IN THE SUPREME COURT OF THE STATE OF NEVADA

RAEKWON ROBERTSON,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

CASE NO: 87811

APPELLANT'S OPENING BRIEF

Appeal From Denial of Post-Conviction Habeas Petition

STEVEN S. OWENS, ESQ.
Nevada Bar #004352
Steven S. Owens, LLC
1000 N. Green Valley #440-529
Henderson, Nevada 89074
(702) 595-1171

Counsel for Appellant

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

AARON D. FORD
Nevada Attorney General
Nevada Bar #007704
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Respondent

IN THE SUPREME COURT OF THE STATE OF NEVADA

RAEKWON ROBERTSON, Appellant, v. THE STATE OF NEVADA, Respondent.	CASE NO: 87811

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal. Raekwon Robertson is represented by Steven S. Owens, Esq, of Steven S. Owens, LLC, who is a sole practitioner and there are no parent corporations for which disclosure is required pursuant to this rule.

DATED this 8th day of February, 2024.

/s/ Steven S. Owens

STEVEN S. OWENS, ESQ.
Nevada Bar No. 4352
1000 N. Green Valley #440-529
Henderson, NV 89074
(702) 595-1171

Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

JURISDICTIONAL STATEMENT 1

ROUTING STATEMENT 1

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 5

SUMMARY OF THE ARGUMENT 8

ARGUMENT 9

I. COUNSEL FAILED TO INVESTIGATE AND RAISE APPELLANT'S MENTAL HEALTH ISSUES AT TRIAL AS DISPROVING SPECIFIC INTENT 10

II. COUNSEL FAILED TO INVESTIGATE AND RAISE APPELLANT'S MENTAL HEALTH ISSUES AT SENTENCING IN MITIGATION 16

CONCLUSION 21

CERTIFICATE OF COMPLIANCE 22

CERTIFICATE OF SERVICE 23

TABLE OF AUTHORITIES

Cases

Brown v. State, 110 Nev. 846, 877 P.2d 1071 (1994) 19
Doleman v. State, 112 Nev. 843, 921 P.2d 278 (1996) 14
Evitts v. Lucey, 469 U.S. 387, 105 S. Ct. 830 (1985) 9
Fox v. State, 73 Nev. 241, 316 P.2d 924 (1957) 11
Hancock v. State, 80 Nev. 581, 397 P.2d 181 (1964) 15
Johnson v. State, 123 Nev. 139, 159 P.3d 1096 (2007) 15
Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996) 10
Lader v. Warden, 121 Nev. 682, 120 P.3d 1164 (2005) 10
Riley v. State, 110 Nev. 638, 878 P.2d 272 (1994) 10
Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984) 9
United States v. Brown, 326 F.3d 1143 (10th Cir. 2003) 11
Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984) 9
Washington v. State, 132 Nev. 655, 376 P.3d 802 (2016) 15
Weaver v. Warden, 107 Nev. 856, 822 P.2d 112 (1991) 19
Wilson v. State, 105 Nev. 110, 771 P.2d 583 (1989) 19

Statutes

NRS 193.165 19
NRS 34.575(1) 1

JURISDICTIONAL STATEMENT

This appeal is from an Order Regarding Evidentiary Hearing on Petition for Writ of Habeas Corpus (Post-Conviction) filed on December 1, 2023, which denied a petition for post-conviction relief from a criminal conviction pursuant to a jury verdict. 8 AA 1968. Notice of Entry of Order was filed on December 6, 2023. 8 AA 1967. Appellate jurisdiction in this case derives from NRAP 4(b)(1) and NRS 34.575(1). The Notice of Appeal was timely filed on December 19, 2023. 8 AA 1976.

ROUTING STATEMENT

This matter is not presumptively assigned to the Court of Appeals because it is a postconviction appeal that does involve a challenge to a judgment of conviction or sentence for offenses that are category A felonies. See NRAP 17(b)(3). However, because the case was previously remanded by the Court of Appeals for an evidentiary hearing, it may be appropriate to re-assign it back to the same Court now that the case has returned.

