

# IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVONTAE AMARRI WHEELER,  
Appellant(s),

vs.

GABRIELA NAJERA, WARDEN,  
Respondent(s),

Electronically Filed  
Mar 09 2023 12:47 PM  
Elizabeth A. Brown  
Clerk of Supreme Court

Case No: A-22-857575-W

Docket No: 86086

## RECORD ON APPEAL

**ATTORNEY FOR APPELLANT**  
DAVONTAE WHEELER 1235057,  
PROPER PERSON  
P.O. BOX 208P  
INDIAN SPRINGS, NV 89070

**ATTORNEY FOR RESPONDENT**  
STEVEN B. WOLFSON,  
DISTRICT ATTORNEY  
200 LEWIS AVE.  
LAS VEGAS, NV 89155-2212

A-22-857575-W Davontae Wheeler, Plaintiff(s) vs. Warden Najera, et. al,  
Defendant(s)

**I N D E X**

<b><u>VOLUME:</u></b>	<b><u>PAGE NUMBER:</u></b>
1	1 - 92

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER:</u>
1	2/8/2023	Case Appeal Statement	54 - 55
1	12/21/2022	Certificate of Mailing	49 - 49
1	3/9/2023	Certification of Copy and Transmittal of Record	
1	3/7/2023	Civil Order to Statistically Close Case	89 - 90
1	3/9/2023	District Court Minutes	91 - 92
1	2/16/2023	Findings of Fact, Conclusions of Law and Order	56 - 71
1	12/15/2022	Motion to Compel the State to Provide Petitioner a Copy of State's Opposition to Petitioner's Petition for (Post Conviction) Relief *Hearing Requested*	44 - 48
1	2/7/2023	Notice of Appeal	50 - 53
1	2/22/2023	Notice of Entry of Findings of Fact, Conclusions of Law and Order	72 - 88
1	12/15/2022	Notice of Hearing	43 - 43
1	9/1/2022	Order for Petition for Writ of Habeas Corpus	26 - 27
1	8/29/2022	Petition for Writ of Habeas Corpus (Post- Conviction) *Evidentiary Hearing Requested*	1 - 25
1	10/12/2022	State's Opposition to Petitioner's Petition for Post-Conviction Relief	28 - 42

DAVONTAE WHEELER #1235057  
Petitioner/In Propria Persona  
Post Office Box 208, SDCC  
Indian Springs, Nevada 89070

**FILED**  
**AUG 29 2022**  
*Alvin L. Blum*  
CLERK OF COURT

IN THE EIGHTH JUDICIAL DISTRICT COURT OF  
THE STATE OF NEVADA IN AND FOR THE  
COUNTY OF CLARK

DAVONTAE WHEELER  
Petitioner,  
  
vs.  
Warden Najera et al.  
  
Respondent(s).

Case No. **A-22-857575-W**  
Dept. No. **Dept. 12**  
  
Docket \_\_\_\_\_

**\* EVIDENTIARY HEARING REQUESTED \***

PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

INSTRUCTIONS:

- (1) This petition must be legibly handwritten or typewritten signed by the petitioner and verified.
- (2) Additional pages are not permitted except where noted or with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.
- (3) If you want an attorney appointed, you must complete the Affidavit in Support of Request to Proceed in Forma Pauperis. You must have an authorized officer at the prison complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.
- (4) You must name as respondent the person by whom you are confined or restrained. If you are in a specific institution of the department of corrections, name the warden or head of the institution. If you are not in a specific institution of the department within its custody, name the director of the department of corrections.
- (5) You must include all grounds or claims for relief which you may have regarding your conviction and sentence.

RECEIVED  
AUG 22 2022  
CLERK OF THE COURT

1 Failure to raise all grounds in this petition may preclude you from filing future petitions  
2 challenging your conviction and sentence.

3 (6) You must allege specific facts supporting the claims in the petition you file seeking relief  
4 from any conviction or sentence. Failure to allege specific facts rather than just conclusions may  
5 cause your petition to be dismissed. If your petition contains a claim of ineffective assistance of  
6 counsel, that claim will operate to waive the attorney-client privilege for the proceeding in which  
7 you claim your counsel was ineffective.

8 (7) If your petition challenges the validity of your conviction or sentence, the original and one  
9 copy must be filed with the clerk of the district court for the county in which the conviction  
10 occurred. Petitions raising any other claim must be filed with the clerk of the district court for the  
11 county in which you are incarcerated. One copy must be mailed to the respondent, one copy to the  
12 attorney general's office, and one copy to the district attorney of the county in which you were  
13 convicted or to the original prosecutor if you are challenging your original conviction or sentence.  
14 Copies must conform in all particulars to the original submitted for filing.

### 15 PETITION

16 1. Name of institution and county in which you are presently imprisoned or where and who you  
17 are presently restrained of your liberty: Southern Desert Correctional Center  
18 County of Clark

19 2. Name the location of court which entered the judgment of conviction under attack: Eighth  
20 Judicial District Court 200 Lewis Ave Las Vegas NV

21 3. Date of judgment of conviction: 06/17/2020

22 4. Case number: C-17-32857-3

23 5. (a) Length of sentence: Max 12, Min. 24 COUNT 1; Life with 10yrs Min.

24 (b) If sentence is death, state any date upon which execution is scheduled: N/A

25 6. Are you presently serving a sentence for a conviction other than the conviction under attack in  
26 this motion:

27 Yes N/A No X If "Yes", list crime, case number and sentence being served at this time: \_\_\_\_\_

28 N/A

29 7. Nature of offense involved in conviction being challenged: COUNT 1 - CONSPIRACY  
30 TO COMMIT ROBBERY, and COUNT 3 - SECOND DEGREE MURDER

1 8. What was your plea? (Check one)

2 (a) Not guilty XX

3 (b) Guilty N/A

4 (c) Nolo contendere N/A

5 9. If you entered a guilty plea to one count of an indictment or information, and a not guilty plea  
6 to another count of an indictment or information, or if a guilty plea was negotiated, give details: \_\_\_\_\_

7 N/A  
8 /A

9 10. If you were found guilty after a plea of not guilty, was the finding made by: (check one)

10 (a) Jury XX

11 (b) Judge without a jury N/A

12 11. Did you testify at trial? Yes N/NoA

13 12. Did you appeal from the judgment of conviction?

14 Yes XX No N/A

15 13. If you did appeal, answer the following:

16 (a) Name of court: COURT OF APPEALS OF THE STATE OF NEVADA

17 (b) Case number or citation: 81374-COA

18 (c) Result: AFFIRMED

19 (d) Date of appeal: 02-24-2020

20 (Attach copy of order or decision, if available).

21 14.) If you did not appeal, explain briefly why you did not: \_\_\_\_\_

22 N/A  
23 /A

24 15. Other than a direct appeal from the judgment of conviction and sentence, have you previously  
25 filed any petitions, applications or motions with respect to this judgment in any court, state or  
26 federal? Yes N/NoA

27

28

1 16. If your answer to No 15 was "Yes", give the following information:

2 (a) (1) Name of court: \_\_\_\_\_

3 (2) Nature of proceedings: \_\_\_\_\_

4  
5 (3) Grounds raised : \_\_\_\_\_

6  
7  
8 (4) Did you receive an evidentiary hearing on your petition, application or motion?

9 Yes \_\_\_\_\_ No \_\_\_\_\_

10 (5) Result: \_\_\_\_\_

11 (6) Date of result: \_\_\_\_\_

12 (7) If known, citations of any written opinion or date of orders entered pursuant to each  
13 result: \_\_\_\_\_

14 (b) As to any second petition, application or motion, give the same information:

15 (1) Name of Court: \_\_\_\_\_

16 (2) Nature of proceeding: \_\_\_\_\_

17 (3) Grounds raised: \_\_\_\_\_

18 (4) Did you receive an evidentiary hearing on your petition, application or motion?

19 Yes \_\_\_\_\_ No \_\_\_\_\_

20 (5) Result: \_\_\_\_\_

21 (6) Date of result: \_\_\_\_\_

22 (7) If known, citations of any written opinion or date of orders entered pursuant to each  
23 result: \_\_\_\_\_

24 (c) As to any third or subsequent additional application or motions, give the same  
25 information as above, list them on a separate sheet and attach.

