IN THE SUPREME COURT OF THE STATE OF NEVADA

RAEKWON ROBERTSON,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

CASE NO: 87811

APPELLANT'S APPENDIX

Volume 8

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ALPHABETICAL INDEX TO APPELLANT'S APPENDIX

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DISTRICT COURT
CLARK COUNTY, NEVADA

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

Petitioner,

-vs-

THE STATE OF NEVADA,

Respondent.

CASE NO: A-20-823892-W
(C-17-328587-2)
DEPT NO: XII

STATE'S RESPONSE TO PETITIONER'S PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION) AND PETITIONER'S SUPPLEMENTAL POST CONVICTION PETITION FOR WRIT OF HABEAS CORPUS

DATE OF HEARING: OCTOBER 13, 2022
TIME OF HEARING: 8:30 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through ALEXANDER CHEN, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Response to Petitioner's Petition for Writ Of Habeas Corpus (Post-Conviction) and Petitioner's Supplemental Post Conviction Petition for Writ of Habeas Corpus.

This response is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

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

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

STATEMENT OF THE FACTS

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

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

ARGUMENT

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

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

NRS 34.810(1) reads:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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II. COUNSEL WAS NOT INEFFECTIVE

The basis of all claims Petitioner raised in his Supplemental is ineffective assistance of counsel. Specifically, Petitioner alleges that Counsel failed to: object to a text message on grounds that it constituted evidence of uncharged bad acts; seek severance of trials for Petitioner and co-defendant Wheeler; investigate and raise Petitioner's alleged mental health issues at trial; and raise Petitioner's alleged mental health issues at sentencing as mitigation evidence. Supp. at 5-12. The final claim in Petitioner's Supplemental Brief is that counsel was ineffective during the appellate process. Supp. at 12-15.

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

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

The court begins with the presumption of effectiveness and then must determine whether the defendant has demonstrated by a preponderance of the evidence that counsel was ineffective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). "Effective counsel

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> As used in this chapter, "relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.

The message constitutes evidence of the parties' shared intent to seek pecuniary gain through criminal means, namely burglary. The existence of this intent makes it more probable that Petitioner and his accomplices would subsequently establish a shared intent to seek pecuniary gain by perpetrating robbery. Given that this shared intent is material to the Count 1– CONSPIRACY TO COMMIT ROBBERY, evidence thereof is necessarily relevant.

Moreover, while the State sought the admission of only a single message, a properly executed search warrant recovered a litany of messages between the co-defendants that would establish Conspiracy to Commit Burglary by clear and convincing evidence. TT Day 5 at 98-99. Finally, even if the relative weights of probative and prejudicial value were considered under the doctrine of *res gestae*, Petitioner has failed to assert let alone establish that the risk of unfair prejudice to him posed by the message in question substantially outweighed the probative value thereof.

B. Petitioner Cannot Establish Counsel Was Ineffective for Failing to Seek Severance

Petitioner claims that counsel was ineffective for failing to seek severance from co-defendant Wheeler because the co-defendants had mutually antagonistic defenses. Supp at 8-9. However, Petitioner's claims are belied by the record in that the defenses were not mutually antagonistic.

For purposes of supporting a defendant's motion to sever, the rule in Nevada is that defenses must be antagonistic to the point that they are mutually exclusive before they are to be considered prejudicial. Rowland v. State, 118 Nev. 31, 35, 39 P.3d 114, 116 (2002). Defenses become mutually exclusive when the core of the codefendant's defense is so irreconcilable with the core of the defendant's own defense that the acceptance of the codefendant's theory by the jury precludes acquittal of the defendant. Id.

At trial, Petitioner's defense was that the State could not prove beyond a reasonable doubt that Petitioner was responsible for the brutal slaying of Mr. Valenzuela. TT Day 3 at 37. Co-defendant Wheeler's counsel argued that Wheeler was not a member of the foursome responsible for killing Mr. Valenzuela because Wheeler abandoned the group approximately forty-five (45) minutes before Mr. Valenzuela was slain. TT Day 3 at 39-40. These defenses are not irreconcilable. A jury could have reasonably found both that co-defendant Wheeler had been mistakenly identified and that there was insufficient evidence to convict Petitioner, and ultimately acquitted both defendants. Accordingly, no mutual exclusivity exists between the co-defendants' theories, and the defenses therefore cannot be mutually antagonistic.

Moreover, even if the defense theories were mutually antagonistic, Petitioner fails to

establish that the failure to sever his trial from co-defendant Wheeler's caused him to suffer any prejudice. The decisive factor in any severance analysis remains prejudice to the defendant. Marshall v. State, 118 Nev. 642, 646, 56 P.3d 376, 378 (2002). Petitioner implies the disparities between his convictions and sentences and those of his accomplices constitute evidence of the prejudice he allegedly suffered through the joint trial. Supp at 8-9. However, Petitioner misleads the Court through this implication because these disparities instead reflect the reality that Petitioner was differently situated than his accomplices. Although a valid search warrant was properly executed on the residence of each member of the foursome responsible for Mr. Valenzuela's death, the .22 caliber bullets with the same headstamp as the cartridge case found at the murder scene and rifling characteristics similar to those recovered from Mr. Valenzuela's wounds were recovered from Petitioner's residence. TT Day 3 at 34. In addition, the Taurus .22 that testing confirmed fired the cartridge case left at the murder scene was found in the bottom left drawer of Petitioner's residence. Id. Finally, it was Petitioner's DNA that was recovered from the Taurus .22. Id. Given that Petitioner's convictions and sentences reflect the enormity of the evidence against him, the suggestion that Petitioner suffered any prejudice from his joint trial is a bare and naked assertion suitable only for summary dismissal. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

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

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

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

evidence against him. Pursuant to Molina v. State, such a claim cannot support post-conviction relief. 120 Nev. 185, 192, 87 P.3d 533, 538 (2004) (stating that a defendant who contends his attorney was ineffective because he did not adequately investigate must show how a better investigation would have rendered a more favorable outcome probable).

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

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

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

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

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

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

> We're going to submit everything to the Court. And the reason for that is this, Mr. Robertson is intent on filing an appeal, is intent on going forward with that aspect of it. I believe that ultimately what we have

> here is a situation where Mr. Robertson's in a position where the reason why he's not talking to the Court or saying anything to the Court is because he wants to reserve that -- that right.

Sentencing Transcript at 5-6.

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

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

E. Petitioner Cannot Show Counsel Was Ineffective During the Appellate Process

i. Petitioner cannot establish counsel was ineffective for his alleged failure to communicate with him

A defendant is not entitled to a particular "relationship" with her attorney. Morris v. Slappy, 461 U.S. 1, 14, 103 S. Ct. 1610, 1617 (1983). There is no requirement for any specific amount of communication as long as counsel is reasonably effective in his or her representation. See Id.

Petitioner alleges that Counsel failed to communicate with him during the appellate process. Supp at 13. However, Petitioner fails to establish that this alleged lack of communication at all compromised Counsel's effectiveness during the appellate process. Not only has Petitioner failed to establish that his input would have had any impact on the appellate process, but he has also failed to even suggest that he had any input to provide. Therefore, his claim that Counsel's alleged lack of communication with him constitutes ineffectiveness is bare and naked, suitable only for summary denial. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

ii. Petitioner cannot establish counsel's appellate brief was inadequate

Petitioner alleges that Counsel's appellate briefing was "wholly deficient and inadequate" in part for failing to articulate the specific facts that demonstrate the insufficiency of the evidence that convicted Petitioner. Supp at 14. Further, Petitioner further alleges that, in raising the insufficiency of evidence argument, Counsel should have provided the details that exhibit the alleged weakness of the State's case. Supp at 14. Finally, Petitioner alleges that appellate counsel should have raised on appeal the allegations that the jury venire failed to represent a fair cross-section of the community and the text message constituted evidence of uncharged bad acts. Supp. at 14-15.

There is a strong presumption that appellate counsel's performance was reasonable and fell within "the wide range of reasonable professional assistance." See United States v. Aguirre, 912 F.2d 555, 560 (2nd Cir. 1990); citing Strickland, 466 U.S. at 689, 104 S. Ct. at 2065. The United States Supreme Court has held that there is a constitutional right to effective assistance of counsel in a direct appeal from a judgment of conviction. Evitts v. Lucey, 469

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

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

Appellate counsel is not required to raise every issue that a defendant felt was pertinent to the case. The professional diligence and competence required on appeal involves "winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Jones v. Barnes, 463 U.S. 745, 751-52, 103 S. Ct. 3308, 3313 (1983). In particular, a "brief that raises every colorable issue runs the risk of burying good arguments . . . in a verbal mound made up of strong and weak contentions." Id. at 753, 103 S. Ct. at 3313. For judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy." Id. at 754, 103 S. Ct. at 3314. The Nevada Supreme Court has similarly concluded that appellate counsel may well be more effective by not raising every conceivable issue on appeal. Ford, 105 Nev. at 853, 784 P.2d at 953.

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

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

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

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

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

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

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CONCLUSION

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

DATED this 5th day of October, 2022.

Respectfully submitted,

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

BY /s/ ALEXANDER CHEN
ALEXANDER CHEN
Chief Deputy District Attorney
Nevada Bar #010539

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 5th day of October 2022, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

RAEKWON SETREY ROBERTSON, BAC #1235056
ELY STATE PRISON
4569 N. STATE ROUTE 490
ELY, NEVADA 89301

BY /s/ *Janet Hayes*
Secretary for the District Attorney's Office

17328040B/AC/jh/MVU

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Steven D. Grierson
CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

RAEKWON ROBERTSON, Plaintiff, vs. STATE OF NEVADA, Defendant..	CASE NO. A-20-823892-W DEPT. NO. XII

BEFORE THE HONORABLE MICHELLE LEAVITT, DISTRICT COURT JUDGE

THURSDAY, NOVEMBER 17, 2022

RECORDER'S TRANSCRIPT OF PROCEEDINGS
HEARING RE: PETITION FOR WRIT OF HABEAS CORPUS

APPEARANCES:

For the Plaintiff: STEVEN S. OWENS, ESQ.
via teleconference

For the Defendant: GIANCARLO PESCI
PARKER P. BROOKS
Chief Deputy District Attorneys

RECORDED BY: SARA RICHARDSON, COURT RECORDER

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

* * * * *

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: But it was felony murder, right?

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

THE COURT: Anything else?

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

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

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

THE COURT: Thank you very much.

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

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

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MR. OWENS: Thank you very much.

PROCEEDING CONCLUDED AT 8:53 A.M.

* * * * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio-video recording of this proceeding in the above-entitled case.

Sara Richardson

SARA RICHARDSON
Court Recorder/Transcriber

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

NEFF

DISTRICT COURT
CLARK COUNTY, NEVADA

RAEKWON ROBERTSON,

Petitioner,

vs.

STATE OF NEVADA,

Respondent,

Case No: A-20-823892-W

Dept No: XII

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

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

You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is mailed to you. This notice was mailed on December 13, 2022.

STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk

CERTIFICATE OF E-SERVICE / MAILING

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

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

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

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

/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk

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

DISTRICT COURT
CLARK COUNTY, NEVADA

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

Petitioner,

-vs-

THE STATE OF NEVADA,

Respondent.

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

DEPT NO: XII

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

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

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

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FINDINGS OF FACT, CONCLUSIONS OF LAW

PROCEDURAL HISTORY

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

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

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

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

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FACTUAL SYNOPSIS[1]

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

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

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

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

scene.

ANALYSIS

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

Petitioner alleges that a personal relationship between Chief Deputy District Attorney Giancarlo Pesci and District Court Judge Michelle Leavitt may have substantially affected his trial and sentencing. PWHC at 5. Petitioner alleges that he was willing to accept a guilty plea agreement but was unable to do so because the offered deal was contingent on acceptance by both Petitioner and co-defendant Wheeler. PWHC at 5. Specifically, Petitioner alleges that Counsel failed to: object to a text message on grounds that it constituted evidence of uncharged bad acts; seek severance of trials for Petitioner and co-defendant Wheeler; investigate and raise Petitioner's alleged mental health issues at trial; and raise Petitioner's alleged mental health issues at sentencing as mitigation evidence. SPWHC at 5-12. The final claim in Petitioner's Supplemental Brief is that counsel was ineffective during the appellate process. SPWHC at 12-15.

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

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

NRS 34.810(1) reads:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. COUNSEL WAS NOT INEFFECTIVE

The basis of all claims Petitioner raised in his Supplemental is ineffective assistance of counsel. Specifically, Petitioner alleges that Counsel failed to: object to a text message on grounds that it constituted evidence of uncharged bad acts; seek severance of trials for Petitioner and co-defendant Wheeler; investigate and raise Petitioner's alleged mental health

issues at trial; and raise Petitioner's alleged mental health issues at sentencing as mitigation evidence. SPWHC at 5-12. The final claim in Petitioner's Supplemental Brief is that counsel was ineffective during the appellate process. SPWHC at 12-15.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> As used in this chapter, "relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.

The message constitutes evidence of the parties' shared intent to seek pecuniary gain through criminal means, namely burglary. The existence of this intent makes it more probable that Petitioner and his accomplices would subsequently establish a shared intent to seek pecuniary gain by perpetrating robbery. Given that this shared intent is material to Count 1– CONSPIRACY TO COMMIT ROBBERY, evidence thereof is necessarily relevant. Moreover, while the State sought the admission of only a single message, a properly executed search warrant recovered a litany of messages between the co-defendants that would establish Conspiracy to Commit Burglary by clear and convincing evidence. TT Day 5 at 98-99. Finally, even if the relative weights of probative and prejudicial value were considered under the

doctrine of *res gestae*, Petitioner has failed to assert let alone establish that the risk of unfair prejudice to him posed by the message in question substantially outweighed the probative value thereof. Therefore, this claim is denied.

B. Petitioner Cannot Establish Counsel Was Ineffective for Failing to Seek Severance

Petitioner claims that counsel was ineffective for failing to seek severance from co-defendant Wheeler because the co-defendants had mutually antagonistic defenses. SPWHC at 8-9. However, Petitioner's claims are belied by the record in that the defenses were not mutually antagonistic.

For purposes of supporting a defendant's motion to sever, the rule in Nevada is that defenses must be antagonistic to the point that they are mutually exclusive before they are to be considered prejudicial. Rowland v. State, 118 Nev. 31, 35, 39 P.3d 114, 116 (2002). Defenses become mutually exclusive when the core of the co-defendant's defense is so irreconcilable with the core of the defendant's own defense that the acceptance of the co-defendant's theory by the jury precludes acquittal of the defendant. Id.

At trial, Petitioner's defense was that the State could not prove beyond a reasonable doubt that Petitioner was responsible for the brutal slaying of Mr. Valenzuela. TT Day 3 at 37. Co-defendant Wheeler's counsel argued that Wheeler was not a member of the foursome responsible for killing Mr. Valenzuela because Wheeler abandoned the group approximately forty-five (45) minutes before Mr. Valenzuela was slain. TT Day 3 at 39-40. These defenses are not irreconcilable. A jury could have reasonably found both that co-defendant Wheeler had been mistakenly identified and that there was insufficient evidence to convict Petitioner, and ultimately acquitted both defendants. Accordingly, no mutual exclusivity exists between the co-defendants' theories, and the defenses therefore cannot be mutually antagonistic.

Moreover, even if the defense theories were mutually antagonistic, Petitioner fails to establish that the failure to sever his trial from co-defendant Wheeler's caused him to suffer any prejudice. The decisive factor in any severance analysis remains prejudice to the defendant. Marshall v. State, 118 Nev. 642, 646, 56 P.3d 376, 378 (2002). Petitioner implies the disparities between his convictions and sentences and those of his accomplices constitute

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

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

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

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

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

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

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

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

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

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

> We're going to submit everything to the Court. And the reason for that is this, Mr. Robertson is intent on filing an appeal, is intent on going forward with that aspect of it. I believe that ultimately what we have here is a situation where Mr. Robertson's in a position where the reason why he's not talking to the Court or saying anything to the Court is because he wants to reserve that -- that right.

Sentencing Transcript at 5-6.

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

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

E. Petitioner Cannot Show Counsel Was Ineffective During the Appellate Process

i. Petitioner cannot establish counsel was ineffective for his alleged failure to communicate with him

A defendant is not entitled to a particular "relationship" with her attorney. Morris v. Slappy, 461 U.S. 1, 14, 103 S. Ct. 1610, 1617 (1983). There is no requirement for any specific

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amount of communication as long as counsel is reasonably effective in his or her representation. See Id.

Petitioner alleges that counsel failed to communicate with him during the appellate process. SPWHC at 13. However, Petitioner fails to establish that this alleged lack of communication at all compromised counsel's effectiveness during the appellate process. Not only has Petitioner failed to establish that his input would have had any impact on the appellate process, but he has also failed to even suggest that he had any input to provide. Therefore, his claim that counsel's alleged lack of communication with him constitutes ineffectiveness is bare and naked, and thus denied. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

ii. Petitioner cannot establish counsel's appellate brief was inadequate

Petitioner alleges that counsel's appellate briefing was "wholly deficient and inadequate" in part for failing to articulate the specific facts that demonstrate the insufficiency of the evidence that convicted Petitioner. SPWHC at 14. Petitioner further alleges that, in raising the insufficiency of evidence argument, counsel should have provided the details that exhibit the alleged weakness of the State's case. SPWHC at 14. Finally, Petitioner alleges that appellate counsel should have raised on appeal the allegations that the jury venire failed to represent a fair cross-section of the community and the text message constituted evidence of uncharged bad acts. SPWHC at 14-15.

There is a strong presumption that appellate counsel's performance was reasonable and fell within "the wide range of reasonable professional assistance." See United States v. Aguirre, 912 F.2d 555, 560 (2nd Cir. 1990); citing Strickland, 466 U.S. at 689, 104 S. Ct. at 2065. The United States Supreme Court has held that there is a constitutional right to effective assistance of counsel in a direct appeal from a judgment of conviction. Evitts v. Lucey, 469 U.S. 387, 396-97, 105 S. Ct. 830, 835-37 (1985); see also Burke v. State, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). This Court has held that all appeals must be "pursued in a manner meeting high standards of diligence, professionalism and competence." Burke, 110 Nev. at 1368, 887 P.2d at 268.

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

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

Appellate counsel is not required to raise every issue that a defendant felt was pertinent to the case. The professional diligence and competence required on appeal involves "winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Jones v. Barnes, 463 U.S. 745, 751-52, 103 S. Ct. 3308, 3313 (1983). In particular, a "brief that raises every colorable issue runs the risk of burying good arguments . . . in a verbal mound made up of strong and weak contentions." Id. at 753, 103 S. Ct. at 3313. For judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy." Id. at 754, 103 S. Ct. at 3314. The Nevada Supreme Court has similarly concluded that appellate counsel may well be more effective by not raising every conceivable issue on appeal. Ford, 105 Nev. at 853, 784 P.2d at 953.