STATEMENT OF THE ISSUES

I. **COUNSEL FAILED TO INVESTIGATE AND RAISE APPELLANT'S MENTAL HEALTH ISSUES AT TRIAL AS DISPROVING SPECIFIC INTENT**

II. **COUNSEL FAILED TO INVESTIGATE AND RAISE APPELLANT'S MENTAL HEALTH ISSUES AT SENTENCING IN MITIGATION**

STATEMENT OF THE CASE

On December 14, 2017, Appellant Raekwon Robertson was charged by way of Indictment in Case C-17-328587-2 along with two other co-defendants, Demario Lofton-Robinson and Davontae Wheeler, with counts of Conspiracy to Commit Robbery, Attempt Robbery with use of a Deadly Weapon, and Murder with use of a Deadly Weapon for the killing of Victim Gabriel Valenzuela on August 9, 2017.[1] 1 AA 1-6. An initial trial date was set for July 30, 2018. 1 AA 7-14. Attorney Michael Sanft confirmed as attorney of record on February 13, 2018, and represented Robertson through jury trial, sentencing and direct appeal. 1 AA 15.

A Superseding Indictment with the same charges was filed on April 19, 2018, as a result of new ballistics evidence submitted to the Grand Jury. 1 AA 16-45. On June 14, 2018, the trial date was vacated and reset for January 22, 2019. 1 AA 52-61. On January 2, 2019, Robertson's counsel had no objection to a co-defendant's motion to sever the parties and the trial date was vacated and reset for June 25, 2019. 1 AA 70, 72-6. On May 15, 2019, the trial date was again vacated as to all defendants and was reset for November 19, 2019, because co-defendant Lofton-Robinson had just gotten back from Lakes Crossing. 1 AA 82-6. At calendar call on November

[1] Appellant was also charged alone in the same Indictment with counts of Burglary, Conspiracy and Armed Robbery for a separate and unrelated incident occurring on August 2, 2017, at the Fiesta Discount Market to which he later pleaded guilty.

5, 2019, the trial date was again vacated because co-defendant Lofton-Robinson was sent back to Competency Court and the trial date was reset for February 10, 2020. 1 AA 91-9. When co-defendant Lofton-Robinson was unavailable at Lake's Crossing, Robertson proceeded to a joint jury trial together with co-defendant Wheeler. 1 AA 100-2, 103-8.

On the first day of trial, an Amended Superseding Indictment was filed removing co-defendant Lofton-Robinson. 1 AA 109-12. The trial proceeded for eight days from February 11th through 24th, 2020. 1 AA 113 – 7 AA 1571. The jury returned a verdict of guilty on all three counts including First Degree Murder with use of a Deadly Weapon. 7 AA 1563-71, 1572-3. On March 12, 2020, Robertson pleaded guilty to two additional counts of Conspiracy and Armed Robbery for the unrelated crime at Fiesta Discount Market which were run concurrent. 7 AA 1574-85. Robertson was sentenced on all counts on June 11, 2020, and received an aggregate sentence of 28 years to Life in prison.[2] 7 AA 1586-99. The judgment of conviction was filed on June 17, 2020. 7 AA 1600-3.

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[2] In contrast, co-defendant Wheeler was only found guilty of Conspiracy and Second Degree Murder (without a deadly weapon) and received an aggregate sentence of 144 months (or 12 years) to Life in prison. 7 AA 1659-61. After his return from Lake's Crossing, Co-defendant Lofton-Robinson pleaded guilty to Second Degree Murder with use of a Deadly Weapon and Attempt Robbery and received a stipulated aggregate sentence of 18 to 45 years in prison. 7 AA 1663-5.

Robertson's counsel filed a timely direct appeal on June 24, 2020, which was docketed as SC#81400. 7 AA 1604-5, 1667-8. Counsel filed an Opening Brief on November 12, 2020. 7 AA 1670-84. The Nevada Supreme Court filed its Order of Affirmance on May 14, 2021. 7 AA 1686-90. Remittitur issued on June 8, 2021. 7 AA 1691.

Meanwhile, Robertson filed premature pro se petitions for writ of habeas corpus in the instant case, A-20-823892-W, on October 29th and again on November 5th, 2020, which were stayed pending the outcome of the direct appeal. 7 AA 1606-16, 1617-22, 1623. On May 26, 2022, Robertson filed another timely petition along with a motion to appoint counsel which the district court granted on June 2, 2022. 7 AA 1624-31, 1632-6, 1637. Counsel's Supplemental Brief with exhibits was filed on August 19, 2022. 7 AA 1641-1740. The State's Response was filed on October 5, 2022. 8 AA 1741-62. The matter was heard and argued in court on November 17, 2022, at which time the habeas petition was denied. 8 AA 1763-7. Notice of Entry of Findings of Fact, Conclusions of Law and Order was filed on December 13, 2022. 8 AA 1777-92. A timely Notice of Appeal to this Court was filed on January 6, 2023. 8 AA 1793-4.