1 (d) Did you appeal to the highest state or federal court having jurisdiction, the result or action  
2 taken on any petition, application or motion?

3 (1) First petition, application or motion?

4 Yes \_\_\_\_ No \_\_\_\_

5 Citation or date of decision: \_\_\_\_\_

6 (2) Second petition, application or motion?

7 Yes \_\_\_\_ No \_\_\_\_

8 Citation or date of decision: \_\_\_\_\_

9 (e) If you did not appeal from the adverse action on any petition, application or motion,  
10 explain briefly why you did not. (You may relate specific facts in response to this question. Your  
11 response may be included on paper which is 8 1/2 x 11 inches attached to the petition. Your response  
12 may not exceed five handwritten or typewritten pages in length) \_\_\_\_\_

13 \_\_\_\_\_  
14 \_\_\_\_\_  
15 17. Has any ground being raised in this petition been previously presented to this or any other  
16 court by way of petition for habeas corpus, motion or application or any other post-conviction  
17 proceeding? If so, identify:

18 (a) Which of the grounds is the same: \_\_\_\_\_

19 \_\_\_\_\_  
20 (b) The proceedings in which these grounds were raised: \_\_\_\_\_

21 \_\_\_\_\_  
22 (c) Briefly explain why you are again raising these grounds. (You must relate specific facts  
23 in response to this question. Your response may be included on paper which is 8 1/2 x 11 inches  
24 attached to the petition. Your response may not exceed five handwritten or typewritten pages in  
25 length). \_\_\_\_\_

26 \_\_\_\_\_  
27 \_\_\_\_\_  
28 \_\_\_\_\_



1 18. If any of the grounds listed in Nos. 23(a), (b), (c), and (d), or listed on any additional pages  
2 you have attached, were not previously presented in any other court, state or federal, list briefly what  
3 grounds were not so presented, and give your reasons for not presenting them. (You must relate  
4 specific facts in response to this question. Your response may be included on paper which is 8 1/2 x  
5 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten  
6 pages in length). N/A

7  
8 19. Are you filing this petition more than one (1) year following the filing of the judgment of  
9 conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay.  
10 (You must relate specific facts in response to this question. Your response may be included on  
11 paper which is 8 1/2 x 11 inches attached to the petition. Your response may not exceed five  
12 handwritten or typewritten pages in length). NO: This Petition For Writ of Habeas

13 Corpus has been timely submitted within the one (1) year limitation  
14

15 20. Do you have any petition or appeal now pending in any court, either state or federal, as to the  
16 judgment under attack?

17 Yes N/A No A

18 If "Yes", state what court and the case number: N/A

19  
20 21. Give the name of each attorney who represented you in the proceeding resulting in your  
21 conviction and on direct appeal: Sandra L. Stewart, Esq., attorney on  
22 appeal, James J. Ruggeroli, Esq. Trial counsel  
23

24 22. Do you have any future sentences to serve after you complete the sentence imposed by the  
25 judgment under attack?

26 Yes N/A No A If "Yes", specify where and when it is to be served, if you know: \_\_\_\_\_

27 N/A  
28

Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

23. (a) GROUND ONE: That, counsel for Petitioner was ineffective at trial in violation of Petitioner's Sixth (6th) Amendment right to the effective assistance of counsel to the Bill of rights for the Constitution of the United States (COTUS), and Petitioner's Fourteenth (14th) Amendment right to due process and equal protection of the COTUS, as is more fully set forth and iterated in the Supporting Facts below.

23. (a) SUPPORTING FACTS (Tell your story briefly without citing cases or law): The Supreme Court of the United States (SCOTUS), has long recognized that the "right to counsel is the right to the effective assistance of counsel. To prevail on a claim of ineffective assistance of counsel, Petitioner must prove that he was denied "reasonably effective assistance" of counsel. Petitioner must show that his counsel's representation fell below an objective standard of reasonableness, and that except for counsel's errors, there is a reasonable probability that the result of the trial would have been different. The failure to do even the most basic investigation standing alone is deficient performance. A defendant who contends his attorney was ineffective because he did not adequately investigate must show how a better investigation would have changed the outcome of the trial. Petitioner informed his counsel that on the night of the incident that he left the group of Four (4) individuals and boarded the CAT bus (City Area Transit), that was headed South on S. Jones Blvd., headed to Flamingo Rd. to the Park Way Villas Apartments, at the hour of 11:30 to 11:35 P.M. That, counsel for Petitioner did not conduct any investigation to: 1. locate the driver of the bus on this night to determine whether the driver remembers Petitioner having boarded

the bus, or to determine whether any video footage was available showing petitioner boarding the bus; or to investigate whether there were any passengers on the bus that night of the incident, whom remember petitioner particularly, due to the fact that petitioner was "open carrying" a PT 145 PRO CAL .45 ACP firearm on his right hip. Counsel having conducted this investigation, there is a reasonable probability that the outcome of the trial would have been different.

Additionally, and of most importance to investigation to this case, the witness Robert Mason testified that he went for a jog in his neighborhood. During his jog, Mr. Mason saw four (4) young black males standing on the corner of Lindell and Dewey in front of 5536 Dewey Drive. Shortly after Mr. Mason ran past the four individuals standing in front of Mr. Valenzuela's home. (Mr. Mason's voluntary statement gives greater detail of the description of the 4 black males).

Mr. Mason had a continuing opportunity to view the 4 black males, whom were dressed in dark clothing as described by Mr. Mason.

That, the most basic investigation conducted by petitioner's counsel James J. Ruggeroli (counsel), would have easily, and readily determined that his client on the night of the incident was the only black male

dressed in "RED"! (See attached Exhibit "A" STATE'S EXHIBIT 321 2-13-20, and Exhibit "A-1" STATE'S EXHIBIT 322 2-13-20). Clearly Ex. A shows Petitioner in red and the open carry firearm on his right hip. That, at no time did Petitioner's counsel establish, present to the jury that his client is the only person in RED. Having done so would substantiated that Petitioner was not, and could not have possibly been present when the victim Gabriel Valenzuela, was shot and killed by the 4 black males that Mr. Mason saw in front of Mr. Valenzuela's home the night of August 8th, 2017, into the morning of August 9th, 2017.

Clearly, it cannot be believed that Petitioner was wearing red on the night, morning of the incident. Thus, clearly a more favorable investigation of establishing that counsel's client is the only one in RED, and establishing this fact before the trier of fact, the jury there is a reasonable probability that the result of the trial would have been different.

Counsel for Petitioner failed to conduct the type of investigation that would lead to facts relevant to Petitioner's case, i.e. that counsel's client was wearing "red", when a witness has described that perpetrators, suspects wore dark clothing.

Effective investigation by the lawyer has an important bear-

ing on competent representation at trial, for without adequate investigation counsel was not in a position to make the best use of such mechanism as cross-examination.

#### GROUND ONE (a)

COUNSEL FOR PETITIONER FAILED TO CONDUCT ADEQUATE CROSS-EXAMINATION RELATIVE TO PETITIONER'S DEFENSE. Petitioner does hereby adopt all of the facts, allegations as iterated supra, in GROUND ONE, as though reiterated, set forth, and stated herein GROUND ONE (a).

The adversary system often requires that even truthful witnesses be cross-examined. In Petitioner's case Petitioner only needed counsel to conduct adequate cross-examination of the state's witness Mr. Mason. Counsel only needed to confirm that: 1. Mr. Mason was truthful that on the night of the incident that there was only four (4), black males; 2. that those 4 black males were wearing dark clothing; 3. that Mr. Mason didn't see any suspect with an open carry fire-arm on his right hip; 4. nor did he see any suspect of the 4 black males wearing any other color.

Thus, the failure of counsel to conduct this basic cross-examination of Mr. Mason, extremely prejudiced Petitioner at trial, as Mr. Mason's truthful testimony would have substantiated that Petitioner was not one (1), of the 4

black males present at the time of the incident.

COUNT ONE (b)

COUNSEL FOR PETITIONER WAS UNPREPARED TO CROSS-EXAMINE STATE'S WITNESS

Petitioner does hereby adopt all of the facts, allegations as iterated supra, in GROUND ONE, as though reiterated, set forth, and stated herein GROUND ONE (b).