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

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

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

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

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

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

ORDER

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

Dated this 8th day of December, 2022

069 FC6 36EA E9D4
Michelle Leavitt
District Court Judge

STEVEN B. WOLFSON
DISTRICT ATTORNEY
Nevada Bar #001565

BY /s/ ALEXANDER CHEN
ALEXANDER CHEN
Chief Deputy District Attorney
Nevada Bar #010539

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 6th day of December 2022, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

RAEKWON SETREY ROBERTSON, BAC #1235056
ELY STATE PRISON
4569 N. STATE ROUTE 490
ELY, NEVADA 89301

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

201760536C/AC/ed/jh/MVU

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

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

AUTOMATED CERTIFICATE OF SERVICE

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

Service Date: 12/8/2022

Steven Owens	owenscrimlaw@gmail.com
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Attorney for Petitioner Raekwon Robertson

DISTRICT COURT
CLARK COUNTY, NEVADA

RAEKWON ROBERTSON, Petitioner, vs. STATE OF NEVADA. Respondent.	CASE NO.: A-20-823892-W DEPT NO.: XII **NOTICE OF APPEAL**

TO: THE STATE OF NEVADA, Respondent.

TO: DEPARTMENT XII OF EIGHTH JUDICIAL DISTRICT COURT

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

DATED this 6th day of January, 2023.

/s/ Steven S. Owens, Esq.
STEVEN S. OWENS, ESQ.
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RAEKWON ROBERTSON

CERTIFICATE OF SERVICE

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

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

BY:

/s/ Steven S. Owens, Esq.
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Attorney for Petitioner
RAEKWON ROBERTSON

IN THE SUPREME COURT OF THE STATE OF NEVADA

RAEKWON ROBERTSON,

Appellant,

v.

STATE OF NEVADA,

Respondent.

CASE NO: 85932

APPELLANT'S OPENING BRIEF

Appeal From Denial of Post-Conviction Habeas Petition

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IN THE SUPREME COURT OF THE STATE OF NEVADA

RAEKWON ROBERTSON, Appellant, v. STATE OF NEVADA, Respondent.	CASE NO: 85932

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 7th day of March, 2023.

/s/ Steven S. Owens
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Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

JURISDICTIONAL STATEMENT

This appeal is from Findings of Fact, Conclusions of Law, and Order filed on December 8, 2022, which denied a petition for post-conviction relief from a criminal conviction pursuant to a jury verdict. 8 AA 1769. Notice of Entry of Findings of Fact, Conclusions of Law, and Order was filed on December 13, 2022. 8 AA 1768. Appellate jurisdiction in this case derives from NRAP 4(b)(1) and NRS 34.575(1). The Notice of Appeal was timely filed on January 6, 2023. 8 AA 1793.

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).

STATEMENT OF THE ISSUES

I. **INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO OBJECT TO OTHER BAD ACT EVIDENCE OF TEXT MESSAGE ABOUT "HITTING A HOUSE"**

II. **COUNSEL FAILED TO SEEK SEVERANCE OF TRIAL FROM CO-DEFENDANT WHEELER**

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

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

V. COUNSEL PROVIDED INEFFECTIVE ASSISTANCE ON APPEAL

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

[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.

just gotten back from Lakes Crossing. 1 AA 82-6. At calendar call on November 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.

[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

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.

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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.

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.

SUMMARY OF THE ARGUMENT

The district court below erred in denying Robertson's habeas claims of ineffective assistance of counsel both at trial and on appeal without conducting an evidentiary hearing and erred in its application of law and determination of facts not supported by substantial evidence in the record. Specifically, counsel's failure to object on grounds of other bad act evidence to a text message between defendants which referenced "hitting a house" when the actual crime was one of robbery, not burglary, was deficient and prejudicial to Robertson. Counsel failed to seek severance of trial from co-defendant Wheeler who had an antagonistic defense which sought to shift blame away from himself to Robertson's brother which undermined Robertson's defense and resulted in grossly disparate outcomes. 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. Finally, counsel was ineffective on appeal for failing to communicate with Robertson and for failing to raise several meritorious issues. But for these errors, the outcome of Robertson's trial and appeal would have been different.

ARGUMENT

An indigent defendant possesses a constitutional right to reasonably effective assistance of counsel at trial and on appeal. *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. INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO OBJECT TO OTHER BAD ACT EVIDENCE OF TEXT MESSAGE ABOUT "HITTING A HOUSE"

Before the start of testimony, the parties discussed the admissibility of evidence which the State intended to reference in its opening statement to the jury and elicit through witnesses at trial. 3 AA 596-605. Specifically, the day before the murder there was a posting via Messenger from Raekwon Robertson's Facebook account to DeShawn Robinson's cell phone: "Ask DJ if he trying hit a house tonight Me, you, Sace and him. Sace already said yeah." *Id*. The State argued for admissibility as *res gestae* because the victim was caught, in essence, in the middle

of the efforts to "hit his house" and the statement showed intent. *Id*. Attorney Sanft objected on Robertson's behalf, but only on grounds that the message should not be referenced in opening statement out of an abundance of caution until such time as the State had laid proper foundation through a proper witness. *Id*. The State responded it had a good faith basis for admissibility and further argued the message was made in furtherance of the conspiracy to commit robbery as charged in this case. *Id*. The judge allowed the message to be referenced in the prosecutor's opening statement. *Id*.

The State then told the jury about the message in its opening statement and presented its theory of the case: "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. The State then elicited the message about robbing or hitting a house through the cooperating co-defendant DeShawn Robinson and again through Det. Dosch without further objection from Robertson's counsel, Sanft. 4 AA 991-1000; 5 AA 1001-2; 6 AA 1383-4.

The district court denied this claim on grounds that the text message constituted *res gestae*, was not subject to a *Petrocelli* hearing, and so counsel was not ineffective. 8 AA 1781-2. However, the State could have elicited the four defendants getting together outside on the street without referencing the text message regarding other crimes. Under NRS 48.035(3), a witness may only testify

to an uncharged act or crime if it is so closely related to the act in controversy that the witness cannot describe the act without referring to the other uncharged act or crime. *Bellon v. State*, 121 Nev. 436, 444, 117 P.3d 176, 181 (2005). The encounter, robbery, and murder of the victim in the case could all have been described to the jury without specifically referring to the defendants' intention of getting together that night in order for "hitting a house."

The use of uncharged bad act evidence to convict a defendant is heavily disfavored in our criminal justice system because bad acts are often irrelevant and prejudicial and force the accused to defend against vague and unsubstantiated charges. *Tavares v. State*, 117 Nev. 725, 730, 30 P.3d 1128, 1131 (2001); NRS 48.045. The principal concern with admitting such acts is that the jury will be unduly influenced by the evidence, and thus convict the accused because it believes the accused is a bad person. *Id*. In *Armstrong v. State*, 110 Nev. 1322, 1323, 885 P.2d 600, 600-01 (1994) (citing *Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503 (1985)), this court has stated:

> Before admitting evidence of a prior bad act or collateral offense, the district court must conduct a hearing outside the presence of the jury. During the hearing, the state must present its justification for admission of the evidence, . . . [and] prove by clear and convincing evidence that the defendant committed the collateral offense, and the district court must weigh the probative value of the proffered evidence against its prejudicial effect.

Armstrong, 110 Nev. at 1323-24, 885 P.2d at 601. The *Petrocelli* hearing must be conducted on the record to allow this court a meaningful opportunity to review the district court's exercise of discretion. *Id*.

Counsel was ineffective in failing to specifically object to the text message on grounds that it constituted evidence of an uncharged crime, namely, a conspiracy to burglarize or "hit" a house. But Robertson and the other defendants were not charged with burglary or home invasion. See NRS 205.060, 205.067. Instead, the conspiracy as charged was to rob a person outside on the street. 1 AA 110. The State even conceded in its opening statement that defendants supposedly got together that night to commit one crime, a residential burglary or home invasion, but when they saw the victim, they spontaneously took advantage of that new opportunity and committed an entirely different type of crime, a robbery of the person. 3 AA 634-5, 646. Accordingly, had there been a *Petrocelli* hearing, the text message would not have been admitted because it was not relevant to a conspiracy or intent to rob the victim in this case. The text message was extraordinarily prejudicial in that defendants were labeled as having pre-planned a residential burglary or home invasion as opposed to simply committing a crime of opportunity. Because there was no *Tavares* instruction on other bad acts, the risk is too great that the jury punished Robertson for his bad character and convicted him of the charged offenses based on propensity. The district court erred in denying this claim as *res gestae* did

not apply and the prejudicial other bad act evidence would have been excluded had counsel objected on those grounds.

II. COUNSEL FAILED TO SEEK SEVERANCE OF TRIAL FROM CO-DEFENDANT WHEELER

While there were four defendants charged with this crime, they all received disparate outcomes and sentences in large part because Appellant was tried jointly with his co-defendant Wheeler. Counsel was ineffective in failing to seek severance from Wheeler, but the district court denied this claim finding that their defenses were not mutually antagonistic and there was no prejudice. 8 AA 1783-4. The district court's ruling is not supported by the record or the law.

Co-defendant Demario Lofton-Robinson escaped a joint trial because he was at Lake's Crossing at the time. 1 AA 100-2, 103-8. Upon his return, he accepted a plea bargain for Second Degree Murder with use of a Deadly Weapon and received an aggregate sentence of 18 to 45 years in prison. 7 AA 1663-5. His younger brother, co-defendant DeShawn Robinson entirely escaped a murder charge by agreeing to testify for the State against the other defendants and eventually received probation. 7 AA 1693. Even co-defendant Davontae Wheeler was only found guilty of Second Degree Murder and was given an aggregate sentence of 12 years to life. 7 AA 1659. In contrast, Appellant was the only one of the four to be convicted of

First Degree Murder with use of a Deadly Weapon and received the most severe sentence of an aggregate 28 years to life. 7 AA 1600-3.

If two or more defendants participated in the same unlawful act or transaction, the State may charge the defendants in the same indictment or information. NRS 173.135. But "[i]f it appears that a defendant . . . is prejudiced by a joinder . . . of defendants . . . for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires." NRS 174.165(1). However, joinder is not preferable if it will compromise a defendant's right to a fair trial. *Marshall v. State*, 118 Nev. 642, 646-47, 56 P.3d 376, 379 (2002). "The decisive factor in any severance analysis remains prejudice to the defendant." *Id*. More specifically, severance should be granted "if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Id*., quoting *Safiro v. United States*, 506 U.S. 534, 539 (1993).

Appellant was prejudiced in his association and joint trial with co-defendant Wheeler who was open-carrying a firearm at the convenience store shortly before the murder, yet was not convicted of using a deadly weapon. Wheeler's theory of defense was that he was no longer present at the time of the crime and he was mistaken for another suspect, Adrian Robinson, who was Appellant's brother. 3 AA 648-51; 7 AA 1513-29. Appellant's defense on the other hand was that there was

insufficient evidence to corroborate DeShawn Robinson's testimony. 3 AA 646-7; 6 AA 1495 — 7 AA 1513. Wheeler successfully used his joint trial with Appellant to his advantage to minimize his own culpability and shift blame to Appellant. These mutually antagonistic defenses prejudiced Appellant resulting in a more severe conviction and sentence, which could have been alleviated by severing his case from Wheeler.

Additionally, Appellant would have accepted the plea bargain offered by the State but was prevented from doing so because Wheeler refused the offer which was contingent on both accepting because they were being tried jointly. 1 AA 120-4. There had already been a de facto severance of co-defendant Demario Lofton-Robinson, so trying Appellant and Wheeler separately would not have impaired the efficient administration of justice. Counsel was ineffective in failing to seek severance from co-defendant Wheeler in the trial of this case and the district court erred in finding otherwise.

III. 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.

Without hearing any testimony, the district court denied this habeas claim of ineffective assistance of counsel on grounds that it was a reasonable strategic decision virtually unchallengeable. 8 AA 1784-6. 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*.

Appellant's mother, Erika Loyd, gave a voluntary statement to police on August 15, 2017, and she confirmed that he 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*.

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). 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 erred in denying this claim.

IV. 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 it did not rise to the level of *Strickland*, that Appellant himself intentionally decided to withhold mitigating evidence, and that reasonable strategic decisions by counsel are virtually unchallengeable. 8 AA 1757-8. The district court erred as such determination could not have been made on the record alone and would have required an evidentiary hearing which did not occur.

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.

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. 7 AA 1698-1710, 1712-36. 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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V. COUNSEL PROVIDED INEFFECTIVE ASSISTANCE ON APPEAL

The district court judge below found that appellate counsel's performance on appeal was reasonably effective and resulted in no prejudice, both in terms of counsel's communication with Appellant and the issues he strategically chose to raise on appeal. But this is contrary to the record which shows that Appellant was completely unaware that an appeal had been filed on his behalf and the issues counsel failed to raise were meritorious and would resulted in a different outcome.

The constitutional right to effective assistance of counsel extends to a direct appeal. *Burke v. State*, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). A claim of ineffective assistance of appellate counsel is reviewed under the "reasonably effective assistance" test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). To state a claim of ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness and resulting prejudice such that the omitted issue would have a reasonable probability of success on appeal. *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).

Appellant continued to be represented by counsel Michael Sanft on direct appeal of his conviction, however counsel utterly failed to keep in touch and communicate with Appellant about the appeal. Appellant was so unaware of the appeal that he filed a pro se habeas petition in this case on October 29, 2020, which

raised an appeal deprivation claim under the mistaken belief that no appeal had been filed. 7 AA 1611-2. Unbeknownst to Appellant, the appeal had been filed and was pending at that time. 7 AA 1667-8. Even as late as May 22, 2022, Appellant was still trying to contact Attorney Sanft regarding the appeal to no avail. 7 AA 1738-9.

Pursuant to the Nevada Supreme Court Performance Standards for Indigent Defense (ADKT No. 411), Standard 3-5: Duty to Confer and Communicate With Client in preparing and processing the appeal, counsel should:

> (a) assure that the client is able to contact appellate counsel telephonically during the pendency of the appeal including arrangements for the acceptance of collect telephone calls. Promptly after appointment or assignment to the appeal, counsel shall provide advice to the client, in writing, as to the method(s) which the client can employ to discuss the appeal with counsel; (b) discuss the merits, strategy, and ramifications of the proposed appeal with each client prior to the perfection and completion thereof. When possible, appellate counsel should meet in person with the client, and in all instances, counsel should provide a written summary of the merits and strategy to be employed in the appeal along with a statement of the reasons certain issues will not be raised, if any. It is the obligation of the appellate counsel to provide the client with his or her best professional judgment as to whether the appeal should be pursued in view of the possible consequences and strategic considerations; (c) inform the client of the status of the case at each step in the appellate process, explain any delays, and provide general information to the client regarding the process and procedures that will be taken in the matter, and the anticipated timeframe for such processing; (d) provide the client with a copy of each substantive document filed in the case by both the prosecution and defense; (e) respond in a timely manner to all correspondence from clients, provided that the client correspondence is of a reasonable number and at a reasonable interval; and (f) promptly and accurately inform the client of the courses of action that may be pursued as a result of any disposition of the appeal and the scope of any further representation counsel will provide.

None of this communication occurred in the present case. See also, Rules of Professional Conduct, Rule 1.4 on Communication. This prevented Appellant from having any input into the appeal process.

Additionally, although Attorney Sanft did file a direct appeal, the Opening Brief consisted of just two issues raising a *Batson* challenge and arguing lack of sufficient evidence for co-conspirator corroboration. 7 AA 1670-84. Counsel did not file a Reply Brief. 7 AA 1667-8. Considering this was a direct appeal from an eight-day jury trial with a life sentence, such appellate briefing was wholly deficient and inadequate.

Appellate counsel briefly cited the law on sufficiency of the evidence but failed to articulate for the appellate court the facts and circumstances which raise a reasonable doubt about Appellant's guilt. 7 AA 1670-84. Although a .22 caliber firearm was found in Appellant's possession which was similar to one discharged during the murder, this was a week after the crime and the State had no evidence that the firearm was not acquired or had come into Appellant's possession sometime after the murder. See 5 AA 1192-5. The rifling on the .22 bullet was at best only similar to the rifling characteristics of the firearm found in Appellant's apartment. 6 AA 1304. Also, that particular firearm bore DNA not just from Appellant, but from some other unidentified person who could have committed the murder. 4 AA 754-60. That unknown DNA was found on the clip of the gun itself. *Id*. DNA from the

clip is more probative of someone who loaded a firearm with the intention to use it, as opposed to DNA on the outside of the firearm which simply indicates Appellant had touched the gun at some point. Even if Appellant was present at the convenience store before the robbery, such is not suspicious as he actually lived nearby and it does not indicate that he subsequently must have travelled with the others to the nearby murder scene. 4 AA 839; 5 AA 1007-9. The only independent eyewitness, jogger Robert Mason, could not identify Appellant as being present. 3 AA 674, 681-2.

Also, counsel should have raised a fair-cross section argument on appeal as this had been the subject of an objection and testimony from the jury commissioner at the beginning of the trial and the district court judge had denied the motion. 2 AA 289-338. There were only two African Americans on the sixty-member jury venire which constituted an under-representation of African Americans and denied Robertson a fair trial by a jury composed of a representative fair cross-section of the community. *Id*. Co-defendant Wheeler's counsel made a motion to strike the venire and Attorney Sanft on behalf of Robertson joined the motion but offered no other argument or support. 2 AA 291, 338. The district court judge found there was an absolute disparity of 7% and a comparative disparity of 58%. 2 AA 302. After testimony by the jury commissioner, the judge denied the motion for failing to show that underrepresentation was due to systematic exclusion. 2 AA 338.

In *Morgan v. State*, 416 P.3d 212, 221 (Nev. 2018), the Court set forth a three-prong test that trial courts must follow in order to address the question of whether the venire is a representative cross section of the community: (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this under representation is due to the systematic exclusion of the group in the jury selection process. *Id*., citing *Williams v. State*, 121 Nev. 934, 939, 125 P.3d 627, 631 (2005). In *Valentine*, the Court found that the "random selection" practice of sending an equal number of jury summonses to each postal zip code without ascertaining the percentage of the population in each zip code which constituted a distinctive group, could establish a prima facie case of systematic exclusion of that group. *Valentine v. State*, 135 Nev. 463, 466, 454 P.3d 709 (2019).

Finally, appellate counsel also should have raised on appeal admission of the text message about "hitting a house" which implicated other bad acts for which Appellant had not been charged as raised in Claim 1 above which is incorporated herein. Had counsel raised all the issues above, there is a reasonable probability that one or more of them would have been successful on appeal resulting in a different outcome. The district court's legal conclusions are contrary to established law and

the factual findings on these issues should not be given deference by this court on appeal because they are not supported by substantial evidence and are clearly wrong.

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 7th day of March, 2023.

