw. Mr. Mason specifically  
14 told his wife that he thought it was odd that a group of men would have sweatshirts on with  
15 their hoods up in August in Las Vegas. Mr. Mason was also uncomfortable because it was odd  
16 for a car to be parked on that street given how busy it was. Based on this information Mr.  
17 Mason's wife called the non-emergent 311 number to report these suspicious individuals. She  
18 specifically explained that she thought it was very odd that people were wearing hoodies  
19 during a hot August night.

20 One minute later, at 12:12 AM, Mr. Valenzuela's cousin, John Relato, was inside his  
21 house at 5536 Dewey Drive when he heard a gunshot. Mr. Relato ran to the upstairs window  
22 where he saw Mr. Valenzuela's car door open in the driveway. Thinking this was odd, Mr.  
23 Relato, went outside to check on Mr. Valenzuela and saw him lying on the ground bleeding.  
24 Mr. Relato called 911, removed his shirt, and placed it on Mr. Valenzuela's wounds in an  
25 effort to stop the bleeding.

26 Officer Calleja was the first officer to respond to 5536 Dewey Ave at 12:20 AM. Once  
27 the paramedics took Mr. Valenzuela to the hospital, Officer Calleja began securing the scene.  
28 Officer Calleja had further been informed that one minute prior to the call regarding Mr.

1 Valenzuela's, individuals living on the south side of the street called about a suspicious  
2 circumstance in the neighborhood. Three .45 caliber cartridge cases and one .22 caliber  
3 cartridge case were found at the scene of the murder. The .45 caliber cartridge cases bore three  
4 separate head-stamps: R-P 45 AUTO, NFCR, and WINCHESTER 45 AUTO.

5 Mr. Mason was continuing his run and had just returned to the area about 20 or 25  
6 minutes later where he saw officers in the area where he had just seen the four men. Mr. Mason  
7 approached one of the officers, told him about the four individuals he saw less than half an  
8 hour ago, and gave them the license plate number from the car he passed.

9 Sergeant Tromboni responded to the Dewey drive crime scene, where she helped block  
10 off traffic. When Sergeant Tromboni left that call, he stopped at a Short Line Express  
11 convenience store to use the restroom less than a 10-minute drive from the murder scene.  
12 Inside, he spoke to the clerk, Nikolaus Spahn, who told him that four males had been inside  
13 the store about 45 minutes prior and seemed suspicious. Specifically, Mr. Spahn testified that  
14 he was working at the Short Line Express convenience store the night of August 8, 2017 and  
15 early morning hours of August 9, 2017. He testified that at around 11:30 PM, four men came  
16 into his store looking suspicious. One of the men was open carrying a firearm and used the  
17 restroom for about 15 to 20 minutes. That man was wearing maroon shoes, a maroon  
18 sweatshirt, and a gray hat with a black bill. After the four men left, Mr. Spahn went outside to  
19 smoke a cigarette where he saw those men just sitting at a table hanging out. Mr. Spahn also  
20 noticed that these four men were in a white older model vehicle that looked like a Crown  
21 Victoria.

22 Based on the description provided by Mr. Spahn, Sergeant Tromboni decided it would  
23 be prudent to obtain surveillance footage from the store. At trial, Mr. Spahn's identified the  
24 four men who entered the store as well as the vehicle they were in from that surveillance  
25 footage. The vehicle was seen on surveillance footage arriving to the store at approximately  
26 11:25 p.m. and leaving the store at approximately 11:45 p.m., roughly 25 minutes before the  
27 murder.

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1 Detective Cody, a homicide detective, was at the crime scene at Dewey drive when she  
2 received a call from Sergeant Tromboni regarding the information from the convenience store  
3 clerk. She responded to the convenience store to retrieve video surveillance. During her review  
4 of that surveillance, she was able to identify a vehicle with the license plate matching the  
5 description given by Mr. Mason. Detective Cody further observed four black males in the  
6 surveillance footage. Detective Dosch also reviewed the surveillance footage and concluded  
7 that the vehicle could also be a Mercury Grand Marquis because both the Crown Victoria and  
8 Grand Marquis model cars were released by Ford and were identical other than the emblems.