Due to counsel's failure to conduct adequate investigation, counsel did not consider mounting a defense of blaming co-defendants Demario Lorton-Robinson, and DeShawn Robinson, especially since DeShawn Robinson had decided to implicate Petitioner into the murder conspiracy by fabricating Petitioner's involvement. And the matter was exacerbated by counsel advising Petitioner not to testify in Petitioner's one defense, despite Petitioner's lack of a criminal record and despite the fact that he had consistently maintained his innocence. And especially since DeShawn Robinson in his testimony stated that he lies.

Whereby, the above and foregoing shows how a better investigation would have rendered a more favorable outcome probable. Thus, Petitioner has shown counsel's representation fell below an objective standard of reasonableness, and that except for counsel's errors, there is a reasonable probability that the result of the trial would have been different.

23. (b) GROUND TWO: That, counsel for Petitioner was ineffective at trial, in violation of Petitioner's Sixth (6th), Amendment right to the effective assistance of counsel to the Bill of rights for the Constitution of the United States (COUS), and Petitioner's Fourteenth (14th), Amendment right to due process and equal protection for the COUS as is more fully set forth and iterated in the Supporting Facts below.

23. (b) SUPPORTING FACTS (Tell your story briefly without citing cases or law): Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. Investigation of the case includes locating witnesses, and interviewing those witnesses, and obtaining the services of any necessary expert witnesses. Truly effective cross-examination may not be possible without an adequate investigation of the case. Effective investigation by counsel has an important bearing on competent representation at trial, for without adequate investigation counsel is not in a position to make the best use of such mechanisms as cross-examination or impeachment of adverse witnesses at trial. Additionally, adequate preparation includes being familiar with the law which bears on the client's legal problems which can be discovered through reasonable research. A presumption of prejudice may attach where counsel entirely fails to subject the prosecution's case to meaningful adversarial testing. Counsel for Petitioner knew and/or should have known of the "text message", and of the prosecution's intent to utilize the "text message" against Petitioner at trial. However, prior to trial counsel for Petitioner failed to challenge the authenticity of the text message. At trial counsel was only able to object to admitting the text message, claiming it was hearsay within hearsay,

and that the text message violated the Confrontation Clause." Counsel at trial objected, arguing that the text message was inadmissible hearsay, violated the Confrontation Clause, and "lacked authentication." The district court overruled counsel's objection. Whereby, the state's case as to the authenticity of the "text message" was not subjected to any meaningful adversarial testing. Counsel for Petitioner did not, prior to trial provide the district court with points and authorities, argument as why the "text message" was "hearsay upon hearsay"; why the "text message" violated the Confrontation Clause; or why the "text message" lacked authentication.

This failure of counsel to challenge the authenticity of the text message "prior to trial", extremely prejudiced Petitioner due to the use of the unauthenticated "text message" being utilized to convict Petitioner.

Thus, Petitioner has shown counsel's representation fell below an objective standard of reasonableness, and that except for counsel's errors, there is a reasonable probability that the result of the trial would have been different.



1 23. (c) GROUND THREE: That, Counsel for Petitioner was ineffective at  
2 trial, in violation of Petitioner's Sixth (6th), Amendment right to the effective  
3 assistance of Counsel to the Bill of Rights for the Constitution of the United States  
4 (COTUS), and Petitioner's Fourteenth (14th), Amendment right to the Due Process  
and Equal Protection Clause, for the COTUS, as is more fully set forth and  
iterated in the Supporting Facts below.

5 23. (c) SUPPORTING FACTS (Tell your story briefly without citing cases or law): The  
6 Court received a note from what appears to be Juror 5 Camille  
7 Estrella (Ms. Estrella). However, on the two (2), pages there are  
8 two (2), other names. (See attached Court's Exhibits #9 and #10  
9 also numbered 3124 and 3125). The question asked is as follows:  
10 If a person is aware of a crime being planned, but does nothing,  
11 wasn't there, is he guilty of conspiracy? Neither the Court, nor  
12 the prosecution, nor Counsel for Petitioner provided any more in-  
13 struction as to the Juror's question. It is Petitioner's contention  
14 that Counsel for Petitioner was ineffective provided additional  
15 instruction on conspiracy, or reiteration of the instruction on  
16 conspiracy left this Juror and/or Jurors in a quandary. Clearly  
17 "A conspiracy is an agreement between two or more persons for  
18 an unlawful purpose." "A person who knowingly does any act to  
19 further the object of a conspiracy, or otherwise participates  
20 therein, is criminally liable as a conspirator." Even though "mere  
21 association is insufficient to support a charge of conspiracy."  
22 "proof of even a single overt act may be sufficient to corroborate  
23 a defendant's statement and support a conspiracy conviction."  
24 Conspiracy is usually established by inference from the conduct  
25 of the parties. "Mere knowledge or approval of, or acquiescence  
26 in, the object and purpose of a conspiracy without an agreement  
27 to cooperate in achieving such object or purpose does not make

one a party to conspiracy." "Conspiracy is seldom susceptible of direct proof and is usually established by inference from the conduct of the parties." In particular, a conspiracy conviction may be supported by "a coordinated series of acts," in furtherance of the underlying offense, "sufficient to infer the existence of an agreement." Clearly this juror No. 5 Ms. Estrella, or jurors did **not** believe that petitioner was present, or did any act to further the object of the conspiracy or otherwise participated in the underlying offense. Whereby, clearly any iteration of the above and foregoing being requested by petitioner's counsel to the court to be given to the question, would have aided petitioner at trial, by aiding this juror and/or jurors' to the question asked. This failure of counsel fell below an objective standard of reasonableness, and that except for counsel's errors, there is a reasonable probability that the result of the trial would have been different.

Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

23. (a) GROUND **FOUR:** That, appellate counsel for Petitioner was ineffective at trial, in violation of Petitioner's Sixth (6th), Amendment right to the effective assistance of counsel to the Bill of Rights for the Constitution of the United States (COTUS), and Petitioner's Fourteenth (14th), Amendment right to the Due Process and Equal Protection for the COTUS, as is more fully set forth in the Supporting Facts below.

23. (a) SUPPORTING FACTS (Tell your story briefly without citing cases or law): **Be-**  
**cause** "conspiracy is a specific intent crime," the State is also required to prove that Petitioner had "the intent to agree or conspire and the intent to commit the offense that is the object of the conspiracy." Accordingly, the State was required to prove that Petitioner did **any** act to further the object of the conspiracy or otherwise participated in the underlying offense. Petitioner's iterates that counsel on appeal was ineffective for failing to challenge the sufficiency the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Clearly, the juror's note is a strong indication that, in the mind of Juror No. 5 Ms. Estrella, and/or jurors', believe Petitioner did nothing and wasn't there; thereby setting forth that Petitioner did **not** do any act to further the object of the conspiracy, or otherwise participated in the underlying offense; essential elements to the crime of conspiracy to commit.... This failure of counsel fell below an objective standard of reasonableness, and that except for counsel's error's, there is a reasonable probability that the direct appeal would have been different.

## SUMMARY

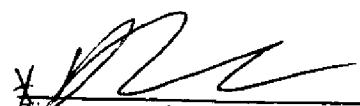
Petitioner states that each Ground of the Petition For Writ of Habeas Corpus (Post-Conviction) (Writ), as iterated supra, sets forth facts supported by specific factual allegations not belied by the record, being true would entitle Petitioner to relief.

In fact, Petitioner's Writ makes a colorable showing he is actually innocent of the crime, and has been wrongfully convicted, for a crime in which Petitioner did ~~not~~ act to further the object of the conspiracy, did ~~no~~ overt act to further the conspiracy or otherwise participated in the underlying offense.

Petitioner's Writ raises sufficient doubt about Petitioner's guilt to undermine confidence in the result of the trial without the assurance ~~that~~ that it was untainted by constitutional errors.


Whereby, Petitioner does respectfully request that upon this Court's review of the Writ, that the Court will issue an Order GRANTING the Writ, or in the alternative issue an Order GRANTING Petitioner an evidentiary hearing; that the GROUND'S setting forth ineffective assistance of counsel may be put to the test.