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 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 5,488 words and 24 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 7th day of March, 2023.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on March 7, 2023. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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IN THE SUPREME COURT OF THE STATE OF NEVADA

RAEKWON ROBERTSON,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 85932

RESPONDENT'S ANSWERING BRIEF

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page Number:

Cases

Statutes

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

RESPONDENT'S ANSWERING BRIEF

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

ROUTING STATEMENT

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

STATEMENT OF THE ISSUE(S)

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

STATEMENT OF THE CASE

On December 14, 2017, an Indictment was filed charging RAEKWON SETREY ROBERTSON ("Appellant") along with co-defendants DEMARIO LOFTON-ROBINSON aka DEMARIO LOFTONROBINSON ("Lofton-Robinson") and DAVONTAE AMARRI WHEELER ("Wheeler") with seven (7) counts: Count 1 – BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON (Category B Felony – NRS 205.060); Count 2 – CONSPIRACY TO COMMIT ROBBERY (Category B Felony – NRS 200.380); Count 3 – ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony – NRS 200.380, 199.480); Count 4 – ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony – NRS 200.380, 199.480); Count 5 – CONSPIRACY TO COMMIT ROBBERY (Category B Felony – NRS 200.380, 199.480); Count 6 – ATTEMPT ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony – NRS 200.380, 193.165); and Count 7 – MURDER WITH USE OF A DEADLY WEAPON (Category A Felony – NRS 200.010, 200.030, 193.165). I Appellant's Appendix ("AA") 1-4. On April 19, 2018, a Superseding Indictment was filed charging Appellant and both co-defendants with the same. I AA 23. On February 11, 2020, an Amended Superseding Indictment was filed charging Appellant and Wheeler with Count 1 – CONSPIRACY TO COMMIT ROBBERY (Category B Felony – NRS 200.380); Count 2 – ROBBERY WITH USE OF A DEADLY

WEAPON (Category B Felony – NRS 200.380, 199.480); and Count 3 – MURDER WITH USE OF A DEADLY WEAPON (Category A Felony – NRS 200.010, 200.030, 193.165). I AA 109. The same day, Appellant's jury trial commenced. I AA 113. On February 24, 2020, Appellant's jury trial concluded, and the jury found Appellant guilty of Count 1 – CONSPIRACY TO COMMIT ROBBERY (Category B Felony – NRS 200.380); guilty of Count 2 – ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony – NRS 200.380, 199.480); and guilty of Count 3 – MURDER WITH USE OF A DEADLY WEAPON (Category A Felony – NRS 200.010, 200.030, 193.165). VII AA 1572-1573. On March 12, 2020, Appellant pled guilty to: Count 4 – CONSPIRACY TO COMMIT ROBBERY (Category B Felony – NRS 200.380, 199.480) and Count 5 – ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony – NRS 200.380, 199.480). VII AA 1574.

On June 11, 2020, Appellant was adjudged guilty and sentenced to the Nevada Department of Corrections ("NDOC") as follows: as to Count 1 – a maximum of seventy-two (72) months with a minimum parole eligibility of twenty four (24) months; as to Count 2 – a maximum of one hundred twenty (120) months with a minimum parole eligibility of forty-eight (48) months, plus a consecutive term of one hundred twenty (120) months with a minimum parole eligibility of forty-eight (48) months for the use of a deadly weapon; as to Count 3 – life with a minimum

parole eligibility of twenty (20) years, plus a consecutive term of twenty (20) years with a minimum parole eligibility of eight (8) years for the use of a deadly weapon; as to Count 4 – a maximum of seventy-two (72) months with a minimum parole eligibility of twenty-four (24) months; and as to Count 5 – a maximum of one hundred eighty (180) months with a minimum parole eligibility of forty-eight (48) months, plus a consecutive term of one hundred eighty (180) months with a minimum parole eligibility of forty-eight (48) months for the use of a deadly weapon, all counts to run concurrent. VII AA 1601-1602.

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

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

STATEMENT OF THE FACTS

The underlying facts occurred as follows:

In accordance with his GPA, Deshawn Robinson ("Robinson") testified against [Appellant] and Wheeler in exchange for not being charged with Murder with Use of a Deadly Weapon. Per his testimony, on August 8, 2017, [Appellant] sent his brother co-defendant Lofton-Robinson a message inquiring as to whether the brothers were interested in joining him in robbing a house that evening, for participation in which burglary Wheeler had already accepted the invitation. The four men, [Appellant], Wheeler, Lofton-Robinson, and Robinson thusly agreed to rob a house. All men carried firearms, with the exception of Robinson. That evening, the group stopped at a convenience store wherein the clerk noticed the gun Wheeler carried in a holster on his hip. Just before midnight, the group drove to Dewey and Lindell Avenue in Lofton-Robinson's white Mercury Grand Marquis. At the same time, Mr. Robert Mason jogged past, noticed the men loitering in the area in the middle of the night, and made a mental note of their car's license plate. Shortly after midnight, young nursing student Gabriel Valenzuela had returned to his home at 5536 West Dewey. After retrieving the family's mail from his mailbox, Mr. Valenzuela walked past the group on his way into his home. [Appellant] and his three accomplices demanded everything Mr. Valenzuela had, then shot him three times in the head and torso, leaving him to die alone in his driveway. The foursome then fled the scene without taking any of Mr. Valenzuela's property.

Robinson also testified that [Appellant] fired first with a .22 caliber gun. Mr. Valenzuela's wounds included a gunshot wound in his abdomen from a .22 caliber gun. On the evening of Mr. Valenzuela's slaying, [Appellant] was the sole carrier of a .22 caliber firearm. In a search of [Appellant's] home, police recovered a .22 caliber gun that retained [Appellant's] DNA. A bullet recovered from Mr. Valenzuela's abdomen wound was too damaged to be matched to [Appellant's] gun,

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

VIII AA 1772-1773.

SUMMARY OF THE ARGUMENT

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

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

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

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

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

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

ARGUMENT

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

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

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

I. INEFFECTIVE ASSISTANCE OF COUNSEL STANDARD OF REVIEW

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

To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063-64; see also Love, 109 Nev. at 1138, 865 P.2d at 323. Under the Strickland test, a defendant must show first that his counsel's representation fell below an objective standard of reasonableness and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. Strickland, 466 U.S. at 687-88, 694, 104 S. Ct. at 2065, 2068; Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-part test). "[T]here is no reason for a court deciding an ineffective assistance claim

to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

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

"There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689, 104 S. Ct. at 689. "Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). Likewise, the decision not to call witnesses is within the discretion of trial counsel and will not be questioned unless it was a plainly unreasonable decision. Rhyne v. State, 118 Nev. 1, 38 P.3d 163 (2002); Dawson, 108 Nev. 112, 825 P.2d 593.

In essence, the court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. A defendant is not entitled to a particular "relationship" with his attorney. Morris v. Slappy, 461 U.S. 1, 14, 103 S. Ct. 1610, 1617 (1983). There is no requirement for any specific amount of communication as long as counsel is reasonably effective in his representation. Id.

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

Even if a defendant can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice

and show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (*citing* Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. (*citing* Strickland, 466 U.S. at 687-89, 694, 104 S. Ct. at 2064–65, 2068).

Claims of ineffective assistance of counsel asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "A petitioner for post-conviction relief cannot rely on conclusory claims for relief but must make specific factual allegations that if true would entitle him to relief. 'Bare' and 'naked' allegations are not sufficient to warrant post-conviction relief, nor are those belied and repelled by the record." Id. "A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." Mann v. State, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002). A habeas corpus petitioner must prove disputed factual allegations by a preponderance of the evidence. Means, 120 Nev. at 1011, 103 P.3d at 32. The burden rests on Appellant to "allege specific facts supporting the claims in the petition." NRS 34.735(6).

A party seeking review bears the responsibility "to cogently argue, and present relevant authority" to support his assertions. Edwards v. Emperor's Garden

Restaurant, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006); Dept. of Motor Vehicles and Public Safety v. Rowland, 107 Nev. 475, 479, 814 P.2d 80, 83 (1991) (defendant's failure to present legal authority resulted in no reason for the district court to consider defendant's claim); Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (an arguing party must support his arguments with relevant authority and cogent argument; "issues not so presented need not be addressed"); Randall v. Salvation Army, 100 Nev. 466, 470-71, 686 P.2d 241, 244 (1984) (court may decline consideration of issues lacking citation to relevant legal authority); Holland Livestock v. B & C Enterprises, 92 Nev. 473, 533 P.2d 950 (1976) (issues lacking citation to relevant legal authority do not warrant review on the merits).

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

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

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

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

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

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

Appellant alleges that Counsel was ineffective for failing to object to the text message on the grounds that it constituted evidence of an uncharged bad act. VIII AA 1781. The message in question read "Sace is in". Id.

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

the prejudicial effect of evidence of other bad acts against the probative value of that evidence. State v. Shade, 111 Nev. 887, 894, 900 P.2d 327, 331 (1995).

As Appellant concedes, the State argued for the message's admission by invoking the doctrine of *res gestae* (codified by NRS 48.035(3)). VIII AA 1782. In addition to other messages contained in the same thread, the message in question explained the purpose of the foursome's gathering and carrying firearms, as well as how they ultimately came to confront and murder Mr. Valenzuela. Accordingly, even if trial counsel had objected to the message as evidence of prior bad acts or an uncharged crime, no *Petrocelli* hearing would have been conducted because the Court concurred the evidence was admissible under the *res gestae* doctrine. Thus, the objection Appellant asserts should have been made would have been futile. Counsel cannot be ineffective for failing to make futile objections or arguments See Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006).

Further, even if trial counsel could be deemed ineffective for the failure to raise a futile objection, Appellant cannot establish a reasonable probability that the proceedings would have resulted in a different outcome if counsel had objected to the text message's admission on the grounds that it constituted evidence of an uncharged crime. Appellant concludes without substantiation that a *Petrocelli* hearing would have found that the text message was not relevant. VIII AA 1782. NRS 48.015 reads:

> As used in this chapter, "relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.

The message constitutes evidence of the parties' shared intent to seek pecuniary gain through criminal means, namely burglary. The existence of this intent makes it more probable that Appellant and his accomplices would subsequently establish a shared intent to seek pecuniary gain by perpetrating robbery. Given that this shared intent is material to Count 1– CONSPIRACY TO COMMIT ROBBERY, evidence thereof is necessarily relevant. Moreover, while the State sought the admission of only a single message, a properly executed search warrant recovered a litany of messages between the co-defendants that would establish Conspiracy to Commit Burglary by clear and convincing evidence. Id. Finally, even if the relative weights of probative and prejudicial value were considered under the doctrine of *res gestae*, Appellant has failed to assert let alone establish that the risk of unfair prejudice to him posed by the message in question substantially outweighed the probative value thereof. Therefore, this claim was properly denied.

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

Appellant claims that counsel was ineffective for failing to seek severance from co-defendant Wheeler because the co-defendants had mutually antagonistic defenses. VIII AA 1783. However, Appellant's claims are belied by the record in that the defenses were not mutually antagonistic.

For purposes of supporting a defendant's motion to sever, the rule in Nevada is that defenses must be antagonistic to the point that they are mutually exclusive before they are to be considered prejudicial. Rowland v. State, 118 Nev. 31, 35, 39 P.3d 114, 116 (2002). Defenses become mutually exclusive when the core of the co-defendant's defense is so irreconcilable with the core of the defendant's own defense that the acceptance of the co-defendant's theory by the jury precludes acquittal of the defendant. Id.

At trial, Appellant's defense was that the State could not prove beyond a reasonable doubt that Appellant was responsible for the brutal slaying of Mr. Valenzuela VIII AA 1783. Co-defendant Wheeler's counsel argued that Wheeler was not a member of the foursome responsible for killing Mr. Valenzuela because Wheeler abandoned the group approximately forty-five (45) minutes before Mr. Valenzuela was slain. Id. These defenses are not irreconcilable. A jury could have reasonably found both that co-defendant Wheeler had been mistakenly identified and that there was insufficient evidence to convict Appellant, and ultimately acquitted both defendants. Accordingly, no mutual exclusivity exists between the co-defendants' theories, and the defenses therefore cannot be mutually antagonistic. Moreover, even if the defense theories were mutually antagonistic, Appellant fails to establish that the failure to sever his trial from co-defendant Wheeler's caused him to suffer any prejudice. The decisive factor in any severance analysis remains

prejudice to the defendant. Marshall v. State, 118 Nev. 642, 646, 56 P.3d 376, 378 (2002). Appellant implies the disparities between his convictions and sentences and those of his accomplices constitute evidence of the prejudice he allegedly suffered through the joint trial. VIII AA at 1784. However, Appellant attempts to mislead this Court through this implication because these disparities instead reflect the reality that Appellant was differently situated than his accomplices. Although a valid search warrant was properly executed on the residence of each member of the foursome responsible for Mr. Valenzuela's death, the .22 caliber bullets with the same headstamp as the cartridge case found at the murder scene and rifling characteristics similar to those recovered from Mr. Valenzuela's wounds were recovered from Appellant's residence. Id. In addition, the Taurus .22 that testing confirmed fired the cartridge case left at the murder scene was found in the bottom left drawer of Appellant's residence. Id. Finally, it was Appellant's DNA that was recovered from the Taurus .22. Id. Given that Appellant's convictions and sentences reflect the enormity of the evidence against him, the suggestion that Appellant suffered any prejudice from his joint trial is a bare and naked assertion that must be denied. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

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

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

Appellant repeatedly states that trial counsel failed to investigate his mental health issues. VIII AA 1784. However, the fact that counsel elected against raising these alleged issues at trial does not constitute evidence that counsel was unaware of them and/or failed to investigate them. Further, Appellant fails to show how an investigation of his alleged mental health issues would have produced a more favorable outcome given the strength of the evidence against him. Pursuant to Molina v. State, such a claim cannot support post-conviction relief. Molina v. State 120 Nev. 185, 192, 87 P.3d 533, 538 (2004) (stating that a defendant who contends his attorney was ineffective because he did not adequately investigate must show how a better investigation would have rendered a more favorable outcome probable). Appellant next takes issue with trial counsel's failure to call witness to attest to his alleged mental health issues and/or otherwise introduce said issues at trial to disprove specific intent. VIII AA 1785. However, which witness to call is a virtually unchallengeable strategic decision. "Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson, 108 Nev. at 117, 825 P.2d at 596; see also Ford, 105 Nev. at 853, 784 P.2d

at 953. In essence, the court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. Trial counsel has the "immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop." Rhyne, 118 Nev. at 8, 38 P.3d at 167. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Harrington v. Richter, 131 S. Ct. 770, 788 (2011) (*citing* Yarborough v. Gentry, 540 U.S. 1, 124 S. Ct. 1 (2003)). Appellant fails to even assert that trial counsel's failure to raise his alleged mental health issues does not constitute a strategic decision. Furthermore, trial counsel's defense theory was clear from his opening statement: the State could not prove beyond a reasonable doubt that Appellant was responsible for Mr. Valenzuela's murder. VIII AA 1785. In fact, on multiple occasions, Attorney Sanft sought to undermine the certainty of Appellant's participation in the murder. For example, Attorney Sanft attempted to paint Robinson as a liar motivated by his desire to avoid adult custody. Id. Later, Attorney Sanft attempted to cast doubt on a photographic depiction of Appellant. Id. The trial transcripts confirm that Appellant's trial counsel sought to establish that there was insufficient evidence to convict him because Appellant was not in fact responsible for Mr. Valenzuela's murder. Given that raising Appellant's alleged mental health issues to disprove

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

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

Appellant also contends counsel was ineffective for failing to raise Appellant's alleged mental health issues as mitigation evidence at the sentencing hearing. VIII AA 1786. Appellant further takes issue with counsel's failure to present any other form of mitigation evidence. Id. However, counsel's conduct in context is inconsistent with ineffective assistance of counsel.

When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness. Strickland 466 U.S. at 687-88, 104 S. Ct. at 2064. Regardless of whether Appellant is citing ineffective assistance of trial or appellate counsel, the inquiry should focus on counsel's "performance as a whole". Kirksey v. State. 112 Nev. 980, 998, 923 P.2d 1102 (1996). Even if a defendant can demonstrate that his counsel's representation fell below an objective standard of

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

First, this Court provided both counsel and Appellant an opportunity to be heard at sentencing. VIII AA 1786. Neither Appellant nor counsel elected to offer mitigation evidence or arguments, which forbearance counsel clarified to the Court:

> We're going to submit everything to the Court. And the reason for that is this, Mr. Robertson is intent on filing an appeal, is intent on going forward with that aspect of it. I believe that ultimately what we have here is a situation where Mr. Robertson's in a position where the reason why he's not talking to the Court or saying anything to the Court is because he wants to reserve that -- that right.

Id.

Appellant was present while his counsel offered this explanation, yet he permitted the hearing to proceed without demur. Clearly, Appellant and counsel had engaged in a prior discussion during which they jointly made the strategic decision to withhold mitigation evidence or other argument. "Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson, 108 Nev. at 117, 825 P.2d 596; see also Jones v. State, 95 Nev. 613, 617,

600 P.2d 247, 250 (1979) (recognizing that when a defendant participates in an alleged error, he is estopped from objecting to it on appeal).

Moreover, even if Appellant could challenge trial counsel's failure to offer mitigation evidence and establish that said failure was unreasonable, Appellant is unable to demonstrate the requisite prejudice for a valid ineffective assistance of counsel claim. This Court heard the disturbing facts of this case. The State introduced evidence that Appellant and his accomplices had assembled on August 8, 2017 with the intent to "hit a house". VIII AA 1787. This Court also learned that all but one member of the foursome were carrying firearms. Finally, this Court heard how the group agreed to rob 24-year-old Gabriel Valenzuela whose promising future as a nurse was snuffed out when Appellant and his accomplices ruthlessly discharged multiple bullets into him, and left him to die alone in his own driveway. Id. Moreover, Mr. Valenzuela's mother provided the Court with a devastating account of the suffering she continued to endure since the death of her only child. Id. Given the strength of State's evidence against Appellant, the aggravating factors in the multiple, violent offenses of which Appellant was convicted, and Appellant's own failure to express any remorse during sentencing, even if counsel had offered mitigation evidence, there is no reasonable probability that this offer would have resulted in this Court's imposition of a lighter sentence. This claim was therefore properly denied.

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

A defendant is not entitled to a particular "relationship" with her attorney. Morris v. Slappy, 461 U.S. 1, 14, 103 S. Ct. 1610, 1617 (1983). There is no requirement for any specific amount of communication as long as counsel is reasonably effective in his or her representation. See Id.

Appellant alleges that counsel failed to communicate with him during the appellate process. VIII AA 1788. However, Appellant fails to establish that this alleged lack of communication at all compromised counsel's effectiveness during the appellate process. Not only has Appellant failed to establish that his input would have had any impact on the appellate process, but he has also failed to even suggest that he had any input to provide. Therefore, his claim that counsel's alleged lack of communication with him constitutes ineffectiveness is bare and naked, and thus denied. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

Appellant alleges that counsel's appellate briefing was "wholly deficient and inadequate" in part for failing to articulate the specific facts that demonstrate the insufficiency of the evidence that convicted Appellant. VIII AA 1788. Appellant further alleges that, in raising the insufficiency of evidence argument, counsel should have provided the details that exhibit the alleged weakness of the State's case. Id. Finally, Appellant alleges that appellate counsel should have raised on appeal the

allegations that the jury venire failed to represent a fair cross-section of the community and the text message constituted evidence of uncharged bad acts. Id.

There is a strong presumption that appellate counsel's performance was reasonable and fell within "the wide range of reasonable professional assistance." See United States v. Aguirre, 912 F.2d 555, 560 (2nd Cir. 1990); *citing* Strickland, 466 U.S. at 689, 104 S. Ct. at 2065. The United States Supreme Court has held that there is a constitutional right to effective assistance of counsel in a direct appeal from a judgment of conviction. Evitts v. Lucey, 469 U.S. 387, 396-97, 105 S. Ct. 830, 835-37 (1985); see also Burke v. State, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). This Court has held that all appeals must be "pursued in a manner meeting high standards of diligence, professionalism and competence." Burke, 110 Nev. at 1368, 887 P.2d at 268.