In the post-conviction appeal (SC# 85932), Appellant filed an Opening Brief on March 7, 2023, which was followed by the State's Answering Brief on April 5, 2023, and then by Appellant's Reply Brief on April 14, 2023. 8 AA 1795, 1826,

1862. On August 7, 2023, the Nevada Court of Appeals filed its Order Affirming in Part, Reversing in Part and Remanding. 8 AA 1876-82. Remittitur issued on September 1, 2023. 8 AA 1883.

On remand, a status check was set for September 14, 2023, at which time an evidentiary hearing was scheduled for November 3, 2023. 8 AA 1884-86. On October 23, 2023, Appellant filed Exhibits in Support of Evidentiary Hearing. 8 AA 1890-1933. The evidentiary hearing was then conducted as planned on November 3, 2023, at which Appellant's former counsel, Michael Sanft, and Appellant's mother, Erika Loyd, both testified. 8 AA 1934-66. A written Order Regarding Evidentiary Hearing on Petition for Writ of Habeas Corpus (Post-Conviction) was filed on December 1, 2023, which denied the habeas claims. 8 AA 1968-75. Notice of Entry Order was filed on December 6, 2023. 8 AA 1967. A Notice of Appeal was filed on December 19, 2023. 8 AA 1976-77.

STATEMENT OF THE FACTS

At trial, the State presented evidence that on August 8th, 2017, and into the morning of the August 9th, 2017, Appellant Raekwon Robertson, with his co-defendants Demario Lofton-Robinson, Davonte Wheeler, and Deshawn Robinson attempted to carry out an armed robbery. 4 AA 982-3. They arrived in the neighborhood of Dewey Avenue and Lindell Avenue just before midnight where they and their car, a white Mercury Grand Marquis, were observed by a passing

jogger, Robert Mason who took note of the suspicious activity. 3 AA 653-8. Shortly after, they saw Gabrielle Valenzuela pull into his driveway and check his mail. 5 AA 1005-6.

The four men quickly approached him, grabbed him, and told him to give them everything he had. 5 AA 1005-6. Within a couple of seconds Valenzuela lay dying in his driveway, shot in his head and torso. 5 AA 1024. The four men fled the scene without taking any of Valenzuela's property. 5 AA 1007.

The State used accomplice DeShawn Robinson to validate the facts of the events. 5 AA 1019. Robinson agreed to this only after the State offered to remove the charge of Murder with use of a Deadly Weapon in exchange for his testimony against Robertson and Wheeler. 5 AA 1019. Robinson testified that Appellant Robertson carried a gun and participated in the attempted robbery and murder. 4 AA 990; 5 AA 1006. The State also presented a text message Robertson sent to another accomplice on the day of the incident asking if he wanted to "hit a house," surveillance video showing Robertson in a car identified by a witness as being in the immediate vicinity of the crime scene at the time the crimes occurred, evidence of Robertson's fingerprints on that car, and a gun found at Robertson's house that had his DNA on it and contained bullets that matched casings found at the crime scene. 7 AA 1687-8.

At the evidentiary hearing recently held on November 3, 2023, Appellant's mother Erika Loyd furnished and identified her son's school records which were admitted into evidence by stipulation. 8 AA 1890-1933, 1940, 1957-1958. She had obtained copies of these school records and provided them to Appellant's trial counsel, Michael Sanft, in preparation for trial. 8 AA 1959. Ms. Loyd remembered that Appellant had many behavioral problems at school and that he had been diagnosed with bipolar and schizophrenia. 8 AA 1959-60. Although doctors had prescribed medication, Ms. Loyd discontinued having her son take the pills because they made him like a zombie with dry mouth and no appetite. *Id*. Ms. Loyd testified that her son's mental health history showed his thinking and ability to understand were not at the level he should have been and would have made a difference to the jury and sentencing judge. 8 AA 1961.