1 WHEREFORE, Davontae Wheeler, prays that the court grant Petitioner's  
2 relief to which he may be entitled in this proceeding  
3 EXECUTED at Southern Desert Correctional Center  
4 on the 15 day of August, 2022

5  
6   
7 Signature of Petitioner

8 **VERIFICATION**

9 Under penalty of perjury, pursuant to N.R.S. 208.165 et seq., the undersigned declares that he is  
10 the Petitioner named in the foregoing petition and knows the contents thereof; that the pleading is  
11 true and correct of his own personal knowledge, except as to those matters based on information and  
12 belief, and to those matters, he believes them to be true.

13  
14   
15 Signature of Petitioner

16  
17 N/A  
18 Attorney for Petitioner

**CERTIFICATE OF SERVICE BY MAILING**

I, Navontae Wheeler, hereby certify, pursuant to NRCP 5(b), that on this 5  
day of August, 2022, I mailed a true and correct copy of the foregoing, "Petition For  
Writ of Habeas Corpus (Post-Conviction)"  
by placing document in a sealed pre-postage paid envelope and deposited said envelope in the  
United State Mail addressed to the following:

District Attorney  
Clark County Nevada  
200 Lewis Ave  
PO Box 552212  
Las Vegas NV 89155-2212

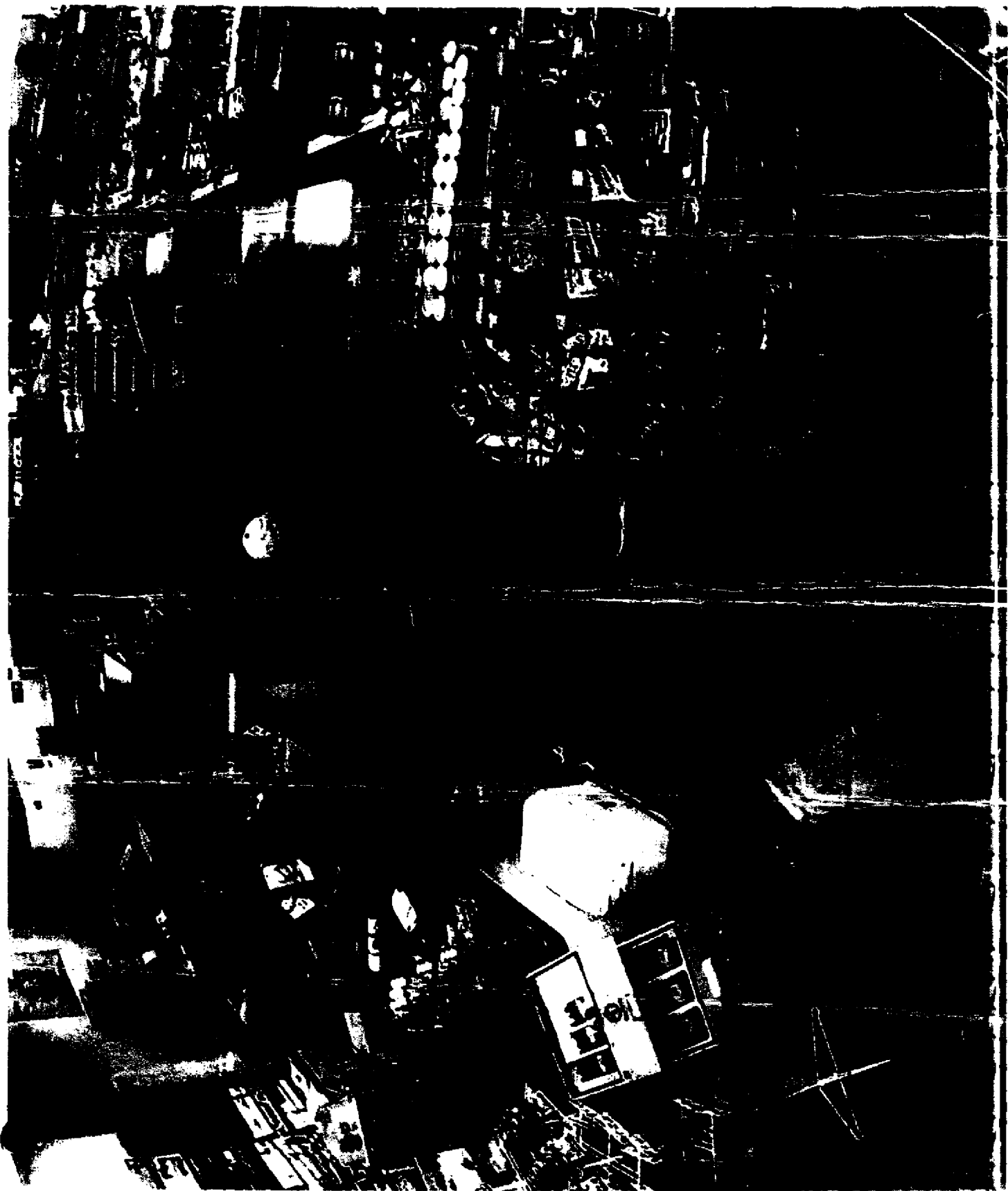
CC:FILE

DATED: this 15 day of August, 2022.

NAVONTAE WHEELER #1235057  
PETITIONER /In Propria Personam  
Post Office Box 208, S.D.C.C.  
Indian Springs, Nevada 89018  
IN FORMA PAUPERIS:



2106  
-OVER-



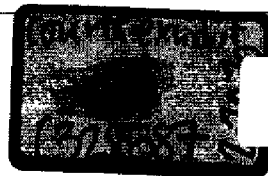
2107  
-OVER-



If a person is aware of a crime being planned, but does nothing and wasn't there, is he guilty of Conspiracy?

G/S

02/20/2020



3125

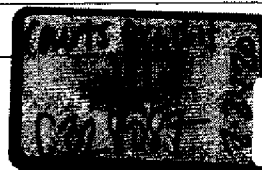
2-20-20

Juror 5

Denise Signorelli

Camille ESTRELLA

651-5556



3124

2-20-20

### AFFIRMATION

Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding Petition for

Writ of Habeas Corpus (Post-Conviction)  
(Title of Document)

(Title of Document)

filed in District Court Case number C-17-328587-3

☒ Does not contain the social security number of any person.

**-OR-**

☐ Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

(State specific law)



B. For the administration of a public program or for an application for a federal or state grant.

**Signature**

8.15.22

Date \_\_\_\_\_

Print Name \_\_\_\_\_

**The**

Darontae Wheeler  
SDCC #1235057  
PO Box 208

Indian Springs NV 89070-0208

8/5 2616325

Clerk of the Court  
Eighth Judicial Dist. Court  
200 Lewis Ave 3<sup>rd</sup> Floor  
Las Vegas NV 89155-1160

*Heather S. Smith*  
CLERK OF THE COURT

PPOW

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

Davontae Wheeler,

Petitioner,

vs.

Warden Najera, et. al,

Respondent,

Case No: A-22-857575-W  
Department 12

**ORDER FOR PETITION FOR  
WRIT OF HABEAS CORPUS**

Petitioner filed a Petition for Writ of Habeas Corpus (Post-Conviction Relief) on August 29, 2022. The Court has reviewed the Petition and has determined that a response would assist the Court in determining whether Petitioner is illegally imprisoned and restrained of his/her liberty, and good cause appearing therefore,

**IT IS HEREBY ORDERED** that Respondent shall, within 45 days after the date of this Order, answer or otherwise respond to the Petition and file a return in accordance with the provisions of NRS 34.360 to 34.830, inclusive.

**IT IS HEREBY FURTHER ORDERED** that this matter shall be placed on this Court's

Calendar on the 3rd day of November, 2022, at the hour of

8:30 am o'clock for further proceedings.

Dated this 1st day of September, 2022

*Michelle Leavitt*

District Court Judge  
538 686 20C4 AD6E  
Michelle Leavitt  
District Court Judge

1 **CSERV**

2  
3 DISTRICT COURT  
CLARK COUNTY, NEVADA

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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

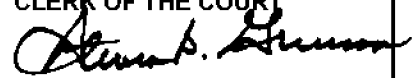
11 **AUTOMATED CERTIFICATE OF SERVICE**

12 Electronic service was attempted through the Eighth Judicial District Court's  
13 electronic filing system, but there were no registered users on the case.