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

Appellate counsel is not required to raise every issue that a defendant felt was pertinent to the case. The professional diligence and competence required on appeal

involves "winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Jones v. Barnes, 463 U.S. 745, 751-52, 103 S. Ct. 3308, 3313 (1983). In particular, a "brief that raises every colorable issue runs the risk of burying good arguments . . . in a verbal mound made up of strong and weak contentions." Id. at 753, 103 S. Ct. at 3313. For judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy." Id. at 754, 103 S. Ct. at 3314. The Nevada Supreme Court has similarly concluded that appellate counsel may well be more effective by not raising every conceivable issue on appeal. Ford, 105 Nev. at 853, 784 P.2d at 953.

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

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

Second, as indicated above, there was ample evidence to support Appellant's convictions. Appellant was in possession of the bullets that bore similar characteristics to the cartridge found at the murder scene and the bullets recovered from Mr. Valenzuela's injuries. VIII AA 1789. Appellant was also in possession of the Taurus .22 gun that was traced to the cartridge case at the scene. VIII AA 1790. The DNA found on the Taurus .22 belonged to Appellant. Id.

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

Finally, Appellant provides no grounds for why the admissibility of the text message would have made the appellate brief more likely to succeed. Instead, Appellant merely continues to imply that the prejudicial effect of the message outweighed the probative value. VIII AA 1790. However, as discussed hereinabove, the message was admitted under the doctrine of *res gestae*. Accordingly, the determinative analysis is not a weighing of the prejudicial effect of evidence of other bad acts against the probative value of that evidence. Shade, 111 Nev. at 894, 900

P.2d at 331. Thus, this argument would have been futile and counsel cannot be ineffective for failing to raise it. Ennis, 122 Nev. at 706, 137 P.3d at 1103.

CONCLUSION

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

Dated this 5th day of April, 2023.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

Dated this 5th day of April, 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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IN THE SUPREME COURT OF THE STATE OF NEVADA

RAEKWON ROBERTSON,

Appellant,

v.

STATE OF NEVADA,

Respondent.

CASE NO: 85932

APPELLANT'S REPLY BRIEF

Appeal From Denial of Post-Conviction Habeas Petition

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IN THE SUPREME COURT OF THE STATE OF NEVADA

RAEKWON ROBERTSON, Appellant, v. STATE OF NEVADA, Respondent.	CASE NO: 85932

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 14th day of April, 2023.

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TABLE OF CONTENTS

ARGUMENT

The only citations to the record that appear in the State's Answering Brief are references to the district court's Findings of Fact, Conclusions of Law and Order which is found at 8 AA 1769-1790. In turn, the district court's Findings of Fact, which were prepared by the State, are a verbatim regurgitation of the facts and argument from the State's Response to the Supplemental Habeas Petition. 8 AA 1741-1762. Nowhere does the State cite to the actual trial transcripts in support of any of the facts it alleges. This fails to comply with the citation rules of NRAP 28(e). See also, *Evans v. State*, 117 Nev. 609, 28 P.3d 498, 522 (2001). This deficiency and error is repeated throughout the Answering Brief such that this Court cannot rely upon any of the facts alleged by the State.

I. INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO OBJECT TO OTHER BAD ACT EVIDENCE OF TEXT MESSAGE ABOUT "HITTING A HOUSE"

The State simply and inaccurately reduces the challenged text message down to, "Sace is in." Answering Brief, p. 14. [1] The text message itself was sent by Appellant and queried of DeShawn Robinson whether he and his brother "DJ" or Demario Lofton-Robinson wanted to "hit a house tonight" with Appellant and co-defendant Wheeler. 3 AA 596-605. The State does not dispute that no house was

[1] "Sace" is actually the nickname for co-defendant Davontae Wheeler, whereas Appellant was known by the name of "Ray Logan." 5 AA 1023-1024.

hit that night. The State's reliance *upon res gestae* is misplaced because the "complete story of the crime" doctrine must be ***construed narrowly*** and only applies where another uncharged act or crime is so closely related to the act in controversy ***that the witness cannot describe the act without referring to the other uncharged act or crime***. *Bellon v. State*, 121 Nev. 436, 444, 117 P.3d 176, 181 (2005) [emphasis added]. No such analysis took place in the present case either at trial, or in the district court's habeas findings. 3 AA 596-605; 8 AA 1781-1782. Appellant's assertion that the encounter, robbery, and murder of the victim in the case could all have been described to the jury without specifically referring to the defendants' intention of getting together that night in order to "hit a house," remains unrebutted.

Alternatively, the State argues the text message would have been admissible as a prior bad act to show intent. However, the State's own theory of relevance belies an improper propensity purpose:

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

Answering Brief, p. 16 [emphasis added]. The claim of a probable "shared intent" is nothing more than a bald argument to admit criminal character and disposition to show propensity. Furthermore, "[A] presumption of inadmissibility attaches to all prior bad act evidence." *Rosky v. State*, 121 Nev. 184, 195, 111 P.3d 690, 697

(2005). "[T]he use of uncharged bad act evidence to convict a defendant is heavily disfavored in our criminal justice system because bad acts are often irrelevant and prejudicial and force the accused to defend against vague and unsubstantiated charges." *Tavares v. State*, 117 Nev. 725, 730, 30 P.3d 1128, 1131 (2001). If counsel had raised this issue and a proper legal analysis been done, the evidence would not have been admitted. Because the prejudicial effect of a planned home invasion far exceeds that of the crime of opportunity that was actually committed, the outcome of the trial would have been different.

II. COUNSEL FAILED TO SEEK SEVERANCE OF TRIAL FROM CO-DEFENDANT WHEELER

In response to the severance issue, the State maintains that the defenses were not mutually exclusive and that Appellant suffered no prejudice attributable to the joint trial. Answering Brief, pp. 16-18. In its analysis and conclusion regarding prejudice, the State and the district court below utterly failed to consider or address Appellant's arguments as to judicial economy:

> Nevertheless, prejudice to the defendant is not the only relevant factor: a court must consider not only the possible prejudice to the defendant but also the possible prejudice to the State resulting from expensive, duplicative trials. Joinder promotes judicial economy and efficiency as well as consistent verdicts and is preferred as long as it does not compromise a defendant's right to a fair trial.

Marshall v. State, 118 Nev. 642, 56 P.3d 376 (2002). Under the unique facts of this case, although four defendants were indicted together, only two proceeded to a joint

trial. There was a de facto severance of two of the defendants because one was unavailable at Lake's Crossing and the other became a cooperating witness for the State. Appellant alleged below that he would have accepted the plea offer but it was contingent on Wheeler also accepting because of the joint trial. 1 AA 100-108, 120-4. So, had the district court granted a severance, there would have been virtually no impact on the efficient administration of justice and no prejudice to the State as Appellant would have pleaded guilty. When weighed against the prejudice to Appellant of being tried jointly with Wheeler, there is a reasonable probability a severance motion would have been granted. Counsel was ineffective in failing to seek severance from co-defendant Wheeler in the trial of this case and the district court erred in finding otherwise.

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

The State seeks to summarily dismiss this argument as raising only bare and naked assertions and because the investigation and calling of witnesses is a virtually unchallengeable strategic decision of counsel. While deference must be given to counsel's strategic choices, the State and district court's analysis is far too simplistic and dismissive. Both in his Opening Brief and in his habeas pleadings below, Appellant identified specific witnesses by name and attached statements of what their testimony would have been had they been called at trial. Neither the State nor

the district court even attempt an analysis of how such testimony would have affected the outcome of the trial, particularly as to issues of specific intent. Calling a decision by counsel as "strategic," especially without first conducting an evidentiary hearing, is not some kind of shorthand way of avoiding a proper *Strickland* analysis.

Ordinarily, who should be called as a witness is a tactical decision within the discretion of counsel. *Doleman v. State*, 112 Nev. 843, 848, 921 P.2d 278, 280-81 (1996) (citing *Strickland*, 466 U.S. at 690-691, 104 S.Ct. at 2066). However, it constitutes ineffective assistance of counsel when important witnesses are not investigated and presented to the jury when their testimony would have changed the outcome of the case. *Id*. Counsel has a duty to investigate and interview important witnesses. *State v. Love*, 109 Nev. 1136, 865 P.2d 322 (1993). The district court erred in denying this claim.

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

The State argues that because Appellant decided not to personally address the court at sentencing, "[c]learly, Appellant and counsel had engaged in a prior discussion during which they jointly made the strategic decision to withhold mitigation evidence or other argument." Answering Brief, p. 22. This reasoning is flawed and highlights the need for, yet absence of, an evidentiary hearing. Appellant

can waive his right to speak at sentencing without waiving his right to have counsel present mitigating evidence and argument.

The State next claims that mitigating evidence would not have made a difference in the sentence due to the strength of the State's case in aggravation. However, at no time does the State nor the district court below consider or weigh in its analysis the considerable mitigating evidence of bipolar disorder, schizophrenia, mild mental retardation, learning disability, paranoia and ADHD, and how this might reduce Appellant's relative culpability. Defendants must "be sentenced individually, taking into account the individual, as well as the charged crime." *Martinez v. State*, 114 Nev. 735, 737, 961 P.2d 143, 145 (1998).

Nor does the State's analysis consider that Appellant received a life sentence plus a maximum sentence for the deadly weapon. To say that Appellant, even with his substantial mental health issues, deserved a maximum sentence the same as the most aggravated of defendants with no diminished mental health or other mitigating circumstances, creates a gross inequity which fails to account for a defendant's unique and personal circumstances. The district court erred in denying this claim.

V. COUNSEL PROVIDED INEFFECTIVE ASSISTANCE ON APPEAL

The State does not dispute the lack of communication from counsel on direct appeal, but instead argues there was no prejudice as Appellant had nothing of value to add to the appeal. This overlooks the several pro se habeas petitions filed

personally by Appellant in this case which identified issues which should have been raised by direct appeal counsel. 7 AA 1606-1637. This included the admissibility of the text messages and a fair cross-section violation among other issues. *Id*. If counsel's communication were not deficient, Appellant would have insisted on inclusion of these issues in the direct appeal and the outcome would have been different.

The State claims that appellate counsel, as a matter of professional judgment and discretion, decided not to raise the issues that Appellant now insists should have been raised. However, the State cannot possibly know this. What appellate counsel may or may not have intentionally decided to do is outside the scope of the record as there was no evidentiary hearing. The State cannot say that the omission of certain issues by counsel was the result of considered judgment as opposed to deficient performance and error. Appellate counsel may have a duty to "winnow" out weaker issues, but there is nothing in the record to suggest that appellate counsel even recognized or contemplated these issues, much less intentionally omitted them as weaker claims.

On the merits of the claims, the State only emphasizes a few selectively favorable facts without even addressing contrary facts raised by Appellant which undermine the State's narrative and the sufficiency of the evidence. The State also summarily states that the fair cross-section issue is futile and has no merit without

conducting the proper three-prong legal analysis or distinguishing any of the case law cited by Appellant. Finally, the State's response to the admissibility of the text message simply double-downs on it as *res gestae* as opposed to other bad act evidence. The State's errors are the same as the district court's errors as it entirely adopted the State's argument and reasoning in denying the petition.

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 14th day of April, 2023.

/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 2,234 words and 9 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 14th day of April, 2023.

/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 April 14, 2023. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON FORD
Nevada Attorney General

ALEXANDER CHEN
Chief Deputy District Attorney

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

IN THE SUPREME COURT OF THE STATE OF NEVADA

RAEKWON SETREY ROBERTSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 85932
District Court Case No. A823892~~;C328587~~

FILED
SEP - 6 2023
CLERK OF COURT

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Elizabeth A. Brown, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows:

"ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order."
Judgment, as quoted above, entered this 7th day of May,2023.

IN WITNESS WHEREOF, I have subscribed my name and affixed the seal of the Supreme Court at my Office in Carson City, Nevada this September 01, 2023.

Elizabeth A. Brown, Supreme Court Clerk

By: Elyse Hooper
Administrative Assistant

A-20-823892-W
CCJAR
NV Supreme Court Clerks Certificate/Judgi
5045423

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RAEKWON SETREY ROBERTSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 85932-COA

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

Raekwon Setrey Robertson appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on October 29, 2020, and later-filed supplements. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Robertson argues the district court erred by denying his claims of ineffective assistance of trial counsel without conducting an evidentiary hearing. To demonstrate ineffective assistance of trial counsel, a petitioner must show counsel's performance was deficient in that it fell below an objective standard of reasonableness and prejudice resulted in that there was a reasonable probability of a different outcome absent counsel's errors. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Warden v. Lyons*, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in *Strickland*). Both components of the inquiry must be shown. *Strickland*, 466 U.S. at 687. To warrant an evidentiary hearing, a petitioner must raise claims supported by specific factual allegations that are not belied by the record and, if true, would entitle him to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). We give deference to the district

court's factual findings if supported by substantial evidence and not clearly erroneous but review 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). We review the district court's decision not to conduct an evidentiary hearing for an abuse of discretion. *Berry v. State*, 131 Nev. 957, 969, 363 P.3d 1148, 1156 (2015).

First, Robertson claimed counsel was ineffective for failing to object to evidence admitted during trial on the grounds that it constituted prior bad acts. The State introduced an electronic message sent from Robertson to a coconspirator on the day of the offenses asking him if he and the coconspirator's brother wanted to "hit a house tonight." Robertson explained that the group would include himself, the two brothers, and another coconspirator who had "already said yeah." Robertson was charged with conspiring with the others in the group to rob the victim, attempting to rob the victim, and murdering the victim. Robertson claimed that because he was not charged with burglary or home invasion, the messages were not relevant to the conspiracy or his intent to rob the victim.

Robertson disputed that he planned or was with the group when they committed the offenses. The message was relevant to establish that Robertson sought to engage in a criminal association with the others in the group and that his criminal relationship with them developed prior to the offenses. Accordingly, the evidence was admissible, *see Fields v. State*, 125 Nev. 785, 792-93, 220 P.3d 709, 714 (2009) (applying cases and holding that evidence of an uncharged criminal conspiracy may be admitted for a nonpropensity purpose under NRS 48.045(2)), and Robertson failed to demonstrate that counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome but for

counsel's alleged error. Therefore, we conclude the district court did not abuse its discretion by denying this claim without conducting an evidentiary hearing.

Second, Robertson claimed counsel was ineffective for failing to seek severance of his trial from that of D. Wheeler's, the only codefendant with whom Robertson was jointly tried. Robertson claimed he was prejudiced at trial by his and Wheeler's mutually antagonistic defenses. The district court found that Robertson's defense theory was that the State could not prove beyond a reasonable doubt he killed the victim and that Wheeler's defense theory was that Wheeler was not a member of the foursome that killed the victim because he left the group before the victim was killed. The district court also found that the jury could have found both defense theories viable and acquitted both defendants. The district court's findings are supported by substantial evidence. Robertson's and Wheeler's defenses were not mutually exclusive. Robertson thus failed to demonstrate that his defense was mutually antagonistic to Wheeler's defense such that he was entitled to a severed trial. *See* NRS 174.165 (providing when a defendant is entitled to a severed trial); *Rowland v. State*, 118 Nev. 31, 45, 39 P.3d 114, 122-123 (2002) (describing antagonistic defenses as "mutually exclusive"). Accordingly, Robertson failed to demonstrate that counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome but for counsel's alleged error. Therefore, we conclude the district court did not abuse its discretion by denying this claim without conducting an evidentiary hearing.

Third, Robertson claimed counsel was ineffective for failing to investigate his mental health conditions or present evidence of them during trial to demonstrate he did not have the specific intent to commit the crimes.

Robertson alleged (1) he was off his mental health medications at the time of the offenses; (2) when he was off his medications, he would hear voices and suffer from paranoia and blackouts; and (3) he had no memory of the offense.

The district court denied relief because it found (1) that counsel's failure to raise the issue at trial was not evidence that counsel failed to investigate the issue and (2) that counsel made a strategic decision. The district court did not properly apply the evidentiary hearing standard. In determining whether an evidentiary hearing was required, the district court must to assume the petitioner's factual allegations were true unless the allegations were belied by the record. *See Hargrove*, 100 Nev. at 503, 686 P.2d at 225. Robertson's claims are not belied by the absence of evidence in the record. *See Berry*, 131 Nev. at 969, 363 P.3d at 1156 (explaining when a claim is belied by the record). Accordingly, we conclude the district court abused its discretion by denying this claim without conducting an evidentiary hearing. Therefore, we reverse the district court's denial of this claim and remand for the district court to conduct an evidentiary hearing on this claim.

Fourth, Robertson claimed counsel was ineffective at sentencing for failing to argue for specific sentences and present to the court his mental health issues or other mitigating evidence. Robertson alleged that counsel failed to communicate with him in advance of sentencing and had no discernable plan or strategy for presenting mitigating evidence or arguments. Robertson supported his argument with specific factual allegations that are not belied by the record and, if true, would have entitled him to relief. Accordingly, we conclude the district court abused its discretion by denying this claim without conducting an evidentiary hearing.

Therefore, we reverse the district court's denial of this claim and remand for the district court to conduct an evidentiary hearing on this claim.

Robertson also argues the district court erred by denying his claims of ineffective assistance of appellate counsel without conducting an evidentiary hearing. To demonstrate ineffective assistance of appellate counsel, a petitioner must show that counsel's performance was deficient in that it fell below an objective standard of reasonableness and prejudice resulted in that the omitted issue would have a reasonable probability of success on appeal. *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). Appellate counsel is not required to raise every non-frivolous issue on appeal. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). Rather, appellate counsel will be most effective when every conceivable issue is not raised on appeal. *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

First, Robertson claimed counsel was ineffective for failing to communicate with him during the appellate process. Robertson alleged the lack of communication prevented him from having any input in the appeal process. Robertson failed to explain what input he would have offered during the appeal process.[1] Accordingly, Robertson failed to demonstrate a reasonable probability of a different outcome on appeal but for counsel's alleged errors. Therefore, we conclude the district court did not abuse its discretion by denying this claim without conducting an evidentiary hearing.

Second, Robertson claimed counsel was ineffective because his opening brief on appeal failed to argue certain facts from Robertson's trial

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[1]Robertson alleges for the first time in his reply brief on appeal what his input into the appeal process would have been. Because these arguments were not raised below, we need not consider them. *See McNelton v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999).

in support of his claim that insufficient evidence supported his convictions. After viewing the evidence in the light most favorable to the prosecution, the Nevada Supreme Court concluded there was sufficient evidence to support Robertson's convictions. *See Robertson v. State*, No. 81400, 2021 WL 1964229 (Nev. May 14, 2021) (Order of Affirmance). Accordingly, Robertson failed to demonstrate a reasonable probability of success had counsel raised on appeal the facts Robertson alleged in his petition. *See McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (providing the standard for reviewing sufficiency of the evidence includes "viewing the evidence in the light most favorable to the prosecution" (quotation marks omitted)). Therefore, we conclude the district court did not abuse its discretion by denying this claim without conducting an evidentiary hearing.