9 Detective Cody set to tracking down the owner of the vehicle and subsequently learned  
10 that the car belonged to Lofton-Robinson and was registered at 919 Bagpipe Court in North  
11 Las Vegas. Detective Cody drove to that residence on August 9, 2017, and saw the Grand  
12 Marquis depicted in the surveillance from the convenience store parked in the driveway.  
13 Detective Cody watched two black males exit the residence, get into the car, and drive away.  
14 Those men resembled the same men in the convenience store surveillance footage. Detective  
15 Cody followed the vehicle. The vehicle was ultimately stopped, and the occupants were taken  
16 into custody. Those occupants were Robinson and Robinson-Lofton.

17 Search warrants were subsequently obtained and executed on both the Mercury Grand  
18 Marquis and at 919 Bagpipe Court. From the Mercury Grand Marquis, CSA Fletcher  
19 impounded a box of .45 firearm ammunition from the glove box, a pair of red air Jordan  
20 athletic shoes, a sweatshirt matching the sweatshirt worn by one of the men in the convenience  
21 store surveillance, as well as DNA prints from the vehicle. CSA Claire Bowing similarly  
22 searched the vehicle and collected latent print evidence. Robinson's and Robinson-Lofton's  
23 fingerprints were found on multiple locations of the Mercury Grand Marquis. Petitioner's  
24 fingerprints were found in the car along with co-defendant Robertson's.

25 Crime Scene Investigator William Speas, on August 9, 2017, at around 11:00 PM, CSA  
26 Speas responded to a house located at 919 Bagpipe Court. There, he impounded a pink  
27 backpack containing a handgun and red air Jordan athletic shoes. CSA Speas processed all  
28 impounded pieces of evidence for fingerprints. At trial, Robinson identified the pink backpack

1 containing the firearm recovered during the search of 919 Bagpipe Court as a backpack that  
2 both he and Robinson-Lofton would use.

3 During the search of the Bagpipe Court residence, officers located a .45 caliber firearm  
4 and ammunition bearing a headstamp of R-P .45, which matched one of .45 caliber cartridge  
5 cases found at the scene of the murder. Ballistic testing revealed that three .45 caliber cartridge  
6 cases found at the scene of the murder were fired from this firearm.

7 Both Robinson's and Robinson-Lofton's cell phones were seized, and Detective Dosch  
8 recovered a message thread referencing two other suspects involved in the robbery: Ray Logan  
9 and Sace. Detective Dosch ultimately learned that Ray Logan was co-defendant Robertson,  
10 and "Sace" was Petitioner. Based on this conclusion, Detective Dosch learned that Robertson  
11 was living at 6647 West Tropicana Ave, and Appellant was living at 3300 Civic Center  
12 Detective Dosch obtained and executed search warrants on both addresses.

13 In Petitioner's apartment, Detective Dosch recovered all the clothing worn by Petitioner  
14 in the surveillance of the convenience store: the shoes, hat, shirt, and gun including the holster.  
15 Specifically, officers recovered a .45 caliber firearm. The magazine of the firearm contained  
16 10 rounds of live ammunition bearing the head stamp of RP45 AUTO (the same head stamp  
17 as one of the .45 cartridges found at the scene of the murder). Detectives also recovered a pair  
18 of red Nike Huaraches, and a black and grey baseball cap, which matched the items worn by  
19 Petitioner in the surveillance footage from the convenience store. Petitioner's fingerprints were  
20 found on the magazine found inside the firearm. A search of Petitioner's phone number  
21 showed a Facebook account of "Young Sace Versace." Petitioner's phone also showed a call  
22 history between co-defendant Robertson, Robinson-Lofton, and Robinson. Specifically,  
23 between August 2, 2017 and August 9, 2017, Petitioner called Lofton-Robinson 29 times.