Appellant's former counsel Michael Sanft testified that he represented Appellant in the underlying criminal case for murder that went to trial in 2020. 8 AA 1939. Sanft acknowledged that there had been two pre-trial competency reports done on Appellant by Drs. Paglini and Kapel. 8 AA 1940. Those two competency reports were admitted into evidence by stipulation. *Id*.; 7 AA 1698-1710. These reports confirmed that although Appellant was competent to stand trial, he suffered from "bipolar disorder, schizophrenia, and ADHD." *Id*. Although Appellant was receiving treatment and medication while in custody, at the time of the instant

offense he had been off his medications for over a year. *Id*. When off his medications, he reported hearing voices, paranoia, and blackouts and had no memory of the offense. *Id*. Appellant dropped out of school in 11th grade where he had been in special education for a "learning disability" and he received social security. *Id*. Sanft recalled he had seen and been generally familiar with these competency reports at the time, but did not necessarily remember their content. 8 AA 1941-42.

The school records provided to him by Erika Loyd did not look familiar to Sanft and he did not recall seeing any of Appellant's school records in preparation for trial. 8 AA 1944. The school records documented Appellant's history of problems with inappropriate behavior, making bad choices and poor decisions. 8 AA 1945. School personnel had determined that Appellant's actions were a manifestation of his disability and his conduct was related to possible emotional problems. 8 AA 1946. Despite not having been previously familiar with much of this information, Sanft testified that he would not have used it at trial. 8 AA 1946-49. But Sanft also opined that he should have used it as mitigation in sentencing. 8 AA 1949-50.

SUMMARY OF THE ARGUMENT

This habeas case returns after being previously remanded by the Court of Appeals (SC#85932) for an evidentiary hearing on two particular issues. 8 AA 1878-1880. Following an evidentiary hearing, the district court below again erred

in denying Robertson's habeas claims of ineffective assistance of counsel at trial and at sentencing and erred in its application of law and determination of facts which are not supported by substantial evidence in the record. Specifically, counsel failed to investigate and raise Robertson's substantial mental health issues of a learning disability, mild mental retardation, bipolar disorder, schizophrenia, and ADHD either at trial to negate the specific intent crimes or at sentencing in mitigation. But for these errors, the outcome of Robertson's trial and sentencing would have been different.

ARGUMENT

An indigent defendant possesses a constitutional right to reasonably effective assistance of counsel at trial. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984) (trial); *Evitts v. Lucey*, 469 U.S. 387, 391, 105 S. Ct. 830, 833 (1985) (appeal); *Warden v. Lyons*, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984), *cert. denied*, 471 U.S. 1004, 105 S. Ct. 1865 (1985). To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a convicted defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that he was prejudiced as a result of counsel's performance. *Strickland*, 466 U.S. at 687-88, 692, 104 S. Ct. at 2064-65, 2067. Prejudice is demonstrated where counsel's errors were so severe that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the

proceeding would have been different. *Id*. at 694, 104 S. Ct. at 2068. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome of trial. *Id*. The defendant carries the affirmative burden of establishing prejudice. 466 U.S. at 693, 104 S. Ct. at 2067-68.

A claim of ineffective assistance of counsel presents a mixed question of law and fact that is subject to independent review. *Kirksey v. State*, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996). However, a district court's factual findings will be given deference by this court on appeal, so long as they are supported by substantial evidence and are not clearly wrong. *Riley v. State*, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994). This Court reviews the court's application of the law to those facts de novo. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005). Appellant Robertson was denied his right to effective assistance of counsel under the Sixth Amendment to the U.S. Constitution as set forth in the following claims for relief, which the district court erred in denying.

I. COUNSEL FAILED TO INVESTIGATE AND RAISE APPELLANT'S MENTAL HEALTH ISSUES AT TRIAL AS DISPROVING SPECIFIC INTENT

Appellant's counsel called no witnesses at trial and Appellant himself did not testify. So, the jury heard nothing at all about Appellant's mental health issues and how they might have affected his behavior and intent the night of the robbery. After

the remand for an evidentiary hearing, the district court again denied this habeas claim of ineffective assistance of counsel on grounds that it was inconsistent with defense counsel's theory at trial which was that Appellant was not present for the robbery and was not the shooter. 8 AA 1970-1971. Further, the district court concluded that this was a reasonable strategic decision. *Id*. However, the decision was neither strategic nor reasonable because counsel was not even aware of Appellant's mental health issues despite having access to Appellant's competency reports and information from Appellant's mother. Also, while true that counsel pursued a theory of defense that the evidence was insufficient to convict beyond a reasonable doubt, presenting this mental health evidence was not inconsistent with such an argument and the failure to present it was both deficient and prejudicial to Appellant as it would have changed the outcome of the case.