Third, Robertson claimed counsel should have challenged on appeal the district court's denial of his fair-cross-section claim. In his petition, Robertson claimed the trial court had found that African Americans were underrepresented but that Robertson had failed to demonstrate the underrepresentation was due to systematic exclusion. Robertson did not allege any facts that demonstrated the trial court's decision was erroneous, nor did he allege what appellate counsel should have argued on appeal. Accordingly, Robertson failed to allege specific facts that demonstrated counsel's performance fell below an objective standard of reasonableness or a reasonable probability of success had counsel raised this claim on appeal. Therefore, we conclude the district court did not abuse its discretion by denying this claim without conducting an evidentiary hearing.

Finally, Robertson claimed that counsel was ineffective for failing to challenge on appeal the admission of the message sent from

Robertson to his codefendant inviting him and another to "hit a house tonight." For the reasons discussed above, Robertson failed to demonstrate counsel's performance fell below an objective standard of reasonableness or a reasonable probability of success had counsel raised this claim on appeal. Therefore, we conclude the district court did not abuse its discretion by denying this claim without conducting an evidentiary hearing. Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.

_____, C.J.
Gibbons

_____, J.
Bulla

_____, J.
Westbrook

cc: Hon. Michelle Leavitt, District Judge
Steven S. Owens
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

RAEKWON SETREY ROBERTSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 85932
District Court Case No. A823892;~~C328587~~

REMITTITUR

TO: Steven D. Grierson, Eighth District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: September 01, 2023

Elizabeth A. Brown, Clerk of Court

By: Elyse Hooper
Administrative Assistant

cc (without enclosures):
Hon. Michelle Leavitt, District Judge
Steven S. Owens
Clark County District Attorney \ Alexander G. Chen, Chief Deputy District Attorney

RECEIPT FOR REMITTITUR

Received of Elizabeth A. Brown, Clerk of the Supreme Court of the State of Nevada, the REMITTITUR issued in the above-entitled cause, on SEP - 6 2023.

HEATHER UNGERMANN
Deputy District Court Clerk

RECEIVED
APPEALS
SEP - 5 2023
CLERK OF THE COURT

23-28753

Electronically Filed
9/6/2023 3:42 PM
Steven D. Grierson
CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

****

RAEKWON SETREY ROBERTSON, Appellant, vs THE STATE OF NEVADA, Respondent.	CASE NO: A-20-823892-W

NOTICE OF HEARING

At the request of the Court, a **Status Check on Evidentiary Hearing** has been set for **Thursday, September 14, 2023,** at 8:30 a.m. in District Court Department XII.

DATED: September 6, 2023

By: Pamela Osterman
Pamela Osterman
Judicial Executive Assistant
to Judge Michelle Leavitt
Department XII

MICHELLE LEAVITT
DISTRICT JUDGE
DEPT XII

CERTIFICATE OF SERVICE

I hereby certify that on the date filed, I caused the foregoing Notice of Hearing to be served by e-filing through wiznet, or by mailing, to:

Clark County District Attorney
Email: Alexander Chen, Chief Deputy District Attorney
Alexander.chen@clarkcountyda.com

Steven S. Owens, Esq.
owenscrimlaw@gmail.com

Pamela Osterman

Pamela Osterman
Judicial Executive Assistant

DISTRICT COURT
CLARK COUNTY, NEVADA

Writ of Habeas Corpus	**COURT MINUTES**	**September 14, 2023**
A-20-823892-W	Raekwon Robertson, Plaintiff(s) vs. State of Nevada, Defendant(s)	**Department 12**

September 14, 2023 **08:30 AM** **Set Evidentiary Hearing per Nevada Supreme Court Reversal and Remand**

HEARD BY: Leavitt, Michelle **COURTROOM:** RJC Courtroom 14D

COURT CLERK: Gonzalez, Kimberly; Villatoro, Reina

RECORDER: Coll, Connie

REPORTER:

PARTIES PRESENT:

Raekwon Robertson	**Plaintiff**
State of Nevada	**Defendant**
Steven S. Owens	**Attorney for Plaintiff**

JOURNAL ENTRIES

Mr. Owens confirmed as counsel. Following colloquy regarding Defendant's video appearance from prison, COURT ORDERED, matter SET for Evidentiary Hearing.

11/03/23 9:00 AM EVIDENTIARY HEARING

OPI
STEVEN S. OWENS, ESQ
Nevada Bar No. 4352
1000 N. Green Valley #440-529
Henderson, Nevada 89074
Telephone: (702) 595-1171
owenscrimlaw@gmail.com
Attorney for Petitioner Raekwon Robertson

DISTRICT COURT
CLARK COUNTY, NEVADA

RAEKWON ROBERTSON, Petitioner, vs. STATE OF NEVADA, Respondent.	CASE NO.: A-20-823892-W DEPT NO.: XII

ORDER FOR AUDIOVISUAL APPEARANCE OF INMATE RAEKWON ROBERTSON, BAC #1235056

DATE OF HEARING: November 3, 2023
TIME OF HEARING: 9:00 AM

TO: NEVADA DEPARTMENT OF CORRECTIONS

TO: ELY STATE PRISON

Upon the ex parte application of RAEKWON ROBERTSON, Petitioner, by and through her counsel of record, STEVEN S. OWENS, ESQ., and good cause appearing therefor,

IT IS HEREBY ORDERED that NEVADA DEPARTMENT OF CORRECTIONS shall be, and is, hereby directed to produce RAEKWON ROBERTSON, BAC #1235056, Petitioner in Case Number A-20-823892-W, inasmuch as the said RAEKWON ROBERTSON is currently incarcerated in the ELY STATE PRISON located in Nevada, and his presence will be required in the Eighth Judicial District Court XII, Las Vegas, Nevada, commencing on November 3, 2023,

at the hour of 9:00 o'clock AM and continuing until completion of the evidentiary hearing.

IT IS FURTHER ORDERED that in lieu of the inmate's physical appearance, that arrangements be made for the inmate's virtual appearance via audiovisual means, specifically Bluejeans video conferencing, at the appointed date and time. The Bluejeans information is as follows:

Meeting URL
https://bluejeans.com/912413707/7322?src=join_info

Meeting ID
912 413 707

Participant Passcode
7322

Dated this 15th day of September, 2023

DISTRICT COURT JUDGE
E12 FB2 503E 2F4A
Michelle Leavitt
District Court Judge

Respectfully Submitted,

/s/ Steven S. Owens
STEVEN S. OWENS, ESQ.
Nevada Bar No. 4352

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

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

AUTOMATED CERTIFICATE OF SERVICE

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

Service Date: 9/15/2023

Alexander Chen	Alexander.chen@clarkcountyda.com
Steven Owens	owenscrimlaw@gmail.com
Dept 12 Law Clerk	dept12lc@clarkcountycourts.us
Eileen Davis	eileen.davis@clarkcountyda.com

EXHS

STEVEN S. OWENS, ESQ
Nevada Bar No. 4352
1000 N. Green Valley #440-529
Henderson, Nevada 89074
Telephone: (702) 595-1171
owenscrimlaw@gmail.com
Attorney for Petitioner Raekwon Robertson

DISTRICT COURT
CLARK COUNTY, NEVADA

RAEKWON ROBERTSON, Petitioner, vs. STATE OF NEVADA. Respondent.	CASE NO.: A-20-823892-W DEPT NO.: XII

EXHIBITS IN SUPPORT OF EVIDENTIARY HEARING

COMES NOW, Petitioner, RAEKWON ROBERTSON, by and through his counsel of record, STEVEN S. OWENS, ESQ., and hereby submits his Exhibits in Support of Evidentiary Hearing in this matter which is currently scheduled for November 3, 2023.

DATED this 23rd day of October, 2023.

Respectfully submitted

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

Attorney for Petitioner
RAEKWON ROBERTSON

Exhibit 1

Clark County School District
Student Support Services Division
Las Vegas, Nevada 89121
FAX (702) 799-2494
Multidisciplinary Evaluation Team Report

CONFIDENTIAL
This report contains confidential information and is the property of Clark County School District.

Name:	**Robertson, Raekwon**
Student ID:	**419250**
MDT Date:	**10/06/2010**
Reevaluation Date:	**10/06/2013**
Date of Birth:	**02/06/1997**
Chronological Age:	**13-07**
Gender:	**Male**
Ethnicity:	**African American**
Grade	**8th**
PLC:	**English**
PLH:	***English***
Home School:	**Monaco MS**
Attending School:	**Monaco MS**

Team Members:

Name	Title	Attended Meeting
Steven Perkins, Ph.D., NASP	School Psychologist	YES
Mildred J. Walker	Teacher	YES
Adam Taylor	School Nurse	NO
Lorraine L. Sweitzer	Special Education Teacher	YES
Tom Sweitzer	Local Educational Administer	YES

REASON FOR REFERRAL:
Raekwon was referred for a three year psycho-educational re-evaluation on September 3, 2010, per the request of his special education classroom teacher. According to the classroom teacher, there is current concern about Raekwon's current special education eligibility status. He is currently enrolled in the 8th grade and receives special education services under the special education category of Emotionally Disturbed. There is no reported or known "documented" concern about Raekwon's current behavior at Monaco Middle School.

Additional information available for review and scope of assessment included parent input, general education teacher input, special education teacher input, LEA, report cards, the IEP progress report, and observations. The multidisciplinary team currently suspects a Specific Learning Disability. Additional assessment information needs to be obtained to address Raekwon's current cognitive, academic functioning and social/emotional functioning in comparison to his same age/grade peers.

EVALUATION PROCEDURES:
The assessment included all the components of a comprehensive evaluation required by state regulations, including information provided by Raekwon's parents or primary caregiver (if the student is younger than 18 years of age). Information regarding Raekwon's current classroom performance (observations and assessments), and the observations of his teachers and other providers of instructional or educational services were also included. Raekwon's primary language, racial, and ethnic background were considered prior to selection and interpretation of evaluation procedures and measures. All assessment procedures measure a limited sample of the individual's total repertoire. The selected measures should only be interpreted within the limits of their measured validity.

The following procedures were components of the evaluation:

PROCEDURES	DATE

Interview with teacher, Developmental History, Medical History, Vision Screening, Hearing Screening, Review of School Records	09/30/2010
Review of Previous Assessment Records	09/30/2010
Classroom Observation	09/30/2010
Interview and Observation of Student	09/30/2010
Peabody Individual Achievement Test-Revised (PIAT-R)	09/30/2010
Human Figure Drawing	09/30/2010
Bender Gestalt II	09/30/2010
Reynolds Intellectual Assessment Scale (RIAS)	09/30/2010
Behavior Assessment System for Children, Second Edition (BASC-2)	09/30/2010

BACKGROUND INFORMATION:
Background can be ascertained from an initial Clark County School District's (CCSD) Multidisciplinary Evaluation Team Report (MDT), dated October 3, 2007. A review, in brief, indicated that Raekwon was initially evaluated as a result of his regular education classroom teacher. At the time of referral, it was reported that academic concerns were in the following areas: reading, spelling, writing and oral expression. There is also documentation that address' Raekwon's most recent inappropriate behaviors and resulting consequences at Monaco Middle School.

DEVELOPMENTAL HISTORY:
Developmental information can be ascertained from the aforementioned CCSD' MDT Report dated October 3, 2007.

MEDICAL HISTORY (School Nurse Report):
Per previous nurse's notes, there is no medical diagnosis for ADHD but Raekwon was diagnosed with bipolar disorder without psychotic features. Other health issues include sickle cell carrier trait. Raekwon was once prescribed Abilify on a trial basis but it was discontinued. Raekwon says he has not had any type of medication in three to four years.

Raekwon presents with a well mannered and polite disposition. He is dressed and groomed appropriately for a middle school student. Large gauge ear rings are noted. Raekwon's speech is clear and he expresses himself well. Raekwon uses eye contact appropriately, has a sense of humor and smiles easily.

Raekwon's general health could be described as good. Raekwon's prior medication is stated above and very remote in history. There are no current medications that might impact his academic performance or behavior.

On 09/30/10 Raekwon's vision and hearing were screened. Both far and near vision screening's are within the normal limits, suggesting that Raekwon can see material presented at any distance in the classroom setting. Raekwon's hearing was also found to be with in the normal limits. At this time Raekwon does not require any accommodations be made for his vision or hearing.

Raekwon has not had any health conditions that have required hospitalization or surgery. Raekwon's current health history is void of any conditions which may affect academic performance or classroom behavior.

EDUCATIONAL HISTORY:
Developmental information can be ascertained from the aforementioned CCSD' MDT Report dated October 3, 2007.

PRIOR ASSESSMENTS:
According to the aforementioned Clark County School District's (CCSD) Multidisciplinary Evaluation Team Report (MDT), dated October 3, 2007, Raekwon reportedly was administered the Wechsler Individual Achievement Test II (WRAT-II) and the results reportedly were as follows:

Wechsler Individual Achievement Test II (WIAT-II):

SUBTEST	SS	%ILE	Stan	A.E.	G.E.
Word Reading	96	39	04	9-8	4:6
Reading Comprehension	107	68	06	12-0	6:8
Pseudo Word Decoding	106	66	06	11-8	5:5
Composite	**100**	**50**	**05**		
Numerical Operations	93	32	04	9-8	4:4
Math Reasoning	91	27	04	9-4	4:2
Composite	**90**	**25**	**04**		
Spelling	93	32	04	9-4	4:2
Listening Comprehension	128	97	09	17-19	11:4

In brief, it was noted that Raekwon's performance on the Listening Comprehension subtest yielded a standard score of 128, which was said to be within the Superior range and at the 97th percentile.

According to the aforementioned CCSD MDT Report dated October 3, 2007, Raekwon reportedly was administered the Reynolds Intellectual Assessment Scales (RIAS) on July 8, 2004 and the results reportedly were as follows:

Reynolds Intellectual Assessment Scales (RIAS):

Subtest	SS
Verbal Memory	37
Nonverbal Memory	43

No interpretation was provided for this particular standardized intellectual assessment.

Furthermore, results on the Bracken Basic Concept Scale, administered on July 8, 2004, reportedly indicated a standard score of 80 on the School Readiness Concepts with an educational finding of "delayed". Findings on the "K-ABC" achievement test reportedly yielded the following achievement results:

K-ABC

	SS	%ile	A.E.
Arithmetic	91	27	6-9
Reading Decoding	79	8	6-3
Reading Understanding	84	14	6-3

Otherwise, test results on the various social/emotional/behavioral assessment instruments reportedly yielded no significant clinical/educational data outside the "normal limits". Please review the case folder on this student for further information on previous CCSD's assessments and outside psychiatrist report (dated January 11, 2005) and psychologist report (dated August 11, 2000). **Please note that the flow of documented information is somewhat inconsistent and misleading.**

PRESENT LEVELS:

It was said by the classroom that on the Kaufman Test of Individual Achievement, Second Edition, Brief Form K-TEA-II (b), that Raekwon obtained the following results:

	Standard Score	Percentile	Grade Equivalent
Reading	87	19	5.6
Math	82	12	5.1
Writing	81	84	12.8

Raekwon reportedly correctly answered as many reading questions as did the typical student at grade level 4.0 in the standardization sample. He reportedly demonstrated basic decoding skills, but had difficulty reading words when the vocabulary was not familiar to him. He also reportedly decoded words like "labyrinth," "patriotism," and "punctuate," but miscalled words like "ache," "authentic," and "rhythmic." His responses reportedly were similar to the stimulus word in all cases. Raekwon reportedly read and followed one-step instructions. He read four short

passages and correctly answered five of eleven questions about the passages. He reportedly usually did not re-read for detail when answering questions. It was said that Raekwon could perform all four basic operations including multi-digit multiplication and long division. He reportedly has difficulty working on fractions and decimal. Raekwon was also said to have problems using algebra strategies.

SEC –It was reported that Raekwon has not had any infractions with students or teachers since he arrived to this school. Raekwon reportedly comprehends oral instructions. He reportedly is participating in class discussions. He reportedly is able to express ideas verbally and in written form. It was said that he gets along cooperatively with others and he is very chatty and has a hard time keeping focused on his work. He reportedly handles frustration appropriately, and knows to talk to someone when upset. He reportedly is a capable student. His academic progress reportedly has been good. He reportedly works very well by himself once he starts the work that is presented to him.

Ms. Mooha "Film Exploration" - Raekwon reportedly can answer the question sheets correctly. He reportedly is capable of doing the work. Raekwon reportedly is "easily distracted"; he is "talkative"; and social, at times, he has to be asked to "get to work".

OBSERVATIONS:

Raekwon appeared to be a friendly pleasant and cooperative student who presented the examiner with no unusual behavioral concerns. He appeared to be well liked by his peers and classroom teacher. Raekwon interacted well with others while being observed in his special education classroom environment. He appeared to listen attentively to his classroom teacher while being taught.

During the evaluative period, Raekwon was responsive to oral directions and structure. He seemed to be a little nervous at times while engaged on tasks requiring oral answers. He did not make plausible excuses for his various test failures. He made good eye contact throughout the testing period. His level of motivation was not at issue. No unusual behaviors were observed.

INTELLECTUAL ASSESSMENTS:

Validity Statement

Raekwon's performance during formal testing appeared not to be adversely affected by failure or frustration and, therefore, the results appear be valid. He did not require adaptation or modifications to the standardized procedures due to language deficits or cultural differences or limited English speaker. Raekwon did not require an excessive amount of reinforcement and praise to focus and/or attend to the various test items presented. However, he was encouraged to do his best when necessary.

The Reynolds Intellectual Assessment Scales (RIAS) was administered on September 30, 2010 and the results were as follows:

Reynolds Intellectual Assessment Scales (RIAS):

Subtest	TS	SS	%ile
Guess What	34		
Verbal Reasoning	32		
VERBAL INTELLIGENCE INDEX		77	06
Odd-Item Out	49		
What's Missing	44		
NONVERBAL INTELLIGENCE INDEX		95	37
COMPOSITE INTELLIGENCE INDEX		84	14
Verbal Memory	31		
Nonverbal Memory	47		
COMPOSITE MEMORY INDEX		82	12

The Reynolds Intellectual Assessment Scales (RIAS) is an individually administered test of intelligence. The RIAS includes a two-subtest Verbal Intelligence Index (VIX) and a two-subtest Nonverbal Intelligence Index (NIX). The scaled sums of T scores for the four subtests are combined to form the Composite Intelligence Index (CIX), which is a summary estimate of global intelligence. The index scores are reported in Standard Scores (SS) and Percentile Ranks (%ile). Standard score have a mean of 100 and a standard deviation of 15. The subtest scores are reported in T scores with a mean of 50 and a standard deviation of 10.