24 A .22 caliber semi-automatic Taurus firearm was located at 6647 West Tropicana, co-  
25 defendant Robertson's residence. Officers also located ammunition bearing the headstamp  
26 "C". This ammunition matched the .22 caliber cartridge case found at the murder scene. Co-  
27 defendant Robertson's and Petitioner's fingerprints were both on the magazine of the Taurus  
28 handgun. Ballistic testing revealed that the .22 caliber cartridge case found at the scene of the

1 murder was fired from this firearm. At trial, Robinson testified that when he was 14 years old,  
2 himself and his brother Robinson-Lofton had been living with their grandmother at 919  
3 Bagpipe Court. Robinson explained that about a week before August 8, 2017, Robinson-  
4 Lofton purchased a white Mercury Grand Marquis, which they began living out of. Robinson-  
5 Lofton also bought each of them a pair of red Air Jordan athletic sneakers, which Robinson  
6 wore the night of August 8, 2017.

7 Robinson testified that on August 8, 2017, a man he knew as Ray Logan messaged him  
8 on Facebook asking if Robinson-Lofton was “trying to hit a house” and that Ray Logan,  
9 Robinson, and Sace were “in.” Both Ray Logan and “Sace” were nicknames that each male  
10 went by. At trial, Robinson identified Petitioner as the person he called “Sace,” and co-  
11 defendant Robertson as the person he called Ray Logan. Robinson testified that the night of  
12 August 8, 2017, he, Robinson-Lofton, Petitioner, and co-defendant Robertson went first to a  
13 convenience store in Robinson-Lofton’s Mercury Grand Marquis, and to a home afterwards.

14 When shown a picture of the males inside the convenience store, Robinson identified  
15 himself wearing the red Air Jordans along with a black shirt and black pants. Robinson  
16 similarly identified Robinson-Lofton in the surveillance video, also wearing the same pair of  
17 Air Jordans. Robinson identified Petitioner as the man wearing the burgundy sweatshirt, gray  
18 baseball hat with a black bill and sticker on it, black pants, and Nike Huaraches. He also  
19 confirmed that Petitioner was at Mr. Valenzuela’s home. Next, Robinson confirmed that co-  
20 defendant Robertson was with them in the surveillance footage, and was the person in all black  
21 who entered the store behind Petitioner.

22 When shown a photograph of Mr. Valenzuela’s home, Robinson confirmed that it was  
23 the house he, Robinson-Lofton, Petitioner, and co-defendant Robertson stopped at after  
24 leaving the convenience store. Robinson further confirmed that all the men except himself had  
25 firearms. Additionally, Robinson confirmed that the four of them went to Mr. Valenzuela’s  
26 home to rob it and that on the way to the home he overheard a conversation between the men  
27 about exchanging bullets in their guns. Robinson’s job was supposed to be to enter the home  
28 first and tell everyone to get down.



1 While they were standing on the corner waiting to enter the home, Robinson confirmed  
2 that a jogger ran past them just before they saw Mr. Valenzuela arrive at the home. Once Mr.  
3 Valenzuela arrived, they men surrounded him, and co-defendant Robertson commanded Mr.  
4 Valenzuela to give them everything he had. A struggle ensued, and Mr. Valenzuela was shot  
5 several times by these four men who then fled the scene. Robinson, Robinson-Lofton, co-  
6 defendant Robertson, and Petitioner fled in Robinson-Lofton's Mercury Grand Marquis, and  
7 first dropped co-defendant Robertson Ray Logan off at an apartment before returning to their  
8 grandmother's home.