Evidence of a mental disorder or defect not raising to the level required for an insanity instruction may be considered in determining whether a defendant had the requisite intent at the time of the offense. See *Fox v. State*, 73 Nev. 241, 247, 316 P.2d 924, 927 (1957); *United States v. Brown*, 326 F.3d 1143, 1146 (10th Cir. 2003) (Evidence of a defendant's mental condition is admissible for the purpose of disproving specific intent).

Prior to trial, Appellant had undergone a couple competency evaluations by Dr. Lawrence Kapel and Dr. John Paglini. 7 AA 1698-1710. These reports

confirmed that although Appellant was competent to stand trial, he suffered from "bipolar disorder, schizophrenia, and ADHD." *Id*. Although Appellant was receiving treatment and medication while in custody, at the time of the instant offense he had been off his medications for over a year. *Id*. When off his medications, he reported hearing voices, paranoia, and blackouts and had no memory of the offense. *Id*. Appellant dropped out of school in 11th grade where he had been in special education for a "learning disability" and he received social security. *Id*. At the evidentiary hearing, Appellant's trial counsel Michael Sanft admitted that he had these competency reports prior to trial, but did not specifically remember anything about Appellant hearing voices, being paranoid, not remembering the incident, or having blackouts, mood swings, and anger. 8 AA 1939-1941. Instead, counsel relied on his own interactions with Appellant and concluded that he was never concerned for his safety around Appellant who appeared normal to him. 8 AA 1942-1943.

In regards to the school records furnished to him by Appellant's mother, Erika Loyd, counsel testified that they did not look familiar to him and he did not recall seeing any of Appellant's school records in preparation for trial. 8 AA 1944. The school records documented Appellant's history of problems with inappropriate behavior, making bad choices and poor decisions. 8 AA 1945. School personnel

had determined that Appellant's actions were a manifestation of his disability and his conduct was related to possible emotional problems. 8 AA 1946.

In its Order denying this claim, the district court concluded that trial counsel was unaware of Appellant's mental health conditions:

> Mr. Sanft, Esq., trial counsel presented at the hearing and provided testimony. He was not familiar with the mental health records admitted at the hearing, and therefore, did not review them prior to trial. Mr. Sanft indicated he never had any indication Mr. Robertson suffered from any mental health condition nor did petitioner convey to him any mental health conditions that were relevant. Although the petitioner was referred to competency court in November, 2017, Mr. Sanft was not aware of petitioner's history of mental illness or his medication regiment, and whether petitioner was off his medication at the time of the murder. Mr. Robertson never informed counsel of any mental health issues that would be relevant in the trial phase according to his trial counsel.

8 AA 1969. But trial counsel ***should*** have been aware of Appellant's mental health conditions because he had the competency reports which were part of the record. 8 AA 1939-1941. Counsel also knew of and had spoken at the time with Appellant's mother, Erika Loyd, who gave a voluntary statement to police on August 15, 2017, confirming that Appellant has mental illnesses for which he receives social security benefits. 7 AA 1712-36. Specifically, she explained that Appellant has been diagnosed with schizophrenia, bipolar, mild mental retardation, learning disability, and sickle cell trait. *Id*. Appellant was prescribed and took several medications to include Adderall and Abilify but she had him stop taking them because it made him "like a zombie." *Id*.; 8 AA 1960. At the evidentiary hearing, Erika Loyd testified

that she personally spoke with Michael Sanft before the trial about Appellant's mental illness and learning disabilities. 8 AA 1958-1959. She informed Sanft about the school records and hand-delivered them to his office before trial. *Id*. Yet, Sanft did not remember seeing them. 8 AA 1944. The district court's finding that Appellant was at fault for not informing his counsel of his mental health issues is not supported by the record. 8 AA 1969. Under these circumstances, trial counsel's ignorance of Appellant's mental health illnesses and conditions fell below an objective standard of reasonable performance.