According to the RIAS manual, Raekwon is currently functioning in the Low Average range (VIX=77; NIX=95; CIX=84). Raekwon's scores reflect functioning at a level equal to or better than 14 percent of his same age peers. However, he is not seen to be functioning typically within his intellectual capacity based on his current Nonverbal Intelligence Index (95), which is within the Average range of intellectual functioning. Raekwon's verbal reasoning skills were measured to be within the Borderline range and represents verbal skills at a level equal to or better than 6 percent of his peers. His nonverbal skills were measured within Average range reflecting nonverbal skills at a level equal to or better than 37 percent of his same age peers. More importantly, there is an 18 point significant difference between Raekwon's verbal and nonverbal abilities in favor of the latter. He appears to be a non verbal learner or at best a concrete visual learner. Raekwon's Composite Memory Index was measured to be within the lower limits of the Low Average range and more likely reflective of his degree of possible test anxiety and inconsistent visual memory, in general.

ACADEMIC ACHIEVEMENT ASSESSMENTS:
Raekwon's academic performance was assessed using the Peabody Individual Achievement Test-Revised (PIAT-R), administered on September 30, 2010 and the results were as follows:

Peabody Individual Achievement Test – Revised (PIAT-R):

Subtest	Grade Equivalent	Standard Score	Percentile Rank
Reading Recognition	4.7	86	18
Reading Comprehension	3.0	79	08
Mathematics	3.8	75	05
Spelling	6.3	92	30

On the PIAT-R, Raekwon obtained a Low Average standard score in the following achievement area: reading recognition (G.E.: 4.6). His reading comprehension (G.E.: 5.2) and mathematics (G.E.: 4.8) standard scores were measured to be within the Borderline range. On the Spelling subtest, Raekwon demonstrated a 6.3 Grade Equivalent score with a standard score (92) within the Average range. In general, his overall standard scores were commensurate with his several measured IQ scores on the RIAS. He is not achieving consistently at his current grade placement according to standardized assessment data.

VISUAL MOTOR INTEGRATION:
On the Bender Gestalt II, Raekwon obtained a Standard Score of , which indicated that he has Average visual motor perceptual skills. His overall planning and organizational skills also appear to be relatively intact.

SOCIAL/EMOTIONAL:
The Behavior Assessment System for Children, Second Edition (BASC-2) Self-Report – Adolescent (SRP-A) was administered on September 30, 2010 and the results were as follows:

Behavior Assessment System for Children – Second Edition – BASC-2 (SRP-A):

Self-Report of Personality		
Composite	T-Score	%ile
School Problems	45	32
Internalizing Problems	43	27
Inattention/Hyperactivity	37	08
Emotional Symptoms Index	40	14
Personal Adjustment	64	94

The Self-Report of Personality (SRP) of the Behavioral Assessment System for Children, Second Edition (BASC-2) was completed by Raekwon. This self-report assessment yields scores for a number of clinical and adaptive scales as well as three composite scores and a global indicator called the Emotional Symptoms Index. Generally speaking, the clinical scales measure maladjustment and therefore, high scores suggest a high degree of negative or undesirable behavior and low scores reflect higher functioning. The SRP provides composite scores for School Problems, Internalizing Problems, Inattention/Hyperactivity, Emotional Symptoms Index, and Personal Adjustment.

Before interpreting Raekwon's composite scales and their components a determination of the validity must be made. The BASC contains several scales useful for validity determinations. These are the F-Index, L-Index and the V-Index. All validity determinations are acceptable.

The Emotional Symptoms Index composite-scale T score is 40 and within the Average classification range with a *percentile rank of 14. The School Problems composite-scale T score is comprised of the Attitude to School,* Attitude to Teachers, and Sensation Seeking Scales. Raekwon's School Problems composite-scale T score of 45 is at the 32nd percentile and within the Average classification range. The Internalizing Problems composite-scale T score is in the Average range with a score of 43, which is at the 27th percentile. The Atypicality, Locus of Control, Somatization, and Social Stress scales make up the Internalizing Problems composite-scale T score. The Personal Adjustment composite-scale T score of 64 is within the Average range with a percentile rank of 94. The Personal Adjustment composite-scale T score is comprised of the Relations with Parents, Interpersonal Relations, Self-Esteem and Self-Reliance scales.

The following subtests were measured within the Average range: Attitude to School, Sensation Seeking, Anxiety, Somatization, Attention Problems, Relations with Parents, Interpersonal Relations, Self-Reliance, Attitude to Teachers, Atypicality, Locus of Control, Social Stress, Sense of Inadequacy, Hyperactivity, and Self-Esteem among others categories. The following subtests were measured in the At-Risk range: Test Anxiety. Hence, there appears to be some need for further exploration at this time.

The following critical items were noted: None, which may or may not be a good sign at this time. No judgment will be made at this point in time except that Raekwon has made significant improvement in controlling his behavior, feelings and perceptions of his known environment.

ACADEMIC SCOPE AND SEQUENCE:

A typical 8th grade student can apply knowledge of roots and affixes and explain the difference between literal and figurative language in text. He or she can make inferences from text and revise predictions while reading. He or she can apply appropriate strategies to aid comprehension. A typical 8th grade student can read and follow multi-step directions, identify main idea and differentiate from the supporting evidence or details, and interpret information in new context. The typical 8th grade student can add, subtract, multiply, divide real numbers, radicals, exponents, and scientific notation. He or she solves problems using positive and negative numbers, ratios, and proportions. He or she uses inductive reasoning, applies ratios and proportions and applies concepts of perimeter, area, and volume. He or she analyzes data, finds the theoretical probability of an event and forms reasonable inferences. The typical 8th grade student can apply multi-step integrated problem solving strategies and interpret and solve word problem

Typical middle school students come to school prepared to learn. They are polite, respectful and work hard. In addition, typical middle school students follow school rules and regulations. They keep their hands and feet to themselves and respect the property and space of others. Typical middle school students follow direction Raekwon will not be able to independently read and comprehend material written above a beginning 4th grade level. He may not understand higher level vocabulary used in instruction.

Typical middle school students come to school prepared to learn. They are polite, respectful and work hard. Typical middle school students follow school rules and regulations. They keep their hands and feet to themselves and respect the property and space of others. Typical middle school students follow directions and directives from adults and staff members.

SPECIAL EDUCATION DETERMINATION:

Raekwon's academic difficulties are not seen to be due to an educational, environmental, economic disadvantage or cultural, ethnic difference. The Multidisciplinary Team can rule out an educational disadvantage due to attendance

at schools with lower expectations, as the primary factor, influencing Raekwon's educational performance. There appears to be no environmental or economic disadvantage, as a primary factor, influencing Raekwon's educational performance.

Raekwon's appears to be eligible for the special education under the category of Specific Learning Disability based on the criteria established in the State of Nevada regulations (NAC 388.420). He demonstrates an inability to learn which cannot be explained by intellectual, sensory, or other health factors. Raekwon exhibits a severe discrepancy between his predicted and actual achievement, which is not correctable without special education services, and is demonstrated in reading comprehension and mathematics. This discrepancy was determined through a statistically valid formula which considered Raekwon's age and level of ability and the discrepancy was corroborated by classroom-based assessment. These discrepancies are not primarily the result of a visual, hearing or motor impairment; mental retardation; a serious emotional disturbance; or environmental, cultural difference or economic disadvantage. Intervention strategies have been previously implemented to address his behavior and overall academic performance in core subject areas (i.e. IEP). The determining factor for Raekwon's eligibility is not the lack of instruction in reading or math or limited English proficiency.

Instructional Recommendations:
Regardless of actual placement, areas which may require specific goals are reading skills, math application skills, spelling skills, writing skills, attending to task, and ability to follow directions.

RECOMMENDATIONS:
1. Raekwon appears to be eligible for special education services in the following educational areas: Specific Learning Disability.

2. Consultation with the school psychologist and school nurse should be made available on an as needed basis to Raekwon's caregivers for infrequent status report.

3. Individual remedial support in all of the academic areas measured in order to provide structured support as needed including an active RTI plan monitored by AimsWeb.

4. Contacts should occur with the school counselor to enhance Raekwon's self-esteem in addition to monitoring his peer relationships and general adaptability to the regular education program.

5. Homework assignments should occur regularly with clear expectations for completion and quality of submitted assigned tasks if deemed necessary or appropriate.

6. Referral to speech and language pathologist for assessment of observed and possible stuttering that might interfere with learning in the classroom environment.

7. A behavioral plan should be considered as soon as Raekwon demonstrates a pattern of previous documented behaviors (i.e., insubordinate, verbal confrontation, fighting, hitting and threats to others).

The evaluation team that determined eligibility included participation by the parent and, when applicable, the student. The parent attended the eligibility determination meeting.

This report includes a description of parent participation in the educational evaluation and decision regarding eligibility because Raekwon has not attained the age of majority (or a formal court declaration retaining the parental rights exists). The Multidisciplinary Evaluation Team included all members required by state regulation. Others may have attended if they had information to contribute regarding Raekwon. The name and role of each attendee is listed in the signature portion of this report. A copy of the Procedural Safeguards under the Individuals with Disabilities Education Act was provided to the parent upon initial referral for evaluation; upon notification of a MET meeting, upon notification of an IEP meeting, upon notification of reevaluation of the student (if applicable), and at the MET meeting.

Team Members:

Steven Perkins, PhD., NCSP — Date 10/6/10
School Psychologist

Mildred J. Walker — Date 10/6/10
Regular Education Teacher

Adam Taylor, RN — Date
School Nurse

Lorraine L. Sweitzer — Date 10/6/10
Special Education Teacher

Tom Sweitzer — Date 10/6/10
Local Education Administer

I have reviewed this report and received a copy. I understand that I can submit a written response or propose changes to this report. I have been notified that I may request to review the information used as the basis for this report.

Parent Signature — Date 10/6/10

X Raekwon Robertson

Exhibit 2

Date: 9/4/2013

Clark County School District

Las Vegas, Nevada

Student Support Services Division

CCF-542
08/07

STATEMENT OF ELIGIBILITY
ELIGIBILITY TEAM REPORT - SPECIFIC LEARNING DISABILITIES

Student Name: RAEKWON S ROBERTSON Grade: 11 DOB: 2/6/1997 ID #: 419250

GENERAL CRITERIA FOR SPECIFIC LEARNING DISABILITIES BASED ON ASSESSMENT OF RESPONSE TO INTERVENTION AND/OR COMPARATIVE ANALYSIS:

☒ The pupil has been provided with learning experiences and instruction appropriate for the pupil's age.

☒ The pupil does not achieve adequately for the pupil's age or to meet State-approved grade-level standards in one or more of the following areas (check all that apply):

- ☒ Oral Expression
- ☒ Listening Comprehension
- ☒ Mathematical Calculation
- ☒ Mathematical Problem Solving
- ☒ Written Expression
- ☐ Basic Reading Skills
- ☒ Reading Fluency Skills
- ☒ Reading Comprehension

☒ Any identified underachievement is not primarily the result of a visual, hearing or motor disability; mental retardation; emotional disturbance; cultural factors; environmental or economic disadvantage; or limited English proficiency.

☒ There is documented, data based evidence that any identified underachievement is not due to a lack of appropriate instruction in math or reading. This determination is based upon each of the following:

- ☒ Data that demonstrates that prior to, or as part of, the referral process, the pupil was provided appropriate instruction in regular education settings, delivered by qualified personnel; and
- ☒ Data based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessment of the pupil's progress during instruction, and which was provided to the pupil's parents.

☒ The controlling factor for the pupil's eligibility is not lack of appropriate instruction in math.

☒ The controlling factor for the pupil's eligibility is not lack of appropriate instruction in reading, including the essential components of reading instruction. Explicit and systematic instruction has been provided for each of the following:

- ☒ Phonemic awareness
- ☒ Phonics
- ☒ Vocabulary development
- ☒ Reading fluency, including oral reading skills
- ☒ Reading comprehension strategies

☒ Interventions implemented in general education classrooms have not remedied any identified underachievement.

☒ The following relevant behavior was noted during the observation of the pupil:

- ☐ None noted.
- ☒ As follows: The student has an active behavioral plan in place.

☒ Relationship of any relevant behavior to the academic functioning of the pupil:

Student tends to make poor cognitive decisions about relationships, in general.

☒ The following educationally relevant medical findings were noted:

- ☒ None noted.
- ☐ As follows:

Date: 9/4/2013

Clark County School District

Las Vegas, Nevada

Student Support Services Division

CCF-542
08/07

STATEMENT OF ELIGIBILITY
ELIGIBILITY TEAM REPORT - SPECIFIC LEARNING DISABILITIES cont.

Student Name: RAEKWON S ROBERTSON Grade: 11 DOB: 2/6/1997 ID #: 419250

☐ The determination that the pupil has a specific learning disability has been made based upon the results of the evaluation described in NAC 388.420. In interpreting the evaluation data, information was drawn from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the pupil's physical condition, social or cultural background, and adaptive behavior, and information from all of these sources was documented and carefully considered.

ADDITIONAL CRITERIA FOR ELIGIBILITY:

☒ Yes ☐ No Was Response to Intervention used?

☐ Yes ☐ No Was a comparative analysis used?

Additional Criteria for Response to Intervention:

☐ The pupil has not made sufficient progress to meet age or State-approved grade-level standards in one or more of the areas identified above (oral expression, listening comprehension, mathematical calculation, mathematical problem solving, written expression, basic reading skill, reading fluency skills, reading comprehension) when using a process based on the child's response to scientific, research-based intervention.

☒ The following instructional strategies were used:

The student has an active IEP and BIP.

☒ The following student-centered data were collected:

Individualized assessment information, observations, parent input and review of available school records.

☒ Any identified underachievement is not correctable without special education services.

☒ On (date) 9/5/2013 the pupil's parents were notified about Nevada's policies regarding the amount and nature of student performance data that would be collected and the general education services that would be provided; strategies for increasing the child's rate of learning; and the parents' right to request an evaluation.

Distribution: Original - Confidential Folder 1st Copy - Parent/Guardian/Adult Student 2nd Copy- Special Education Teacher/School

Date: 9/4/2013

Clark County School District

Las Vegas, Nevada

Student Support Services Division

CCF-542
08/07

STATEMENT OF ELIGIBILITY
ELIGIBILITY TEAM REPORT - SPECIFIC LEARNING DISABILITIES

Student Name: RAEKWON S ROBERTSON Grade: 11 DOB: 2/6/1997 ID #: 419250

AND/OR

Additional Criteria for Comparative Analysis:

☐ The pupil exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, State-approved grade-level standards, or intellectual development, that is determined by the group to be relevant to the identification of a specific learning disability, using appropriate assessments.

☐ The pupil exhibits a severe discrepancy between achievement and intellectual ability in one or more of the areas identified above (oral expression, listening comprehension, mathematical calculation, mathematical problem solving, written expression, basic reading skill, reading fluency skills, reading comprehension).

☐ The severe discrepancy had been determined through the use of a statistically valid formula which takes into account the age and level of ability of the pupil, the correlation between tests of ability and achievement, and the reliability of each test used. In the case of a pupil under the age of 6 years, a discrepancy may be identified through the use of one or more tests of language concepts or academic readiness skills.

OR

☐ In considering the continuing existence of a severe discrepancy between achievement and intellectual ability in a reevaluation of the pupil, the determination of a severe discrepancy has been made based upon information other than the statistically valid formula.

☐ The severe discrepancy is not correctable without special education services.

☐ The severe discrepancy is corroborated by classroom-based assessment.

ADDITIONAL CRITERIA FOR ELIGIBILITY(Cont.):

Additional Information (Optional):

Student has a manifestation concerning recent suspension pending expulsion. Mother reportedly revoked behavioral contract.

ELIGIBILITY DETERMINATION:

According to state regulations (NAC 388.420):

☐ This pupil **is not eligible** for special education under the category of specific learning disabilities, based on the above criteria.

☒ This pupil **is eligible** for special education under the category of specific learning disabilities, based on the above criteria.

☒ Primary Disability ☐ Secondary Disability

Eligibility Team Members:

Any member who disagrees with the eligibility determination must prepare a statement of the conclusions of that member.

Name		Agree	Disagree	Date
Shana Stott	Regular Classroom Teacher	☒	☐	9/5/2013
Clifford Lange	Special Education Teacher	☒	☐	9/5/2013
Steven Perkins, PhD	School Psychologist	☒	☐	9/5/2013
Erika Loyd	Parent	☒	☐	9/5/2013
Raekwon Robertson	Student	☒	☐	9/5/2013
E. Dawn Colvin	SEIF	☒	☐	9/5/2013

☒ Any decision of an eligibility team must be justified in a written report. Parents have been provided a copy of the report and a copy of the determination of the pupil's eligibility. (NAC 388.340.4)

Distribution: Original - Confidential Folder | 1st Copy - Parent/Guardian/Adult Student | 2nd Copy- Special Education Teacher/School

Exhibit 3

DATE: 01/16/2014

Clark County School District
Las Vegas, Nevada
Student Support Services Division

CCF-530
08/07

Page ___ of ___

INDIVIDUALIZED EDUCATIONAL PROGRAM (IEP)
INFORMATION

STUDENT/PARENT INFORMATION

Student: RAEKWON S ROBERTSON Sex: M Birth Date: 02/06/1997 Grade: 11

Student ID: 419250 Student Primary Language: ENGLISH Student English Proficiency Code (optional): EE

Address: 5201 WALNUT AVE APT 13

City/State/Zip: LAS VEGAS NV 89110 Student Phone: 717-7366

Parent/Guardian/Surrogate: ERIKA LOYD Parent Phone (Home): 717-7366

Parent Phone (Work): 641-3227 Email Address:

Optional (Cell): Primary Language Spoken at Home: ENGLISH

Interpreter or Other Accommodations Needed: None needed

Emergency Contact/Phone Number: Cleopatra Loyd - 702-616-6830

Current School: MORRIS BEHAVIOR JR-SR HIGH Zoned School: ELDORADO HS

ELIGIBILITY CATEGORY

Primary: Specific Learning Disability Other:

ELIGIBILITY DATE: 09/05/2013 ANTICIPATED 3-YR REEVALUATION: 09/04/2016

MEETING INFORMATION

DATE OF MEETING: 01/16/2014 DATE OF LAST IEP MEETING: 01/28/2013

PURPOSE OF MEETING:

☐ Interim IEP ☒ Annual IEP ☐ Revision To IEP Dated:

☐ Initial IEP ☐ IEP Following 3-Yr Reevaluation ☐ Exit/Graduation Reason:

☐ IEP Revision without a meeting: ☐ Other:

At the request of: ☐ Parent or ☐ School District

IEP SERVICES WILL BEGIN: 01/16/2014 ANTICIPATED DURATION OF SERVICES: 01/16/2015

IEP REVIEW DATE: 01/16/2015 COMMENTS:

IEP PARTICIPATION

Parent/Guardian/Surrogate*	E. Loyd
Student**	R. Robertson Raekwon Robertson
LEA Rep.*	N. Peck
Spec. Ed Teacher***	M. Miguelgorry
Reg. Ed Teacher***	R. Stienle

* Required participant;
**Student must be invited when transition is discussed (beginning at age 14 or younger if appropriate).
***The IEP team must include at least one regular education teacher of the student (if the student is, or may be, participating in the regular education environment).

PROCEDURAL SAFEGUARDS

☒ I have received a statement of procedural safeguards under the Individuals With Disabilities Education Act (IDEA) and these rights have been explained to me in my primary language.

☒ I received the Middle/High School Graduate profile.