## 9 CONCLUSIONS OF LAW

### 10 **I. PETITIONER'S TRIAL COUNSEL WAS NOT INEFFECTIVE**

11 Petitioner argues that his trial counsel was ineffective for five reasons: (A) conducting  
12 inadequate investigation, (B) ineffective cross examination of the State's witness, Robert  
13 Mason, (C) an ineffective defense strategy, (D) failing to address the authenticity of a text  
14 message prior to trial, (E) and not addressing a jury question during deliberations. Petitioner's  
15 Writ of Habeas Corpus ("PWHC") at 7-9a. Petitioner further alleges that his appellate counsel  
16 was ineffective for failing to address a specific argument during his direct appeal. *Id.*  
17 Petitioner's claim fails, and post-conviction relief should not be granted in this matter because  
18 Petitioner cannot establish that his trial attorney was ineffective and that he was substantially  
19 prejudiced by his trial attorney's representation.

20 The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal  
21 prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his  
22 defense." The United States Supreme Court has long recognized that "the right to counsel is  
23 the right to the effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 686,  
24 104 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323  
25 (1993).

26 To prevail on a claim of ineffective assistance of trial counsel, a Petitioner must prove  
27 he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of  
28 Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063-64. See also Love, 109 Nev. at 1138, 865

1 P.2d at 323. Under the Strickland test, a Petitioner must show first that his counsel's  
2 representation fell below an objective standard of reasonableness, and second, that but for  
3 counsel's errors, there is a reasonable probability that the result of the proceedings would have  
4 been different. 466 U.S. at 687–88, 694, 104 S. Ct. at 2065, 2068; Warden, Nevada State Prison  
5 v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-part test).  
6 “[T]here is no reason for a court deciding an ineffective assistance claim to approach the  
7 inquiry in the same order or even to address both components of the inquiry if the Petitioner  
8 makes an insufficient showing on one.” Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

9 The court begins with the presumption of effectiveness and then must determine  
10 whether the Petitioner has demonstrated by a preponderance of the evidence that counsel was  
11 ineffective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). “Effective counsel  
12 does not mean errorless counsel, but rather counsel whose assistance is ‘[w]ithin the range of  
13 competence demanded of attorneys in criminal cases.’” Jackson v. Warden, 91 Nev. 430, 432,  
14 537 P.2d 473, 474 (1975).

15 **A. Petitioner’s Trial Counsel Conducted Adequate Investigation.**

16 Under Ground One of the Petition, Petitioner argues that Trial Counsel did not conduct  
17 adequate investigation. PWHC at 7. Petitioner explains that he informed Trial Counsel that he  
18 was not with the group of four individuals when Mr. Valenzuela was shot. Id. Petitioner alleges  
19 that during that time, he boarded a City Area Transit Bus (“CAT”) during the hour of the  
20 murder. Id. Petitioner argues that Trial Counsel never attempted to locate the driver of the  
21 CAT, determine if there was video footage of the bus stop, or locate passengers that could  
22 have seen him on that night. Id. at 7(a).

23 A defendant who contends he received ineffective assistance because his counsel did  
24 not adequately investigate must show how a better investigation would have changed the  
25 outcome of trial. Strickland, 466 U.S. at 687, 104 S. Ct. at 2064. Such a defendant must allege  
26 with specificity what the investigation would have revealed and how it would have altered the  
27 outcome of the trial. See State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993).

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1 “[D]efense counsel has a duty ‘to make reasonable investigations or to make a  
2 reasonable decision that makes particular investigations unnecessary.’ State v. Love, 109 Nev.  
3 1136, 1138, 865 P.2d 322, 323 (1993) (quoting Strickland, 466 U.S. at 691, 104 S. Ct. at 2066).  
4 A decision “not to investigate must be directly assessed for reasonableness in all the  
5 circumstances, applying a heavy measure of deference to counsel’s judgment.” Id. Moreover,  
6 “[a] decision not to call a witness will not generally constitute ineffective assistance of  
7 counsel” Id. at 1145, 865 P.2d at 328. Indeed, it is well established that “counsel is not required  
8 to unnecessarily exhaust all available public or private resources.” Molina v. State, 120 Nev.  
9 185, 192, 87 P.3d 533, 538 (2004).