Additionally, without investigation and knowledge of Appellant's mental illness, a decision to omit such facts from trial can not be deemed an informed and reasonable strategic decision. It is the epitome of hindsight to say that counsel's omission of facts unknown to him could ever be an intentional strategic decision. Instead, objectively reasonable counsel "must make a sufficient inquiry into the information that is pertinent to his client's case" and only then "make a reasonable strategy decision on how to proceed." *Doleman v. State*, 112 Nev. 843, 848, 921 P.2d 278, 280 (1996) (citing *Strickland*, 466 U.S. at 690–91). It is only those "strategic choices made after thorough investigation" which are virtually unchallengeable. *Id*. Testimony showed that the decision here in this case to forego evidence of Appellant's mental health issues at trial was uninformed and unintentional because counsel was not even aware of the facts and did not review

the documents in his possession. The district court's decision to the contrary is not supported by the evidence.

Appellant's counsel did not investigate nor present any of this mental health evidence at trial as a defense to the specific intent crimes of Conspiracy to Commit Robbery, Attempt Robbery with use of a Deadly Weapon, and First Degree Murder. *Washington v. State*, 132 Nev. 655, 664, 376 P.3d 802, 809 (2016) (Conspiracy is a specific intent crime); *Johnson v. State*, 123 Nev. 139, 142, 159 P.3d 1096, 1097 (2007) (An attempt crime is a specific intent crime); *Hancock v. State*, 80 Nev. 581, 583, 397 P.2d 181, 182 (1964) (First degree murder is a specific intent crime). Such a defense which challenges and undermines an important specific intent element of the offenses is not necessarily inconsistent with a defense such as insufficiency of the evidence that Appellant was one of the perpetrators. The two arguments are not mutually exclusive as found by the district court. 8 AA 1970. Attorneys can and do argue alternative theories all the time. Appellant's co-defendant, DeShawn Robinson, testified that Appellant was in fact present for the robbery and actually was one of the shooters, so relying exclusively on an "I-wasn't-there" defense was not reasonable under the circumstances. 4 AA 965 – 5 AA 1024. Because the judge found counsel was not familiar with and had not reviewed Appellant's mental health records, there was no conscious strategic decision to forego that defense as weaker or inconsistent to the strategy actually used at trial.

Had the jurors heard the evidence of Appellant's various mental health conditions and that he had not been taking his medications at the time, there is a reasonable probability they would not have found that he possessed the *mens rea* necessary for the specific intent crimes charged and he would have been acquitted or convicted of lesser offenses. The district court's factual findings are not entitled to deference by this court on appeal as they are not supported by substantial evidence and are clearly wrong. The district court's legal conclusions misapply and overlook the law.

II. COUNSEL FAILED TO INVESTIGATE AND RAISE APPELLANT'S MENTAL HEALTH ISSUES AT SENTENCING IN MITIGATION

The district court denied this claim of ineffective counsel at sentencing on grounds that counsel made a reasonable strategic decision because the robbery/murder was a premeditated plan and Appellant had denied participation in the crime. 8 AA 1970-1971. The district court also found that had the mental health evidence and arguments been presented, there was no reasonable probability of a different outcome more favorable for Appellant. 8 AA 1972.

At sentencing on June 11, 2020, Appellant informed the court that he had to go to the extraordinary length of personally contacting the prosecutor by letter to get a copy of his PSI because he could not get in contact with his own counsel. 7 AA

1589. He only received the PSI the day before sentencing. *Id*. Arguing on his behalf, counsel asked that all counts run concurrent but otherwise submitted the sentencing determination to the judge because she had heard the trial testimony and was familiar with the case. 7 AA 1590-1. But the prosecutor had asked for extra time on the deadly weapon enhancement and counsel failed to respond to this argument. 7 AA 1588-91. Counsel erred in failing to argue for a fixed term of 50 years on the murder charge as opposed to a life sentence and further erred in failing to argue for a 12-month minimum sentence on the deadly weapon enhancement. *Id*. In fact, counsel failed to present any mitigation evidence or argument at all. *Id*. As a result, and without being given any reason to reduce the sentence, the judge imposed a life term for the murder and gave the maximum possible sentence on the deadly weapon enhancement of 8 to 20 years consecutive. 7 AA 1591-2. At the evidentiary hearing, once he was faced with the new facts and records of Appellant's mental health issues, Michael Sanft agreed that he should have presented them as mitigation in sentencing. 8 AA 1949-50. Contrary to counsel's own admission of deficient performance, the judge's conclusion that omission of the mental health information was a reasonable strategic decision is plainly wrong and not supported by the record as argued above.