14 If indicated below, a copy of the above mentioned filings were also served by mail  
15 via United States Postal Service, postage prepaid, to the parties listed below at their last  
16 known addresses on 9/2/2022

17 Davontae Wheeler	#1235057
	SDCC
	P.O. Box 208
	Indian Springs, NV, 89070

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**OPPS**  
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Attorney for Plaintiff

DISTRICT COURT  
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,  
  
Respondent,  
  
-vs-  
  
DAVONTAE WHEELER,  
#1235057  
  
Petitioner.

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

DEPT NO: XII

**STATE'S OPPOSITION TO PETITIONER'S PETITION FOR  
POST-CONVICTION RELIEF**

DATE OF HEARING: November 3, 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 moves this Honorable Court for an order denying the Petitioner's Petition for Post-Conviction Relief heretofore filed in the above-entitled matter.

This Opposition 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.

**POINTS AND AUTHORITIES**

**STATEMENT OF THE 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);

1 Count 6 — Attempt Robbery with Use of a Deadly Weapon (Category B Felony — NRS  
2 200.380, 193.330, 193.165); and Count 7 — Murder with Use of a Deadly Weapon (Category  
3 A Felony — NRS 200.010, 200.030, 193.165). Petitioner was charged for having committed  
4 these crimes with Demario Lofton-Robinson (“Lofton-Robinson”), DeShawn Robinson  
5 (“Robinson”), and Raekwon Robertson (“Robertson”).

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

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

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

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

21 On August 29, 2022, Petitioner filed the instant Petition for Writ of Habeas Corpus  
22 (Post-Conviction Relief). The State responds as follows.

### 23 **STATEMENT OF THE FACTS**

24 In the early morning hours of August 9, 2017, just after midnight, Gabriel Valenzuela  
25 ("Mr. Valenzuela") was coming home from nursing school when he was shot in the driveway  
26 of his own home, located at 5536 Dewey Drive, in Las Vegas, Nevada. Dr. Corneal testified  
27 that Mr. Valenzuela suffered from a gunshot wound to the head, left lower chest, right ankle,  
28



1 and left ankle. Based on these injuries, she concluded that the gunshot wounds to the ankles  
2 would have made moving incredibly painful, and that either the gunshot wound to the  
3 abdomen, or the gunshot wound to the head could have been fatal. She further opined that Mr.  
4 Valenzuela was shot first in the stomach and then in the head. Ultimately, Dr. Corneal  
5 concluded that Mr. Valenzuela's cause of death was multiple gunshot wounds, and the manner  
6 of death was homicide.

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

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

22 One minute later, at 12:12 AM, Mr. Valenzuela's cousin, John Relato, was inside his  
23 house at 5536 Dewey Drive when he heard a gunshot. Mr. Relato ran to the upstairs window  
24 where he saw Mr. Valenzuela's car door open in the driveway. Thinking this was odd, Mr.  
25 Relato, went outside to check on Mr. Valenzuela and saw him lying on the ground bleeding.  
26 Mr. Relato called 911, removed his shirt, and placed it on Mr. Valenzuela's wounds in an  
27 effort to stop the bleeding.  
28

1           Officer Calleja was the first officer to respond to 5536 Dewey Ave at 12:20 AM. Once  
2           the paramedics took Mr. Valenzuela to the hospital, Officer Calleja began securing the scene.  
3           Officer Calleja had further been informed that one minute prior to the call regarding Mr.  
4           Valenzuela's, individuals living on the south side of the street called about a suspicious  
5           circumstance in the neighborhood. Three .45 caliber cartridge cases and one .22 caliber  
6           cartridge case were found at the scene of the murder. The .45 caliber cartridge cases bore three  
7           separate head-stamps: R-P 45 AUTO, NFCR, and WINCHESTER 45 AUTO.

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

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

25          Based on the description provided by Mr. Spahn, Sergeant Tromboni decided it would  
26          be prudent to obtain surveillance footage from the store. At trial, Mr. Spahn's identified the  
27          four men who entered the store as well as the vehicle they were in from that surveillance  
28          footage. The vehicle was seen on surveillance footage arriving to the store at approximately

1 11:25 p.m. and leaving the store at approximately 11:45 p.m., roughly 25 minutes before the  
2 murder.

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

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

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

27 Crime Scene Investigator William Speas, on August 9, 2017, at around 11:00 PM, CSA  
28 Speas responded to a house located at 919 Bagpipe Court. There, he impounded a pink

1 backpack containing a handgun and red air Jordan athletic shoes. CSA Speas processed all  
2 impounded pieces of evidence for fingerprints. At trial, Robinson identified the pink backpack  
3 containing the firearm recovered during the search of 919 Bagpipe Court as a backpack that  
4 both he and Robinson-Lofton would use.

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

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

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

26 A .22 caliber semi-automatic Taurus firearm was located at 6647 West Tropicana, co-  
27 defendant Robertson's residence. Officers also located ammunition bearing the headstamp  
28 "C". This ammunition matched the .22 caliber cartridge case found at the murder scene. Co-

1 defendant Robertson's and Petitioner's fingerprints were both on the magazine of the Taurus  
2 handgun. Ballistic testing revealed that the .22 caliber cartridge case found at the scene of the  
3 murder was fired from this firearm. At trial, Robinson testified that when he was 14 years old,  
4 himself and his brother Robinson-Lofton had been living with their grandmother at 919  
5 Bagpipe Court. Robinson explained that about a week before August 8, 2017, Robinson-  
6 Lofton purchased a white Mercury Grand Marquis, which they began living out of. Robinson-  
7 Lofton also bought each of them a pair of red Air Jordan athletic sneakers, which Robinson  
8 wore the night of August 8, 2017.

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

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

24 When shown a photograph of Mr. Valenzuela's home, Robinson confirmed that it was  
25 the house he, Robinson-Lofton, Petitioner, and co-defendant Robertson stopped at after  
26 leaving the convenience store. Robinson further confirmed that all the men except himself had  
27 firearms. Additionally, Robinson confirmed that the four of them went to Mr. Valenzuela's  
28 home to rob it and that on the way to the home he overheard a conversation between the men

1 about exchanging bullets in their guns. Robinson's job was supposed to be to enter the home  
2 first and tell everyone to get down.

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

## 11 **LAW AND ARGUMENT**

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

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

22 The Sixth Amendment to the United States Constitution provides that, "[i]n all  
23 criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel  
24 for his defense." The United States Supreme Court has long recognized that "the right to  
25 counsel is the right to the effective assistance of counsel." Strickland v. Washington, 466 U.S.  
26 668, 686, 104 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d  
27 322, 323 (1993).

28 ///

1 To prevail on a claim of ineffective assistance of trial counsel, a Petitioner must prove  
2 he was denied “reasonably effective assistance” of counsel by satisfying the two-prong test of  
3 Strickland, 466 U.S. at 686–87, 104 S. Ct. at 2063–64. See also Love, 109 Nev. at 1138, 865  
4 P.2d at 323. Under the Strickland test, a Petitioner must show first that his counsel's  
5 representation fell below an objective standard of reasonableness, and second, that but for  
6 counsel's errors, there is a reasonable probability that the result of the proceedings would have  
7 been different. 466 U.S. at 687–88, 694, 104 S. Ct. at 2065, 2068; Warden, Nevada State  
8 Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-  
9 part test). “[T]here is no reason for a court deciding an ineffective assistance claim to approach  
10 the inquiry in the same order or even to address both components of the inquiry if the Petitioner  
11 makes an insufficient showing on one.” Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

12 The court begins with the presumption of effectiveness and then must determine  
13 whether the Petitioner has demonstrated by a preponderance of the evidence that counsel was  
14 ineffective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). “Effective counsel  
15 does not mean errorless counsel, but rather counsel whose assistance is ‘[w]ithin the range of  
16 competence demanded of attorneys in criminal cases.’” Jackson v. Warden, 91 Nev. 430, 432,  
17 537 P.2d 473, 474 (1975).

#### 18 **A. Petitioner’s Trial Counsel Conducted Adequate Investigation**

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

26 A defendant who contends he received ineffective assistance because his counsel did  
27 not adequately investigate must show how a better investigation would have changed the  
28 outcome of trial. Strickland, 466 U.S. at 687, 104 S. Ct. at 2064. Such a defendant must allege

1 with specificity what the investigation would have revealed and how it would have altered the  
2 outcome of the trial. See State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993).