10 Petitioner alleges that his trial counsel did not conduct adequate investigation and  
11 therefore was ineffective. However, Petitioner’s argument is meritless. When getting ready for  
12 trial, Petitioner’s counsel requested to continue trial to ensure that he had time to go through  
13 all of the evidence. Further, Petitioner does not allege specifically what this investigation  
14 would produce. Petitioner vaguely references surveillance video and a bus driver. However,  
15 Petitioner never specifically alleges what bus stop he was at. Petitioner also does not allege  
16 that there was surveillance video of him at the bus stop. Finally, Petitioner does not allege that  
17 a specific bus driver remembers seeing him that night. Even if trial counsel was ineffective for  
18 failing to investigate these claims, Petitioner never alleges how this would have altered the  
19 outcome of the trial. Therefore, this claim is without merit and must be denied.

20 **B. Petitioner’s Trial Counsel Conducted Adequate Cross Examination.**

21 Under Ground One(a), Petitioner argues that his trial counsel failed to conduct adequate  
22 cross examination. Petitioner specifically that his trial counsel did not cross-examine the  
23 State’s witness, Robert Mason, effectively.

24 The United States Constitution’s Sixth Amendment provides that an accused be allowed  
25 to be confronted with the witnesses against him, but that right is not unlimited and has many  
26 exceptions recognized by the courts. “[T]rial judges retain wide latitude insofar as the  
27 Confrontation Clause is concerned to impose reasonable limits on ... cross-examination based  
28 on concerns about, among other things, harassment, prejudice, confusion of the issues, the

1 witness's safety, or interrogation that is repetitive or only marginally relevant.” Farmer v. State,  
2 133 Nev. 693, 703, 405 P.3d 114, 123 (2017), reh'g denied (Feb. 23, 2018) (quoting Delaware  
3 v. Van Arsdall, 475 U.S. 673, 679, 106 S.Ct. 1431(1986). See also Jackson v. State, 116 Nev.  
4 334, 335, 997 P.2d 121, 121 (2000) (“[a] defendant's right to present relevant evidence is not  
5 unlimited, being subject to reasonable restrictions.”).

6 Petitioner claims that his counsel failed to conduct the most basic cross examination of  
7 the State’s witness, Robert Mason (hereinafter, “Mason”). Petition at 7(c). Petitioner claims  
8 that his counsel failed to confirm that there were only four individuals the night in question,  
9 those four males were wearing dark clothing, there was no individual open carrying, and that  
10 Mason didn’t see the individuals in any other color. Petition at 7(c). However, Petitioner’s  
11 claim is meritless. Petitioner’s trial counsel conducted adequate cross examination. Further,  
12 many of these questions were already address during Petitioner’s co-defendant’s cross  
13 examination that was conducted prior to Petitioner’s cross examination. During trial, Mason  
14 was asked about the four individuals that he saw that night. Recorder’s Transcript of Hearing  
15 – Day 3 at 64. Mason testified that he could not remember any specifics about the individual,  
16 including the color of the clothing. Id. Further, Petitioner’s counsel confirmed with Mason that  
17 his prior testimony confirmed that the individuals were wearing black hoodies. Id. at 71.  
18 Therefore, Petitioner’s trial counsel conducted adequate cross examination.

19 **C. Petitioner’s trial counsel had an effective defense strategy during trial.**

20 Under Ground One(b) of the Petition, Petitioner argues that his trial counsel was  
21 unprepared to cross examine the State’s witness. Petition at 7(d). However, it seems that  
22 Petitioner was ultimately arguing that his trial counsel failed to mount a specific defense in  
23 blaming his co-defendants. Further, he claims that this was exasperated by his trial counsel  
24 advising Petitioner not to testify at trial.

25 “There are countless ways to provide effective assistance in any given case. Even the  
26 best criminal defense attorneys would not defend a particular client in the same way.”  
27 Strickland, 466 U.S. at 689, 104 S. Ct. at 689. “Strategic choices made by counsel after  
28 thoroughly investigating the plausible options are almost unchallengeable.” Dawson v. State,

1 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784  
2 P.2d 951, 953 (1989). In essence, the court must “judge the reasonableness of counsel's  
3 challenged conduct on the facts of the particular case, viewed as of the time of counsel's  
4 conduct.” Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.