Nor was the crime premeditated as reasoned by the judge in support of her findings. 8 AA 1970. The supposed plan was to "hit a house," which would mean

a residential burglary, not a robbery of someone on the street. 4 AA 991; 5 AA 1002. While looking for a house to burglarize, the opportunity of robbery outside on the street presented itself when the Victim appeared. 5 AA 1005-1006. Even then, the spontaneous change in plan only encompassed a robbery, not a premeditated murder, as evidenced by the demand for money. *Id*. The Victim was only shot on impulse which surprised all the defendants who immediately fled without taking the Victim's property. 5 AA 1006-1007. The spontaneity of the situation was confirmed by the prosecutor in opening statement: "Why were they there? They went to hit a house that night, but instead, something else happened. They saw an opportunity to hit Gabriel Valenzuela . . . ." 3 AA 634-5, 646. Appellant's impulse control and behavioral problems resulting from his mental illness would have mitigated his culpability for this impulsive shooting had the judge been aware of it. The judge erred in finding that just because some crime was planned that night, that Appellant's mental illness would not have mitigated the resulting felony-murder.

Just because Appellant signed a stipulation waiving his right to a penalty hearing with a jury if convicted and to have the court impose the sentence instead, does not mean that Appellant agreed to waive presentation of any mitigation evidence or arguments on his behalf at sentencing. 1 AA 114-116; 8 AA 1971. Nor does Appellant's failure to personally address the court at sentencing constitute a

waiver of his right to have counsel present and argue mitigating evidence on his behalf as counsel was obliged to do. 7 AA 1590.

In finding no prejudice in counsel's failures at sentencing, the district court erred in focusing exclusively on the incriminating and aggravating facts of the case in its analysis. 8 AA 1972-1973. Utterly absent from the district court's reasoning process as to prejudice, is any mention or consideration of the newly presented mental health information and how it would have mitigated Appellant's culpability and resulted in a different sentence. The judge's findings also do not mention the maximum possible sentence on the deadly weapon enhancement of 8 to 20 years consecutive and how that extreme sentence would have still been imposed and not been mitigated in some way by the new evidence. *Id*.

By statute, imposition of a sentence for use of a deadly weapon must include consideration of "any mitigating factors presented." NRS 193.165. When a judge has sentencing discretion, as in the instant case, possession of the fullest information possible regarding the defendant's life and characteristics is essential to the selection of the proper sentence. *Brown v. State*, 110 Nev. 846, 877 P.2d 1071 (1994) (citing *Wilson v. State*, 105 Nev. 110, 771 P.2d 583 (1989)). Counsel's failure to present significant mitigating evidence at sentencing which is readily available constitutes ineffective assistance of counsel requiring a new sentencing hearing. *Id*.; *Weaver v. Warden*, 107 Nev. 856, 858-59, 822 P.2d 112, 114 (1991) (holding that relief was

proper where counsel failed to present evidence of defendant's PTSD in mitigation at sentencing).

Counsel failed to communicate with Appellant in advance of sentencing and had no discernible plan or strategy for presenting mitigating evidence or arguments to rebut the prosecutor. Evidence of Appellant's mental health issues including bipolar disorder, schizophrenia, paranoia and ADHD as set forth in the argument above and in the competency evaluations and mother's statement to police are compelling mitigation evidence as are the Appellant's school records. 7 AA 1698-1710, 1712-36; 8 AA 1890-1933. Yet, the sentencing transcript is devoid of any reference to Appellant's serious mental health conditions either from his own counsel or the judge in pronouncing the sentence. Had the judge been made aware of this evidence and had it been persuasively argued, there is a reasonable probability that she would have imposed a sentence somewhat less than the maximum allowed by law. The district court's ruling to the contrary is not supported by the evidence or the law.

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CONCLUSION

Wherefore, Robertson respectfully requests this Court reverse the judgment of the district court below and direct that the petition for post-conviction relief be granted.

DATED this 8th day of February, 2024.

/s/ Steven S. Owens

STEVEN S. OWENS, ESQ.
Nevada Bar No. 4352
1000 N. Green Valley #440-529
Henderson, NV 89074
(702) 595-1171

Attorney for Appellant

CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 4,562 words and 21 pages.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 8th day of February, 2024.

/s/ Steven S. Owens

STEVEN S. OWENS, ESQ.
Nevada Bar No. 4352
1000 N. Green Valley #440-529
Henderson, NV 89074
(702) 595-1171

Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on February 8, 2024. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON FORD
Nevada Attorney General

ALEXANDER CHEN
Chief Deputy District Attorney

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