☐ N/A prior to 14 years of age

Parent/Guardian Signature:

AT LEAST ONE YEAR PRIOR TO REACHING AGE 18, STUDENTS MUST BE INFORMED OF THEIR RIGHTS UNDER IDEA AND ADVISED THAT THESE RIGHTS WILL TRANSFER TO THEM AT AGE 18.

☒ Not applicable. Student will not be 18 within one year, and the student's next annual IEP meeting will occur no later than the student's 17th birthday.

☐ The student has been informed of his/her rights under IDEA and advised of the transfer of these rights at age 18.

Clark County School District

Las Vegas, Nevada

Student Support Services Division

PRESENT LEVELS OF ACADEMIC ACHIEVEMENT AND FUNCTIONAL PERFORMANCE

Student Name: RAEKWON S ROBERTSON Grade: 11 DOB: 2/6/1997 ID #: 419250

Consider results of the initial evaluation or most recent reevaluation, and the academic, developmental, and functional needs of the student, which may include the following areas: Academic Achievement, Language/Communication Skills, Social/Emotional/Behavior Skills, Cognitive Abilities, Health, Motor Skills, Adaptive Skills, Pre-Vocational Skills, and other skills as appropriate. For students who are 16 or older, or will turn 16 when this IEP is in effect, also consider the results of age appropriate transition assessments related to Training/Education, Employment, and Independent Living Skills (as appropriate).

ASSESSMENTS CONDUCTED	ASSESSMENT RESULTS	EFFECT ON STUDENT'S INVOLVEMENT AND PROGRESS IN GENERAL EDUCATION CURRICULUM OR, FOR EARLY CHILDHOOD STUDENTS, INVOLVEMENT IN DEVELOPMENTAL ACTIVITIES
MDT 9/4/2013	Raekwon demonstrates deficits oral expression, listening comprehension, mathematical calculation, mathematical problem solving, written expression, reading fluency skills and reading comprehension.	
Curriculum based assessment *Mathematics	When given a curriculum based instructional assessment, Raekwon was able to solve double digit addition and subtraction problems with regrouping. Raekwon is able to multiply single and double digit numbers, he also demonstrated understanding of reducing an improper fraction to a mixed fraction. He was unable to solve problems from the pre-algebraic section. These problems included one step equations and combining like terms.	Students in the 11th grade should be able to have the math content knowledge needed to pass the Nevada High School Proficiency Exam. Raekwon will struggle in the general education math class due to his deficits and need for constant review of basic skills.
Curriculum based reading assessment *Reading fluency and comprehension	When given a curriculum based reading assessment Raekwon was able to read fluently at a 7th grade reading level. He has minor difficulties when reading words that have several syllables and specific content vocabulary words. Raekwon is able to answer non-complex reading comprehension questions but has more difficulties when asked to explain authors tone and or meaning of a passage.	Students in the 11th grade should be able to have the reading skills needed to pass the Nevada High School Proficiency Exam, Due to Raekwon's minor deficits in reading, he will struggle without accommodations and modifications in the general education class.
Sample *Written expression	When asked to write about a given topic, Raekwon was able to write several simple sentences with a clear response that remained on topic. His writing had accurate spelling for the most part. A few of his spelling errors were due to spelling phonetically. He was able to stay on topic but his writing lacked structure, for example his paragraph structure lacked a topic sentence and supporting details.	Students in the 11th grade should have the writing skills required to pass the Nevada High School Writing Exam. Raekwon's writing has deficits and therefore he would struggle in the General Education class without direct instruction and accommodations and modifications.
Classroom behavior *Teacher reports	Raekwon is a well mannered young man among adults. However he struggles with following into being distracted by peers in class. This can cause disruptions within the classroom.	Students in the 11th grade should be able to listen in classroom without disruptions. Raekwon will struggle in the general education class without a Behavior Plan.

INDIVIDUALIZED EDUCATIONAL PROGRAM (IEP)
STRENGTHS, CONCERNS, INTERESTS AND PREFERENCES

Student Name: RAEKWON S ROBERTSON Grade: 11 DOB: 2/6/1997 ID #: 419250

STATEMENT OF STUDENT STRENGTHS

Raekwon's ability to apply new learned skills is a strength. Raekwon can be very polite.

STATEMENT OF PARENT EDUCATIONAL CONCERNS

Mom states that she is concerned about what Raekwon is doing. He needs to step up and do his part. She also wants his IEP t o remain the same.

STATEMENT OF STUDENT'S PREFERENCES AND INTERESTS

(required if transition services will be discussed, beginning at age 14 or younger if appropriate)

If student was not in attendance, describe the steps taken to ensure that the student's preferences and interests were considered:

Raekwon enjoys sports such as boxing, basketball, skateboarding, football and swimming.. Raekwon states he likes math and reading too.. He likes to work on the computer.

CONSIDERATION OF SPECIAL FACTORS

1. Does the student's behavior impede the student's learning or the learning of others? If YES, team must provide positive behavioral strategies, supports and interventions, or other strategies, supports and interventions to address that behavior.	☐ No action needed.	☒ Yes, addressed in IEP.
2. Does the student have limited English proficiency? If YES, team must consider language needs of the student as those needs relate to the student's IEP.	☒ No action needed.	☐ Yes, addressed in IEP.
3. Is the student blind or visually impaired? If YES, team must evaluate reading and writing needs and provide for instruction in Braille unless determined not appropriate for the student.	☒ No action needed.	☐ Yes, addressed in IEP.
4. Is the student deaf or hard of hearing? If YES, team must consider communication needs.	☒ No action needed.	☐ Yes, addressed in IEP.
5. Does the student require assistive technology devices and services? If YES, team must determine nature and extent of devices and services.	☒ No action needed.	☐ Yes, addressed in IEP.

Clark County School District
Las Vegas, Nevada
Student Support Services Division

INDIVIDUALIZED EDUCATIONAL PROGRAM (IEP)
TRANSITION

Student Name: RAEKWON S ROBERTSON Grade: 11 DOB: 2/6/1997 ID #: 419250

DIPLOMA OPTION SELECTED FOR GRADUATION (Diploma option must be declared at age 14 and reviewed annually.)

☒ Standard or Advanced High School Diploma. Must complete all applicable credit requirements and pass the High School Proficiency Examination (with permissible accommodations as needed).	☐ Adjusted High School Diploma. Must complete IEP requirements.

STUDENT'S VISION FOR THE FUTURE A short statement that directly quotes what the student wants for the future.

Raekwon is interested in furthering his future in producing music.

STATEMENT OF TRANSITION SERVICES: COURSE OF STUDY

Beginning at age 14 or younger if determined appropriate by the IEP team, describe the focus of the student's course of study.

Course of regular study.

STATEMENT OF MEASURABLE POSTSECONDARY GOALS

Beginning not later than the first IEP to be in effect when the student is 16, describe measurable postsecondary goals in the following areas:

☒ Training/Education	After HS, R. will look into education needed for music prod.
☒ Employment	After HS. R. will seek competitive employment.
☐ Independent Living Skills (As Appropriate)	
☐ Other:	

STATEMENT OF TRANSITION SERVICES: COORDINATED ACTIVITIES

Beginning not later than the first IEP to be in effect when the student is 16, develop a statement of needed transition services, including strategies or activities, for the student.

Instruction: Raekwon will continue regular course of study to prepare for a high school diploma.

Any Other Agency Involvement (Optional):

Related Services: None needed at this time

Any Other Agency Involvement (Optional):

Community Experiences: None needed at this time

Any Other Agency Involvement (Optional):

Employment and Other Post-School Adult Living Objectives: None needed at this time

Any Other Agency Involvement (Optional): No change to transition plan per this action.

Acquisition of Daily Living Skills and Functional Vocational Evaluation (if Appropriate): None needed at this time

Any Other Agency Involvement (Optional):

Other:

Any Other Agency Involvement (Optional):

IEP GOALS, INCLUDING ACADEMIC AND FUNCTIONAL GOALS, AND BENCHMARKS OR SHORT-TERM OBJECTIVES

Student Name: RAEKWON S ROBERTSON Grade: 11 DOB: 2/6/1997 ID #: 419250

MEASURABLE ANNUAL GOAL *(including how progress toward the annual goal will be measured)*

By annual review date, in a classroom setting, RAEKWON will identify things that anger or frustrate him increasing a criteria of 80% as measured by observation and documentation as implemented by Special Education and General Education Teacher

☒ Check here if this goal supports the student's postsecondary goal(s) and identify the goal(s) to which it relates:

☒ Training/Education ☒ Employment ☒ Independent Living Skills ☐ Other _____

☐ Check here if this goal will be addressed during Extended Year Services (ESY)

BENCHMARK OR SHORT-TERM OBJECTIVE

# 1	By end of fourth quarter of 2013-2014 school year, in a classroom setting, RAEKWON will Accept responsibility for his actions increasing a criteria of 80% as implemented by Special Education and General Education Teacher
# 2	By end of first quarter of 2014-2015 school year, in a classroom setting, RAEKWON will Continue working when frustrated increasing a criteria of 80% as implemented by Special Education and General Education Teacher
# 3	By end of second quarter of 2014-2015 school year, in a classroom setting, RAEKWON will Demonstrate self-control while in a stressful situation increasing a criteria of 80% as implemented by Special Education and General Education Teacher
# 4	By annual review date, in a classroom setting, RAEKWON will Understand that communication is an important componet to problem solving increasing a criteria of 80% as implemented by Special Education and General Education Teacher

MEASURABLE ANNUAL GOAL (including how progress toward the annual goal will be measured)

By annual review date, in the special education class, RAEKWON will create equations and inequalities in one variable and use them to solve problems. Include equations arising from all types of functions, including simple rational and radical functions. *(Modeling Standard) (A.CED.A.1-2) increasing a criteria of 80% as measured by observation, documentation and work samples as implemented by Special Education Teacher

☒ Check here if this goal supports the student's postsecondary goal(s) and identify the goal(s) to which it relates:

☒ Training/Education ☐ Employment ☐ Independent Living Skills ☐ Other _____

☐ Check here if this goal will be addressed during Extended School Year Services (ESY)

BENCHMARK OR SHORT-TERM OBJECTIVE

# 1	By end of third quarter of 2013-2014 school year, in the resource room, RAEKWON will recognize types of equations and inequalities (e.g., *exponential, logarithmic, polynomial, trigonometric*) increasing a criteria of 80% as implemented by Special Education Teacher
# 2	By end of second semester of 2013-2014 school year, in the resource room, RAEKWON will recognize a polynomial's degree by using the method of finite differences increasing a criteria of 80% as implemented by Special Education Teacher
# 3	By end of first quarter of 2014-2015 school year, in the resource room, RAEKWON will create and solve an equation with radicals increasing a criteria of 80% as implemented by Special Education Teacher
# 4	By annual review date, in the resource room, RAEKWON will create and solve a polynomial equation increasing a criteria of 80% as implemented by Special Education Teacher

IEP GOALS, INCLUDING ACADEMIC AND FUNCTIONAL GOALS, AND BENCHMARKS OR SHORT-TERM OBJECTIVES

Student Name: RAEKWON S ROBERTSON Grade: 11 DOB: 2/6/1997 ID #: 419250

MEASURABLE ANNUAL GOAL (including how progress toward the annual goal will be measured)

By annual review date, in a general education class, RAEKWON will determine an author's point of view or purpose in a text in which the rhetoric is particularly effective, analyzing how style and content contribute to the power, persuasiveness, or beauty of the text. (RI.11-12.6) increasing a criteria of 90% as measured by observation, documentation and work samples as implemented by Special Education and General Education Teacher

☒ Check here if this goal supports the student's postsecondary goal(s) and identify the goal(s) to which it relates:

☒ Training/Education ☐ Employment ☐ Independent Living Skills ☐ Other _____

☐ Check here if this goal will be addressed during Extended Year Services (ESY)

BENCHMARK OR SHORT-TERM OBJECTIVE

# 1	By end of third quarter of 2013-2014 school year, in a general education class, RAEKWON will analyze how an author uses rhetoric to develop a point of view or purpose increasing a criteria of 90% as implemented by Special Education and General Education Teacher
# 2	By end of second semester of 2013-2014 school year, in a general education class, RAEKWON will analyze and evaluate effective rhetorical devices used by an author to support a point of view or purpose increasing a criteria of 90% as implemented by Special Education and General Education Teacher
# 3	By end of first quarter of 2014-2015 school year, in a general education class, RAEKWON will analyze and evaluate how style and content work together to advance the ideas in a text increasing a criteria of 90% as implemented by Special Education and General Education Teacher
# 4	By annual review date, in a general education class, RAEKWON will evaluate the effectiveness of an author's use of rhetoric and how it contributes to the power, persuasiveness, or beauty of the text increasing a criteria of 90% as implemented by Special Education and General Education Teacher

MEASURABLE ANNUAL GOAL (including how progress toward the annual goal will be measured)

By annual review date, in a general education class, RAEKWON will write arguments to support claims in an analysis of substantive topics or texts, using valid reasoning and relevant and sufficient evidence. (W.11-12.1) increasing a criteria of 85% as measured by observation, documentation and work samples as implemented by Special Education and General Education Teacher

☒ Check here if this goal supports the student's postsecondary goal(s) and identify the goal(s) to which it relates:

☒ Training/Education ☐ Employment ☐ Independent Living Skills ☐ Other _____

☐ Check here if this goal will be addressed during Extended School Year Services (ESY)

BENCHMARK OR SHORT-TERM OBJECTIVE

# 1	By end of third quarter of 2013-2014 school year, in a general education class, RAEKWON will know an argument is a logical way of demonstrating that a position, belief, or conclusion is based on reasoning and evidence gained from analysis of a topic or text increasing a criteria of 85% as implemented by Special Education and General Education Teacher
# 2	By end of second semester of 2013-2014 school year, in a general education class, RAEKWON will know a claim is a debatable thesis - something on which people could have differing opinions increasing a criteria of 85% as implemented by Special Education and General Education Teacher
# 3	By end of first quarter of 2014-2015 school year, in a general education class, RAEKWON will know an analysis is an examination of a complex topic or issue increasing a criteria of 85% as implemented by Special Education and General Education Teacher
# 4	By annual review date, in a general education class, RAEKWON will know the effectiveness of an argument is grounded in valid reasoning and appropriate evidence increasing a criteria of 90% as implemented by Special Education and General Education Teacher

Date: 1/16/2014

Clark County School District

CCF-604
9/05

Las Vegas, Nevada

Student Support Services Division

INDIVIDUALIZED EDUCATIONAL PROGRAM (IEP)
SERVICES (SDI)

Student Name: RAEKWON S ROBERTSON Grade: 11 DOB: 2/6/1997 ID #: 419250

SPECIAL EDUCATION SERVICES

SPECIALLY DESIGNED INSTRUCTION	SERVICE TYPE	BEGINNING AND ENDING DATES	FREQUENCY OF SERVICES	LOCATION OF SERVICES
Reading Content (Science)	Direct	1/16/2014 - 1/15/2015	250 Min/Wk	General Education
Written Language	Direct	1/16/2014 - 1/15/2015	250 Min/Wk	General Education
Behavioral/Social Skills	Direct	1/16/2014 - 1/15/2015	40 Min/Wk	General Education
Math	Direct	1/16/2014 - 1/15/2015	250 Min/Wk	Resource
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Date: 1/16/2014

Clark County School District

Las Vegas, Nevada

Student Support Services Division

CCF-601
08/07

INDIVIDUALIZED EDUCATIONAL PROGRAM (IEP)
SERVICES (RS)

Student Name: RAEKWON S ROBERTSON Grade: 11 DOB: 2/6/1997 ID #: 419250

RELATED SERVICES

RELATED SERVICE	SERVICE TYPE AND/OR DESCRIPTION	BEGINNING AND ENDING DATES	FREQUENCY OF SERVICES	LOCATION OF SERVICES
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☐ Transportation		-		
☐ Transportation		-		

EXTENDED SCHOOL YEAR SERVICES

Does the student require extended school year services? ☐ Yes ☒ No ☐ Deferred

If YES, IEP goals and benchmarks/short-term objectives and/or related services to be implemented in ESY must be identified.

If need for ESY is to be determined at a later date, indicate date by which IEP decision will be made: _____

METHOD FOR REPORTING PROGRESS

METHOD FOR REPORTING OF THE STUDENT'S PROGRESS TOWARD MEETING ANNUAL GOALS (check all methods that will be used)	PROJECTED FREQUENCY OF REPORTING
☐ IEP Goals Page ☒ District Report Card ☒ Specialized Progress Report ☐ Parent Conferences ☐ Other:	☐ Semester ☒ Quarterly ☐ Trimester ☐ Other:

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Date: 1/16/2014

Clark County School District

Las Vegas, Nevada

Student Support Services Division

CCF-537.1
08/07

INDIVIDUALIZED EDUCATIONAL PROGRAM (IEP)
ACCOMMODATIONS AND MODIFICATIONS

Student Name: RAEKWON S ROBERTSON Grade: 11 DOB: 2/6/1997 ID #: 419250

SUPPLEMENTARY AIDS AND SERVICES

Includes aids, services, and other supports provided in regular education classes, other education-related settings, and in extracurricular and nonacademic settings to enable students with disabilities to be educated with non-disabled students to the maximum extent appropriate.

MODIFICATION, ACCOMMODATION, OR SUPPORT FOR STUDENT OR PERSONNEL Describe Below:	BEGINNING AND ENDING DATES	FREQUENCY OF SERVICES	LOCATION OF SERVICES
Raekwon may have extra time to complete assignments not to exceed 72 hours.	1/16/2014 - 1/15/2015	Upon student request	General Education class
Raekwon may have access to the resource room to complete assignments and or quizzes/tests.	1/16/2014 - 1/15/2015	Upon student request	General Education class
Raekwon may have access to a calculator during math problems.	1/16/2014 - 1/15/2015	Upon student request	Resource Room
Raekwon may politely ask for access to the water fountain to de-escalate if he feels overwhelmed.	1/16/2014 - 1/15/2015	Upon student request	General Education class
	-		
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PARTICIPATION IN STATEWIDE AND/OR DISTRICT-WIDE ASSESSMENTS

Indicate how the student will participate in statewide or district-wide assessments.	If the student will participate in an alternate assessment, explain why the student cannot participate in the regular assessment, and why the particular alternate assessment selected is appropriate.	If the student will participate in a regular assessment, does the student require accommodations?
State Norm-Referenced Tests (NRT) ☐ Yes ☒ N/A ☐ Alternate		☐ No ☐ Yes **If YES, list on "Accommodation(s) for the Nevada Proficiency Examination Program" (attach form).**
State Criterion-Referenced Tests (CRT) ☐ Yes ☒ N/A ☐ Alternate		☐ No ☐ Yes **If YES, list on "Accommodation(s) for the Nevada Proficiency Examination Program" (attach form).**
High School Proficiency Exam ☒ Yes ☐ N/A ☐ Alternate		☐ No ☒ Yes **If YES, list on "Accommodation(s) for the Nevada Proficiency Examination Program" (attach form).**
Proficiency Examination in Writing ☒ Yes ☐ N/A ☐ Alternate		☐ No ☒ Yes **If YES, list on "Accommodation(s) for the Nevada Proficiency Examination Program" (attach form).**
NASAA ☐ Yes ☒ N/A ☐ Alternate		☐ No ☐ Yes List accommodation(s):

ACTIVITIES ELIGIBILITY

☐ Not Necessary at this time ☒ The student will meet all CCSD and NIAA Regulations.
☐ Regulations exception(s) necessary (Noted in accommodations, must contact NIAA)

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Date: 1/16/2014

Clark County School District

Las Vegas, Nevada

Student Support Services Division

CCF-606
08/07

INDIVIDUALIZED EDUCATIONAL PROGRAM (IEP)
PLACEMENT

Student Name: RAEKWON S ROBERTSON Grade: 11 DOB: 2/6/1997 ID #: 419250

PLACEMENT: 1/16/2014 to 1/15/2015 Total minutes per week in school: 1855

PLACEMENT CONSIDERATIONS	PERCENTAGE OF TIME IN REGULAR EDUCATION ENVIRONMENT
Selected / Rejected	
☐ ☒ Regular class with supplementary aids and services (no removal)	84 %
☒ ☐ Regular class and special education class (e.g. resource) combination	
☐ ☒ Self-contained program	
☐ ☒ Special School	
☐ ☒ Residential	
☐ ☒ Hospital	
☐ ☒ Home	
☐ ☒ Other:	

JUSTIFICATION FOR PLACEMENT INVOLVING REMOVAL FROM REGULAR EDUCATION ENVIRONMENTS*

Raekwon continues a need for continual assistance, prompts, modeling and verbal cues in mathematics. Specialized instruction at Raekwon's functional level is not available in the general education classroom. Due to present levels that are below grade level, Raekwon has been unable to succeed in general education classes (despite attempted modifications and adaptations to curriculum) Raekwon does not learn from the observational concept in the general education classroom. Raekwon has specific disabilities that would require more individualized support and time than is available in a general education classroom. Potential harmful effect may include loss of time with general education peers.