5 Petitioner’s trial counsel’s strategy was to argue that Petitioner was not present during  
6 the incident. Throughout his cross examination of State’s witnesses as well as calling his own,  
7 Petitioner’s trial counsel furthered that argument. This was clearly a strategy that Petitioner’s  
8 trial counsel chose for trial. Further, Petitioner’s decision to testify or not to testify, is  
9 completely Petitioner’s decision to make. During trial, Petitioner was advised by the court that  
10 regardless of what his counsel advises, the decision to testify is ultimately up to Petitioner.  
11 Recorder’s Transcript of Hearing – Day 5 at 196-197. However, even after hearing this,  
12 Petitioner chose not to testify. Recorder’s Transcript of Hearing – Day 6 at 122. Therefore,  
13 Petitioner’s trial counsel was not ineffective based on his defense strategy.

14 **D. Petitioner’s trial counsel was not ineffective for not addressing an argument in**  
15 **a motion in limine.**

16 In Ground Two, Petitioner argues that his trial counsel was ineffective for failing to  
17 address an argument prior to trial. Petition at 8(a). Specifically, Petitioner argues that his trial  
18 counsel should have addressed the authenticity of text messages prior to trial.

19 Counsel cannot be ineffective for failing to make futile objections or arguments. See  
20 Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Trial counsel has the  
21 “immediate and ultimate responsibility of deciding if and when to object, which witnesses, if  
22 any, to call, and what defenses to develop.” Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167  
23 (2002).

24 Based on the above law, the role of a court in considering allegations of ineffective  
25 assistance of counsel is “not to pass upon the merits of the action not taken but to determine  
26 whether, under the particular facts and circumstances of the case, trial counsel failed to render  
27 reasonably effective assistance.” Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711  
28 (1978). This analysis does not mean that the court should “second guess reasoned choices

1 between trial tactics nor does it mean that defense counsel, to protect himself against  
2 allegations of inadequacy, must make every conceivable motion no matter how remote the  
3 possibilities are of success.” Id. To be effective, the constitution “does not require that counsel  
4 do what is impossible or unethical. If there is no bona fide defense to the charge, counsel  
5 cannot create one and may disserve the interests of his client by attempting a useless charade.”  
6 United States v. Cronin, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

7         Petitioner is attempting to claim that his trial counsel was ineffective for failing to  
8 challenge the authenticity of text messages prior to trial. Petition at 8(a). However, during trial,  
9 Petitioner’s trial counsel did object to the authenticity of the text messages. The court was able  
10 to hear argument from both parties and ultimately decided to overrule the objection. Records  
11 Transcript of Hearing – Day 4 at 125. The argument that Petitioner’s trial counsel was  
12 ineffective because he didn’t bring it up at the proper time is inconsequential. Further,  
13 Petitioner’s trial counsel objected to these text messages on several grounds. The question of  
14 admissibility of the text messages was ultimately decided by the Nevada Supreme Court. The  
15 Nevada Supreme Court held that the district court did not err in admitting the text messages.  
16 Therefore, Petitioner’s trial counsel was not ineffective for not bringing up the argument prior  
17 to trial.

18         **E. Petitioner’s trial counsel was not ineffective for failing to answer a jury**  
19         **question during deliberations.**

20         In Ground Three, Petitioner argues that his trial counsel was ineffective because he  
21 never provided more information on conspiracy. During trial, a juror asked: “If a person is  
22 aware of a crime being planned, but does nothing and wasn’t there, is he guilty of conspiracy?”.  
23 Petitioner alleges that because this question was never answered, his trial counsel was  
24 ineffective. However, this claim is meritless.