3 “[D]efense counsel has a duty ‘to make reasonable investigations or to make a  
4 reasonable decision that makes particular investigations unnecessary.’” State v. Love, 109 Nev.  
5 1136, 1138, 865 P.2d 322, 323 (1993) (quoting Strickland, 466 U.S. at 691, 104 S. Ct. at 2066).  
6 A decision “not to investigate must be directly assessed for reasonableness in all the  
7 circumstances, applying a heavy measure of deference to counsel’s judgment.” Id. Moreover,  
8 “[a] decision not to call a witness will not generally constitute ineffective assistance of  
9 counsel” Id. at 1145, 865 P.2d at 328. Indeed, it is well established that “counsel is not required  
10 to unnecessarily exhaust all available public or private resources.” Molina v. State, 120 Nev.  
11 185, 192, 87 P.3d 533, 538 (2004).

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

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

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

26 The United States Constitution’s Sixth Amendment provides that an accused be  
27 allowed to be confronted with the witnesses against him, but that right is not unlimited and  
28 has many exceptions recognized by the courts. “[T]rial judges retain wide latitude insofar as



1 the Confrontation Clause is concerned to impose reasonable limits on ... cross-examination  
2 based on concerns about, among other things, harassment, prejudice, confusion of the issues,  
3 the witness's safety, or interrogation that is repetitive or only marginally relevant.” Farmer v.  
4 State, 133 Nev. 693, 703, 405 P.3d 114, 123 (2017), reh'g denied (Feb. 23, 2018) (quoting  
5 Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S.Ct. 1431(1986). See also Jackson v. State,  
6 116 Nev. 334, 335, 997 P.2d 121, 121 (2000) (“[a] defendant's right to present relevant  
7 evidence is not unlimited, being subject to reasonable restrictions.”).

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

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

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

27         “There are countless ways to provide effective assistance in any given case. Even the  
28 best criminal defense attorneys would not defend a particular client in the same way.”

1 Strickland, 466 U.S. at 689, 104 S. Ct. at 689. “Strategic choices made by counsel after  
2 thoroughly investigating the plausible options are almost unchallengeable.” Dawson v. State,  
3 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784  
4 P.2d 951, 953 (1989). In essence, the court must “judge the reasonableness of counsel's  
5 challenged conduct on the facts of the particular case, viewed as of the time of counsel's  
6 conduct.” Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.

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

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

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

21       Counsel cannot be ineffective for failing to make futile objections or arguments. See  
22 Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Trial counsel has the  
23 “immediate and ultimate responsibility of deciding if and when to object, which witnesses, if  
24 any, to call, and what defenses to develop.” Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167  
25 (2002).

26       Based on the above law, the role of a court in considering allegations of ineffective  
27 assistance of counsel is “not to pass upon the merits of the action not taken but to determine  
28 whether, under the particular facts and circumstances of the case, trial counsel failed to render

1 reasonably effective assistance.” Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711  
2 (1978). This analysis does not mean that the court should “second guess reasoned choices  
3 between trial tactics nor does it mean that defense counsel, to protect himself against  
4 allegations of inadequacy, must make every conceivable motion no matter how remote the  
5 possibilities are of success.” Id. To be effective, the constitution “does not require that counsel  
6 do what is impossible or unethical. If there is no bona fide defense to the charge, counsel  
7 cannot create one and may disserve the interests of his client by attempting a useless charade.”  
8 United States v. Cronin, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

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

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

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

27       During trial, the jury was provided with adequate instruction on conspiracy law.  
28 Further, during closing arguments, the State and both Petitioner’s counsel as well as

Petitioner's co-defendant's counsel was able to explain the law of conspiracy to the jury. Ultimately the conclusion as to whether someone is guilty of a crime, rests in the jury's hands. Therefore, Petitioner's trial counsel could not be found ineffective for failure to answer a legal conclusion.

**F. Counsel on appeal was effective**

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

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. A claim of ineffective assistance of appellate counsel must satisfy the two-prong test set forth by Strickland. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). In order to satisfy Strickland's second prong, the defendant must show that the omitted issue would have had a reasonable probability of success on appeal. Id.

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.

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

///

1 Even if this court determined that Petitioner's appellate counsel was ineffective, the  
2 defendant would have to argue that this issue would have a reasonable probability of success  
3 on appeal. Petitioner only alleges that there was not sufficient evidence to convict. Petition at  
4 10. However, Petitioner never explains why there wasn't sufficient evidence. Petitioner only  
5 claims that based on a jury question; the jury was confused as to what a conspiracy entails.  
6 However, this does not rise to the level required in appeal. Therefore, this claim is meritless.

7 **CONCLUSION**

8 Based upon the arguments, the State respectfully requests that the Court deny  
9 Petitioner's Petition for Writ of Habeas Corpus in its entirety.

10 DATED this 12th day of October, 2022.

11 Respectfully submitted,

12 STEVEN B. WOLFSON  
13 Clark County District Attorney  
Nevada Bar #001565

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

17  
18 **CERTIFICATE OF MAILING**

19 I hereby certify that service of the above and foregoing was made this 12th day of  
20 October 2022, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

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

24  
25 BY /s/ Janet Hayes  
26 Secretary for the District Attorney's Office

27  
28 17F14369C/AC/kh/jh/APPEALS/MVU

DISTRICT COURT  
CLARK COUNTY, NEVADA

\*\*\*\*

Electronically Filed  
12/15/2022 11:16 AM  
Steven D. Grierson  
CLERK OF THE COURT



Davontae Wheeler, Plaintiff(s)

vs.

Warden Najera, et. al, Defendant(s)

Case No.: A-22-857575-W

Department 12

**NOTICE OF HEARING**

Please be advised that the Plaintiff / Petitioner's - Motion to Compel the State to Provide Petitioner a Copy of State's Opposition to Petitioner's Petition for (Post Conviction) Relief in the above-entitled matter is set for hearing as follows:

**Date:** February 16, 2023

**Time:** 8:30 AM

**Location:** RJC Courtroom 14D  
Regional Justice Center  
200 Lewis Ave.  
Las Vegas, NV 89101

**NOTE: Under NEFCR 9(d), if a party is not receiving electronic service through the Eighth Judicial District Court Electronic Filing System, the movant requesting a hearing must serve this notice on the party by traditional means.**

STEVEN D. GRIERSON, CEO/Clerk of the Court

By: /s/ Michelle McCarthy  
Deputy Clerk of the Court

**CERTIFICATE OF SERVICE**

I hereby certify that pursuant to Rule 9(b) of the Nevada Electronic Filing and Conversion Rules a copy of this Notice of Hearing was electronically served to all registered users on this case in the Eighth Judicial District Court Electronic Filing System.

By: /s/ Michelle McCarthy  
Deputy Clerk of the Court

*Heather J. Smith*  
CLERK OF THE COURT

Davontae Wheeler  
SDCC  
#1235057  
PO Box 208  
Indian Springs NV 89070-0208  
Petitioner Pro Se

DISTRICT COURT  
CLARK COUNTY, NEVADA

DAVONTAE WHEELER,  
Petitioner,

vs.

GABRIELA NAJERA, et al.,  
Respondent.

Case No. A-22-857575-W

Dep't No. XII

/\* HEARING REQUESTED \*

MOTION TO COMPEL THE STATE TO PROVIDE PETITIONER  
A COPY OF STATE'S OPPOSITION TO PETITIONER'S PETIT-  
ION FOR (POST-CONVICTION) RELIEF

COMES NOW, Petitioner, Davontae Wheeler (Petitioner), by and through his proper person, and hereby submits for this Court's review, and ruling the foregoing "Motion To Compel The State To Provide Petitioner A Copy Of State's Opposition To Petitioner's Petition For (Post-Conviction) Relief. (Motion).

This Motion is made and based upon all documents, papers, and pleadings on file herein, as to the above captioned case, and case number.

This Motion is also made and based upon the accompanying Points And Authorities, and argument of

Petitioner, made in support of the foregoing Motion.

### POINTS AND AUTHORITIES

Petitioner on 08/29/2022, caused to be filed his Petition for Writ of Habeas Corpus (Post-Conviction) (Writ).

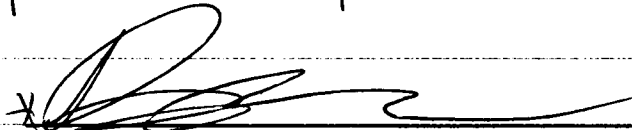
This Court on 09/01/2022, issued its Order for Petition for Writ of Habeas Corpus (Order), requiring the State to respond within 45 days.

The State on 10/12/2022, caused to be filed its "State's Opposition to Petitioner's Petition for Post-Conviction Relief" (Opposition). However, Petitioner has not received a copy of the Opposition, and does so request the State to be compelled to provide, pursuant to NRCF 5(b).

Additionally, this Court held a hearing on the Writ on 11/03/2022, and Petitioner has requested from the Clerk's Office a copy of the Court Minute's and has not received the same. Whereby, Petitioner respectfully request that the Clerk's Office be compelled to provide a copy of the Court Minute's, and or any Order issued by this Court in regards to the 11/03/2022 HEARING.

Respectfully submitted:

Dated this 6<sup>th</sup> day of December, 2022.

x 

DAVONTAE WHEELER  
PETITIONER PRO SE

///



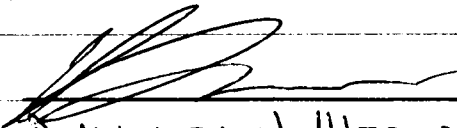
## CERTIFICATE OF MAILING

I, Davontae Wheeler, pursuant to NRCF 5(h), do hereby state that, on the 6<sup>th</sup> day of December, 2022, that I mailed to the District Attorney's Office, a copy of the foregoing "Motion To Compel The State To Provide Petitioner A Copy of States Opposition To Petitioner's Petition For (Post-Conviction) Relief, by placing a copy of same in the United States Mail and addressed as follows:

District Attorney  
Clark County Nevada  
200 Lewis Ave  
PO Box 552212  
Las Vegas NV 89155-2212

Respectfully Submitted

Dated this 6<sup>th</sup> day of December 2022.

  
DAVONTAE WHEELER  
PETITIONER PRO SE

////

////

////

AFFIRMATION  
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding Motion To  
Compel The State To Provide Petitioner A Copy Of...  
(Title of Document)

filed in District Court Case number A-22-857575-W

☒ Does not contain the social security number of any person.

-OR-

☐ Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

\_\_\_\_\_  
(State specific law)

-or-

B. For the administration of a public program or for an application  
for a federal or state grant.

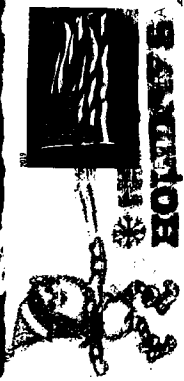
[Signature]  
Signature

12-6-22  
Date

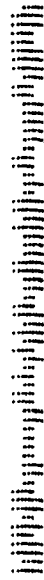
DANDOTAE WHEELER  
Print Name  
PETITIONER PRO SE  
Title

Davontae Wheeler #1235057  
S.D.C.C.  
P.O. BOX 208  
Indian Springs NV 89070

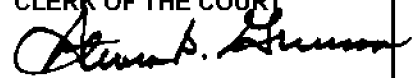
LAS VEGAS NV 890  
7 DEC 2022 PM 3 L



Steven D. Grierson, Clerk of the Court  
200 Lewis Avenue, 3rd floor  
Las Vegas NV 89155-1160



89101-890000



**CERT**  
**STEVEN B. WOLFSON**  
Clark County District Attorney  
Nevada Bar #001565  
**ALEXANDER CHEN**  
Chief Deputy District Attorney  
Nevada Bar #10539  
200 Lewis Avenue  
Las Vegas, Nevada 89155-2212  
(702) 671-2500  
Attorney for Plaintiff

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

**THE STATE OF NEVADA,**  
  
Plaintiff,

-vs-

**DAVONTAE WHEELER,**  
#1235057  
  
Defendant.

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

**CERTIFICATE OF MAILING**

I hereby certify that service of the State's Opposition to Petitioner's Petition for Post-Conviction Relief, was made this 21st day of December, 2022, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

DAVONTAE WHEELER #1235057  
Southern Desert Correctional Center  
PO Box 208  
Indian Springs, NV 89070-0208

BY /s/Deana Daniels  
Secretary for the District Attorney's Office

17F14369C/dd-MVU

*Steven D. Grierson*

1 Davontae Wheeler  
2 Petitioner . In Propria Personam  
3 Post Office Box 208, S.D.C.C.  
4 Indian Springs, Nevada 89018

5 IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
6  
7 IN AND FOR THE COUNTY OF CLARK  
8

9 DAVONTAE WHEELER  
10 Petitioner  
11 vs.  
12 GABRIELA NAJERA, Warden  
13 Respondent  
14

Case No. A-22-857575-W  
(C-17-828587-3)  
Dept. No. XII  
Docket \_\_\_\_\_

15  
16 **NOTICE OF APPEAL**

17 NOTICE IS HEREBY GIVEN, That the Petitioner/Defendant,  
18 Davontae Wheeler, in and through his proper person, hereby  
19 appeals to the Supreme Court of Nevada from the ORDER denying and/or  
20 dismissing the

21 Petition For Writ of Habeas Corpus (Post-Conviction)  
22

23 ruled on the 3<sup>rd</sup> day of November, 20 22.  
24

Dated this 25<sup>th</sup> day of January, 20 23

Respectfully Submitted.

Davontae Wheeler

RECEIVED

FEB 06 2023

CLERK OF THE COURT

**CERTIFICATE OF SERVICE BY MAILING**

I, Davontae Wheeler, hereby certify, pursuant to NRCP 5(b), that on this 25<sup>th</sup> day of January, 2023, I mailed a true and correct copy of the foregoing, "

NOTICE OF APPEAL

by placing document in a sealed pre-postage paid envelope and deposited said envelope in the United State Mail addressed to the following:

District Attorney  
Clark County Nevada  
200 Lewis Ave  
PO Box 552212  
Las Vegas NV 89155

CC FILE

DATED: this 25<sup>th</sup> day of January, 2023.

Davontae Wheeler  
Davontae Wheeler # 1235057  
Petitioner / In Propria Personam  
Post Office Box 208, S.D.C.C.  
Indian Springs, Nevada 89018  
**IN FORMA PAUPERIS:**

AFFIRMATION  
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding \_\_\_\_\_

NOTICE OF APPEAL

(Title of Document)

A-22-857575-W

filed in District Court Case number C-17-328587-3

☒ Does not contain the social security number of any person.

-OR-

☐ Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

\_\_\_\_\_  
(State specific law)

-or-

B. For the administration of a public program or for an application  
for a federal or state grant.

Darontae Wheeler  
Signature

01, 25, 23  
Date

Darontae Wheeler  
Print Name

PETITIONER PRO SE  
Title

Davontae Wheeler #1235057  
S.D.C.C.  
P.O BOX 208  
Indian Springs NV 89070

BRASS SLIP #

26-7977

quadrant

04-11-1991

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ZIP 89070

04-11-1991

Deck of the Court  
8th Sub Dist Ct.  
200 Lewis Ave.  
3rd Floor  
Las Vegas NV 89155-1160





ASTA

**IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE  
STATE OF NEVADA IN AND FOR  
THE COUNTY OF CLARK**

DAVONTAE WHEELER,

Plaintiff(s),

vs.