25         During trial, the jury was provided with adequate instruction on conspiracy law.  
26 Further, during closing arguments, the State and both Petitioner’s counsel as well as  
27 Petitioner’s co-defendant’s counsel was able to explain the law of conspiracy to the jury.  
28 Ultimately the conclusion as to whether someone is guilty of a crime, rests in the jury’s hands.

1 Therefore, Petitioner's trial counsel could not be found ineffective for failure to answer a legal  
2 conclusion.

3 **F. Counsel on appeal was effective.**

4 Ground Four alleges that Petitioner's appellate counsel was ineffective for failing to  
5 address the sufficiency of the evidence during trial. Petition at 10.

6 There is a strong presumption that appellate counsel's performance was reasonable and  
7 fell within "the wide range of reasonable professional assistance." See United States v.  
8 Aguirre, 912 F.2d 555, 560 (2nd Cir. 1990); citing Strickland, 466 U.S. at 689, 104 S. Ct. at  
9 2065. A claim of ineffective assistance of appellate counsel must satisfy the two-prong test set  
10 forth by Strickland. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). In order  
11 to satisfy Strickland's second prong, the defendant must show that the omitted issue would  
12 have had a reasonable probability of success on appeal. Id.

13 The professional diligence and competence required on appeal involves "winnowing  
14 out weaker arguments on appeal and focusing on one central issue if possible, or at most on a  
15 few key issues." Jones v. Barnes, 463 U.S. 745, 751-52, 103 S. Ct. 3308, 3313 (1983). In  
16 particular, a "brief that raises every colorable issue runs the risk of burying good arguments .  
17 . . in a verbal mound made up of strong and weak contentions." Id. at 753, 103 S. Ct. at 3313.  
18 For judges to second-guess reasonable professional judgments and impose on appointed  
19 counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very  
20 goal of vigorous and effective advocacy." Id. at 754, 103 S. Ct. at 3314.

21 Petitioner's appellate counsel focused on two main issues in the direct appeal: the  
22 admissibility of text messages and whether the venire violated Petitioner's Sixth Amendment  
23 Right. Order of Affirmance at 4. It is highly likely that Petitioner's appellate counsel  
24 determined that these two issues were stronger than a sufficiency of the evidence argument.  
25 Therefore, this court should assume that Petitioner's appellate counsel was effective.

26 Petitioner never explains why there wasn't sufficient evidence. Petitioner only claims  
27 that based on a jury question; the jury was confused as to what a conspiracy entails. However,  
28 this does not rise to the level required in appeal. Therefore, this claim is meritless.

**ORDER**

THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief shall be, and it is, hereby denied.

Dated this 16th day of February, 2023



07A 437 C3A6 49E2  
Michelle Leavitt  
District Court Judge

STEVEN B. WOLFSON  
Clark County District Attorney  
Nevada Bar #1565

BY /s/ ALEXANDER CHEN  
ALEXANDER CHEN  
Chief Deputy District Attorney  
Nevada Bar #10539

**CERTIFICATE OF SERVICE**

I certify that on the 14th day of February, 2023, I mailed a copy of the foregoing proposed Findings of Fact, Conclusions of Law, and Order to:

DAVONTAE WHEELER, BAC #1235057  
SOUTHERN DESERT CORRECTIONAL CENTER  
P. O. BOX 208  
INDIAN SPRINGS, NEVADA 89070-0208

BY Janet Hayes  
Secretary for the District Attorney's Office

February 21, 2023



17F14369C/AC/hb/jh/MVU



1 **CSERV**

2  
3 DISTRICT COURT  
CLARK COUNTY, NEVADA

4  
5  
6 Davontae Wheeler, Plaintiff(s) | CASE NO: A-22-857575-W  
7 vs. | DEPT. NO. Department 12  
8 Warden Najera, et. al,  
9 Defendant(s)

10  
11 **AUTOMATED CERTIFICATE OF SERVICE**

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

15 Service Date: 2/16/2023

16 Dept 12 Law Clerk dept12lc@clarkcountycourts.us