WARDEN NAJERA,

Defendant(s),

Case No: A-22-857575-W

Dept No: XII

**CASE APPEAL STATEMENT**

1. Appellant(s): Davontae Wheeler

2. Judge: Michelle Leavitt

3. Appellant(s): Davontae Wheeler

Counsel:

Davontae Wheeler 31235057  
P.O. Box 208  
Indian Springs, NV 89070

4. Respondent (s): Warden Najera

Counsel:

Steven B. Wolfson, District Attorney  
200 Lewis Ave.  
Las Vegas, NV 89155-2212

1 5. Appellant(s)'s Attorney Licensed in Nevada: N/A  
2 Permission Granted: N/A

3 Respondent(s)'s Attorney Licensed in Nevada: Yes  
4 Permission Granted: N/A

5 6. Has Appellant Ever Been Represented by Appointed Counsel In District Court: No

6 7. Appellant Represented by Appointed Counsel On Appeal: N/A

7 8. Appellant Granted Leave to Proceed in Forma Pauperis\*\*: N/A  
8 *\*\*Expires 1 year from date filed*  
9 Appellant Filed Application to Proceed in Forma Pauperis: No  
Date Application(s) filed: N/A

10 9. Date Commenced in District Court: August 29, 2022

11 10. Brief Description of the Nature of the Action: Civil Writ

12 Type of Judgment or Order Being Appealed: Civil Writ of Habeas Corpus

13 11. Previous Appeal: No

14 Supreme Court Docket Number(s): N/A

15 12. Child Custody or Visitation: N/A

16 13. Possibility of Settlement: Unknown

17 Dated This 8 day of February 2023.

18 Steven D. Grierson, Clerk of the Court

19  
20  
21 /s/ Heather Ungermann

22 Heather Ungermann, Deputy Clerk  
23 200 Lewis Ave  
24 PO Box 551601  
Las Vegas, Nevada 89155-1601  
(702) 671-0512

25 cc: Davontae Wheeler  
26  
27  
28

**FFCO**  
STEVEN B. WOLFSON  
Clark County District Attorney  
Nevada Bar #001565  
ALEXANDER CHEN  
Chief Deputy District Attorney  
Nevada Bar #10539  
200 Lewis Avenue  
Las Vegas, Nevada 89155-2212  
(702) 671-2500  
Attorney for Plaintiff

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.

28 ///

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).

28 ///

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.

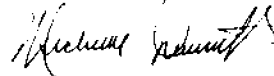
26 Petitioner never explains why there wasn't sufficient evidence. Petitioner only claims  
27 that based on a jury question; the jury was confused as to what a conspiracy entails. However,  
28 this does not rise to the level required in appeal. Therefore, this claim is meritless.



**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

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
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1 NEFF

2 **DISTRICT COURT**  
3 **CLARK COUNTY, NEVADA**

4  
5 DAVONTAE WHEELER,

6 Petitioner,

Case No: A-22-857575-W

Dept No: XII

7 vs.

8 WARDEN NAJERA,

9 Respondent,

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

10  
11 **PLEASE TAKE NOTICE** that on February 16, 2023, the court entered a decision or order in this matter,  
12 a true and correct copy of which is attached to this notice.

13 You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you  
14 must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is mailed  
to you. This notice was mailed on February 22, 2023.

15 STEVEN D. GRIERSON, CLERK OF THE COURT

16 /s/ Amanda Hampton

17 Amanda Hampton, Deputy Clerk

18  
19 **CERTIFICATE OF E-SERVICE / MAILING**

20 I hereby certify that on this 22 day of February 2023, I served a copy of this Notice of Entry on the  
21 following:

22 ☒ By e-mail:

23 Clark County District Attorney's Office  
Attorney General's Office – Appellate Division-

24 ☒ The United States mail addressed as follows:

25 Davontae Wheeler # 1235057  
26 P.O. Box 208  
Indian Springs, NV 89070

27 /s/ Amanda Hampton

28 Amanda Hampton, Deputy Clerk

**FFCO**  
STEVEN B. WOLFSON  
Clark County District Attorney  
Nevada Bar #001565  
ALEXANDER CHEN  
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Nevada Bar #10539  
200 Lewis Avenue  
Las Vegas, Nevada 89155-2212  
(702) 671-2500  
Attorney for Plaintiff

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.

28 ///

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).

28 ///

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.

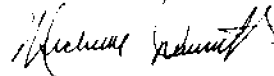
21 Petitioner's appellate counsel focused on two main issues in the direct appeal: the  
22 admissibility of text messages and whether the venire violated Petitioner's Sixth Amendment  
23 Right. Order of Affirmance at 4. It is highly likely that Petitioner's appellate counsel  
24 determined that these 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

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
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*Heather S. Lumin*

CLERK OF THE COURT

OSCC

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

\*\*\*\*\*

DAVONTAE WHEELER,  
PLAINTIFF(S)

VS.

WARDEN NAJERA, ET. AL,  
DEFENDANT(S)

CASE NO.: A-22-857575-W

DEPARTMENT 12

**CIVIL ORDER TO STATISTICALLY CLOSE CASE**

Upon review of this matter and good cause appearing,  
**IT IS HEREBY ORDERED** that the Clerk of the Court is hereby directed to  
statistically close this case for the following reason:

**DISPOSITIONS:**

- ☐ Default Judgment
- ☐ Judgment on Arbitration
- ☐ Stipulated Judgment
- ☐ Summary Judgment
- ☐ Involuntary Dismissal
- ☐ Motion to Dismiss by Defendant(s)
- ☐ Stipulated Dismissal
- ☐ Voluntary Dismissal
- ☐ Transferred (before trial)
- ☐ Non-Jury – Disposed After Trial Starts
- ☐ Non-Jury – Judgment Reached
- ☐ Jury – Disposed After Trial Starts
- ☐ Jury – Verdict Reached
- ☒ Other Manner of Disposition

Dated this 7th day of March, 2023

*Michelle Leavitt*

**618 CAF 0D1C B236  
Michelle Leavitt  
District Court Judge**

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 Order to Statistically Close Case was served via the court's electronic  
14 eFile system to all recipients registered for e-Service on the above entitled case as listed  
below:

15 Service Date: 3/7/2023

16 Dept 12 Law Clerk	dept12lc@clarkcountycourts.us
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17  
18 If indicated below, a copy of the above mentioned filings were also served by mail  
19 via United States Postal Service, postage prepaid, to the parties listed below at their last  
known addresses on 3/8/2023

20 Davontae Wheeler	#1235057
21	SDCC
22	P.O. Box 208
	Indian Springs, NV, 89070

23 Steven Wolfson	Clark County District Attorney
24	200 Lewis Avenue, 3rd Floor
25	Las Vegas, NV, 89155

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

**Writ of Habeas Corpus**

**COURT MINUTES**

**November 03, 2022**

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A-22-857575-W      Davontae Wheeler, Plaintiff(s)  
vs.  
Warden Najera, et. al, Defendant(s)

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**November 03, 2022      8:30 AM      Petition for Writ of Habeas  
Corpus**

**HEARD BY:** Leavitt, Michelle

**COURTROOM:** RJC Courtroom 14D

**COURT CLERK:** Haly Pannullo  
Cristle Ramey

**RECORDER:** Sara Richardson

**REPORTER:**

**PARTIES**

**PRESENT:** Jaramillo, Haley Ann      Attorney

**JOURNAL ENTRIES**

- COURT ORDERED, Petition DENIED as the allegations are bare and naked and belied by the record; State to prepare the Order.

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

**Writ of Habeas Corpus**

**COURT MINUTES**

**February 16, 2023**

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A-22-857575-W	Davontae Wheeler, Plaintiff(s) vs. Warden Najera, et. al, Defendant(s)
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<b>February 16, 2023</b>	<b>8:30 AM</b>	<b>Motion</b>	<b>Plaintiff/Petitioner's Motion to Compel the State to Provide Petitioner a Copy of State's Opposition to Petitioner's Petition for (Post Conviction) Relief</b>
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**HEARD BY:** Leavitt, Michelle

**COURTROOM:** RJC Courtroom 14D

**COURT CLERK:** Reina Villatoro

**RECORDER:** Sara Richardson

**REPORTER:**

**PARTIES**

**PRESENT:** Thompson, Megan Brooke Attorney

**JOURNAL ENTRIES**

- COURT ORDERED the State to send a copy of the State's response and minutes of the hearing to the Plaintiff. Ms. Thompson confirmed with the Court that the State has a certificate of mailing saying that the minutes have been sent by the State to the Plaintiff. COURT SO NOTED

# Certification of Copy and Transmittal of Record

State of Nevada }  
County of Clark } SS:

Pursuant to the Supreme Court order dated March 2, 2023, I, Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, do hereby certify that the foregoing is a true, full and correct copy of the complete trial court record for the case referenced below. The record comprises one volume with pages numbered 1 through 92.

DAVONTAE WHEELER,

Plaintiff(s),

vs.

WARDEN NAJERA, ET.AL.,

Defendant(s),

Case No: A-22-857575-W

Dept. No: XII

now on file and of record in this office.

**IN WITNESS THEREOF**, I have hereunto  
Set my hand and Affixed the seal of the  
Court at my office, Las Vegas, Nevada  
This 9 day of March 2023.

Steven D. Grierson, Clerk of the Court



Amanda Hampton, Deputy Clerk