*Regular education environments include academic classes (which might include field trips linked to the curriculum), nonacademic settings (such as recess), and extra-curricular activities (for example, sports, after-school clubs, band, etc.).

IEP IMPLEMENTATION

☒ As the parent, I agree with the components of this IEP. I understand that its provisions will be implemented as soon as possible after the IEP goes into effect.

☐ As the parent, I disagree with all or part of this IEP. I understand that the school district must provide me with written notice of any intent to implement this IEP. If I wish to prevent the implementation of this IEP, I must submit a written request for a due process hearing to the local school district superintendent.

☐ Parent not in attendance. ☐ Parent participated via telephone.

☒ A copy of this IEP was provided to the student's parent on: 1/16/2014 (date) by: N. Peck (name) Liaison (title)

Parent Signature: _____

☐ Additional Form Needed

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Exhibit 4

DATE: 05/02/2014

Clark County School District
Las Vegas, Nevada
Student Support Services Division

CCF-530
08/07

INDIVIDUALIZED EDUCATIONAL PROGRAM (IEP)
INFORMATION

STUDENT/PARENT INFORMATION

Student: RAEKWON S ROBERTSON Sex: M Birth Date: 02/06/1997 Grade: 11
Student ID: 419250 Student Primary Language: ENGLISH Student English Proficiency Code (optional): EE
Address: 5201 WALNUT AVE APT 13
City/State/Zip: LAS VEGAS NV 89110 Student Phone: (702) 717-7366
Parent/Guardian/Surrogate: ERIKA LOYD Parent Phone (Home): (702) 717-7366
Parent Phone (Work): 641-3227 Email Address:
Optional (Cell): Primary Language Spoken at Home: ENGLISH
Interpreter or Other Accommodations Needed: None needed
Emergency Contact/Phone Number: Cleopatra Loyd - 702-616-6830
Current School: DESERT PINES HS Zoned School: ELDORADO HS

ELIGIBILITY CATEGORY

Primary: Specific Learning Disability Other:
ELIGIBILITY DATE: 09/05/2013 ANTICIPATED 3-YR REEVALUATION: 09/04/2016

MEETING INFORMATION

DATE OF MEETING: 05/02/2014 DATE OF LAST IEP MEETING: 01/16/2014
PURPOSE OF MEETING:
☐ Interim IEP ☐ Annual IEP ☒ Revision To IEP Dated: 01/16/2014
☐ Initial IEP ☐ IEP Following 3-Yr Reevaluation ☐ Exit/Graduation Reason:
☐ IEP Revision without a meeting: ☐ Other:
At the request of: ☐ Parent or ☐ School District
IEP SERVICES WILL BEGIN: 05/02/2014 ANTICIPATED DURATION OF SERVICES: 01/16/2015
IEP REVIEW DATE: 01/16/2015 COMMENTS: Manifestation Determination

IEP PARTICIPATION

Parent/Guardian/Surrogate*	Erika Loyd by phone	Speech/Lang Pathologist
Student**	Raekwon Robertson	School Nurse
LEA Rep.*	Suzanne Strosser	Interpreter
Spec. Ed Teacher***	Pauline Bell	School Psychologist
Reg. Ed Teacher***	Shannon Beserra	
School Psychologist		

* Required participant;
**Student must be invited when transition is discussed (beginning at age 14 or younger if appropriate).
***The IEP team must include at least one regular education teacher of the student (if the student is, or may be, participating in the regular education environment).

PROCEDURAL SAFEGUARDS

☒ I have received a statement of procedural safeguards under the Individuals With Disabilities Education Act (IDEA) and these rights have been explained to me in my primary language.

☒ I received the Middle/High School Graduate profile.

☐ N/A prior to 14 years of age

Parent/Guardian Signature: by phone

AT LEAST ONE YEAR PRIOR TO REACHING AGE 18, STUDENTS MUST BE INFORMED OF THEIR RIGHTS UNDER IDEA AND ADVISED THAT THESE RIGHTS WILL TRANSFER TO THEM AT AGE 18.

☒ Not applicable. Student will not be 18 within one year, and the student's next annual IEP meeting will occur no later than the student's 17th birthday.

☐ The student has been informed of his/her rights under IDEA and advised of the transfer of these rights at age 18.

Clark County School District

Las Vegas, Nevada

Student Support Services Division

PRESENT LEVELS OF ACADEMIC ACHIEVEMENT AND FUNCTIONAL PERFORMANCE

Student Name: RAEKWON S ROBERTSON Grade: 11 DOB: 2/6/1997 ID #: 419250

Consider results of the initial evaluation or most recent reevaluation, and the academic, developmental, and functional needs of the student, which may include the following areas: Academic Achievement, Language/Communication Skills, Social/Emotional/Behavior Skills, Cognitive Abilities, Health, Motor Skills, Adaptive Skills, Pre-Vocational Skills, and other skills as appropriate. For students who are 16 or older, or will turn 16 when this IEP is in effect, also consider the results of age appropriate transition assessments related to Training/Education, Employment, and Independent Living Skills (as appropriate).

ASSESSMENTS CONDUCTED	ASSESSMENT RESULTS	EFFECT ON STUDENT'S INVOLVEMENT AND PROGRESS IN GENERAL EDUCATION CURRICULUM OR, FOR EARLY CHILDHOOD STUDENTS, INVOLVEMENT IN DEVELOPMENTAL ACTIVITIES
Dean's Chronology	April 30, 2014 - During class, one of Raekwon's English teachers asked him to get his head up off as his desk as he was sleeping during read aloud. He was supposed to be following along with the text. Raekwon responded, "You better stop fucking with me our I'm going to kick your ass right here and right now." As the teacher pushed the panic button to call for a hall monitor, Raekwon repeated the threats multiple times and stated that he was serious. Raekwon then got out of his seat and approached the teacher. The teacher asked him to leave the room. Raekwon refused. Raekwon was suspended pending revocation of trial enrollment. 04/28/2014 - Dress Code - warning 04/24/2014 - Disregard of rules and regulations - warning 04/02/2014 - Referral - Dispute with another student, possible racial comments involved - warning 03/21/2014 - Referral - Teacher felt that Raekwon was threatening him. RPC - A 03/18/2014 - Referral - No show at academic detention for missing assignments - RPC-B 02/26/2014 - Referral - Refusal to participate in class - warning	Typical high school students are able to follow CCSD and school rules throughout the school day while interacting appropriately with adults and other students. Raekwon has a history of problems with appropriate behavior. He sometimes makes bad choices and poor decisions in classroom situations.
Weekly behavior monitoring per Behavior Intervention Plan	Raekwon was doing well in English 9 and U.S. History. Comment of history teacher: "Great young man that shows respect at all times." He did not appear motivated and often failed or refused to work in English 11, Science and Math. He did a good job in P.E. Behavior was improving in his Music Appreciation class.	
Grade review Parentlink May 1, 2014	PE II - B; Biology - F; English 9 - D; English 11 -D; Math App - F; U.S. History - D; Music Appreciation - F.	

PRESENT LEVELS OF ACADEMIC ACHIEVEMENT AND FUNCTIONAL PERFORMANCE

Student Name: RAEKWON S ROBERTSON Grade: 11 DOB: 2/6/1997 ID #: 419250

Consider results of the initial evaluation or most recent reevaluation, and the academic, developmental, and functional needs of the student, which may include the following areas: Academic Achievement, Language/Communication Skills, Social/Emotional/Behavior Skills, Cognitive Abilities, Health, Motor Skills, Adaptive Skills, Pre-Vocational Skills, and other skills as appropriate. For students who are 16 or older, or will turn 16 when this IEP is in effect, also consider the results of age appropriate transition assessments related to Training/Education, Employment, and Independent Living Skills (as appropriate).

ASSESSMENTS CONDUCTED	ASSESSMENT RESULTS	EFFECT ON STUDENT'S INVOLVEMENT AND PROGRESS IN GENERAL EDUCATION CURRICULUM OR, FOR EARLY CHILDHOOD STUDENTS, INVOLVEMENT IN DEVELOPMENTAL ACTIVITIES
Folder review (05/01/2014) Behavior/Social	Folder review and current behavior plan indicate a history of behavior problems in the school environment. Raekwon displays disruptive and aggressive behavior, fails to follow verbal directions from adults, disregards school and classroom rules and shows disrespect toward peers and adults. Behavior plan identifies six incidents of verbal confrontations with peers during his sophomore year in high school.	
	Kaufman Test of Educational Achievement, 2nd edition, administered Sept. 3, 2013 : Reading SS 82 GE 5.6 Math 68 3.4 Writing 70 2.3 Composite 70	Achievement testing indicate that Raekwon has made few - if any - academic achievement gains since his last three-year reevaluation in 2010.
	Behavior Assessment System for Children, Second Edition, Self-Report, indicated that several of Raekwon's responses were of concern, notably that he sometimes doesn't care anymore, his life is sometimes getting worse and worse, no one understand him, and that he often hates school. "Raekwon has apparently regressed to a notable degree in controlling his conduct, feelings and perceptions of his scholastic self-worth and attitude toward authority figures, especially in the school environment," the report noted. The Vineland Adaptive Behavior Scales, Second Edition, indicated that Raekwon continues to have difficulty in the adaptive domain of communication.	Less than adequate receptive, expressive and written communication skills will impact his achievement performance in the school environment.

PRESENT LEVELS OF ACADEMIC ACHIEVEMENT AND FUNCTIONAL PERFORMANCE

Student Name: RAEKWON S ROBERTSON Grade: 11 DOB: 2/6/1997 ID #: 419250

Consider results of the initial evaluation or most recent reevaluation, and the academic, developmental, and functional needs of the student, which may include the following areas: Academic Achievement, Language/Communication Skills, Social/Emotional/Behavior Skills, Cognitive Abilities, Health, Motor Skills, Adaptive Skills, Pre-Vocational Skills, and other skills as appropriate. For students who are 16 or older, or will turn 16 when this IEP is in effect, also consider the results of age appropriate transition assessments related to Training/Education, Employment, and Independent Living Skills (as appropriate).

ASSESSMENTS CONDUCTED	ASSESSMENT RESULTS	EFFECT ON STUDENT'S INVOLVEMENT AND PROGRESS IN GENERAL EDUCATION CURRICULUM OR, FOR EARLY CHILDHOOD STUDENTS, INVOLVEMENT IN DEVELOPMENTAL ACTIVITIES
Folder review (continued)	The Bender Gestalt Visual Motor Test, also administered in September of 2013, indicated that Raekwon's performance is suggestive of possible minimal brain dysfunction. School-related behavior typically associated with minimal brain dysfunction includes acting out, disruptive behaviors, low tolerance for frustration, learning disorders, inadequate social adaptation and low self-esteem.	These results also indicate Raekwon may have difficulty achieving in an academic environment.

Clark County School District
Las Vegas, Nevada
Student Support Services Division

INDIVIDUALIZED EDUCATIONAL PROGRAM (IEP)
TRANSITION

Student Name: RAEKWON S ROBERTSON Grade: 11 DOB: 2/6/1997 ID #: 419250

DIPLOMA OPTION SELECTED FOR GRADUATION (Diploma option must be declared at age 14 and reviewed annually.)	
☒ Standard or Advanced High School Diploma. Must complete all applicable credit requirements and pass the High School Proficiency Examination (with permissible accommodations as needed).	☐ Adjusted High School Diploma. Must complete IEP requirements.

STUDENT'S VISION FOR THE FUTURE A short statement that directly quotes what the student wants for the future.

Raekwon is interested in furthering his future in "producing music."

STATEMENT OF TRANSITION SERVICES: COURSE OF STUDY
Beginning at age 14 or younger if determined appropriate by the IEP team, describe the focus of the student's course of study.

Course of regular study to meet graduation requirements for a standard high school diploma.

STATEMENT OF MEASURABLE POSTSECONDARY GOALS
Beginning not later than the first IEP to be in effect when the student is 16, describe measurable postsecondary goals in the following areas:

☒ Training/Education	Raekwon will get training in music production
☒ Employment	Raekwon will be employed in music production
☒ Independent Living Skills (As Appropriate)	Raekwon will live independently
☐ Other:	

STATEMENT OF TRANSITION SERVICES: COORDINATED ACTIVITIES
Beginning not later than the first IEP to be in effect when the student is 16, develop a statement of needed transition services, including strategies or activities, for the student.

Instruction: CCSD will provide Raekwon with specialized instruction in reading, writing, math, & behavior/social skills and the opportunity to take courses in music, as well as the required courses for graduation.

Any Other Agency Involvement (Optional):

Related Services: None needed at this time

Any Other Agency Involvement (Optional):

Community Experiences: None needed at this time

Any Other Agency Involvement (Optional):

Employment and Other Post-School Adult Living Objectives: None needed at this time. No change to transition plan per this action.

Any Other Agency Involvement (Optional):

Acquisition of Daily Living Skills and Functional Vocational Evaluation (If Appropriate): None needed at this time

Any Other Agency Involvement (Optional):

Other:

Any Other Agency Involvement (Optional):

IEP GOALS, INCLUDING ACADEMIC AND FUNCTIONAL GOALS, AND BENCHMARKS OR SHORT-TERM OBJECTIVES

Student Name: RAEKWON S ROBERTSON Grade: 11 DOB: 2/6/1997 ID #: 419250

MEASURABLE ANNUAL GOAL (including how progress toward the annual goal will be measured)

By annual review date, in a classroom setting, RAEKWON will identify things that anger or frustrate him increasing a criteria of 80% as measured by observation and documentation as implemented by Special Education and General Education Teacher

☒ Check here if this goal supports the student's postsecondary goal(s) and identify the goal(s) to which it relates:

☒ Training/Education ☒ Employment ☒ Independent Living Skills ☐ Other

☐ Check here if this goal will be addressed during Extended Year Services (ESY)

BENCHMARK OR SHORT-TERM OBJECTIVE

# 1	By end of fourth quarter of 2013-2014 school year, in a classroom setting, RAEKWON will Accept responsibility for his actions increasing a criteria of 80% as implemented by Special Education and General Education Teacher
# 2	By end of first quarter of 2014-2015 school year, in a classroom setting, RAEKWON will Continue working when frustrated increasing a criteria of 80% as implemented by Special Education and General Education Teacher
# 3	By end of second quarter of 2014-2015 school year, in a classroom setting, RAEKWON will Demonstrate self-control while in a stressful situation increasing a criteria of 80% as implemented by Special Education and General Education Teacher
# 4	By annual review date, in a classroom setting, RAEKWON will Understand that communication is an important componet to problem solving increasing a criteria of 80% as implemented by Special Education and General Education Teacher

MEASURABLE ANNUAL GOAL (including how progress toward the annual goal will be measured)

By annual review date, in the special education class, RAEKWON will create equations and inequalities in one variable and use them to solve problems. Include equations arising from all types of functions, including simple rational and radical functions. *(Modeling Standard) (A.CED.A.1-2) increasing a criteria of 80% as measured by observation, documentation and work samples as implemented by Special Education Teacher

☒ Check here if this goal supports the student's postsecondary goal(s) and identify the goal(s) to which it relates:

☒ Training/Education ☐ Employment ☐ Independent Living Skills ☐ Other

☐ Check here if this goal will be addressed during Extended School Year Services (ESY)

BENCHMARK OR SHORT-TERM OBJECTIVE

# 1	By end of third quarter of 2013-2014 school year, in the resource room, RAEKWON will recognize types of equations and inequalities (e.g., exponential, logarithmic, polynomial, trigonometric) increasing a criteria of 80% as implemented by Special Education Teacher
# 2	By end of second semester of 2013-2014 school year, in the resource room, RAEKWON will recognize a polynomial's degree by using the method of finite differences increasing a criteria of 80% as implemented by Special Education Teacher
# 3	By end of first quarter of 2014-2015 school year, in the resource room, RAEKWON will create and solve an equation with radicals increasing a criteria of 80% as implemented by Special Education Teacher
# 4	By annual review date, in the resource room, RAEKWON will create and solve a polynomial equation increasing a criteria of 80% as implemented by Special Education Teacher

IEP GOALS, INCLUDING ACADEMIC AND FUNCTIONAL GOALS, AND BENCHMARKS OR SHORT-TERM OBJECTIVES

Student Name: RAEKWON S ROBERTSON Grade: 11 DOB: 2/6/1997 ID #: 419250

MEASURABLE ANNUAL GOAL (including how progress toward the annual goal will be measured)

By annual review date, in a general education class, RAEKWON will determine an author's point of view or purpose in a text in which the rhetoric is particularly effective, analyzing how style and content contribute to the power, persuasiveness, or beauty of the text. (RI.11-12.6) increasing a criteria of 90% as measured by observation, documentation and work samples as implemented by Special Education and General Education Teacher

☒ Check here if this goal supports the student's postsecondary goal(s) and identify the goal(s) to which it relates:

☒ Training/Education ☐ Employment ☐ Independent Living Skills ☐ Other _____

☐ Check here if this goal will be addressed during Extended Year Services (ESY)

BENCHMARK OR SHORT-TERM OBJECTIVE

# 1	By end of third quarter of 2013-2014 school year, in a general education class, RAEKWON will analyze how an author uses rhetoric to develop a point of view or purpose increasing a criteria of 90% as implemented by Special Education and General Education Teacher
# 2	By end of second semester of 2013-2014 school year, in a general education class, RAEKWON will analyze and evaluate effective rhetorical devices used by an author to support a point of view or purpose increasing a criteria of 90% as implemented by Special Education and General Education Teacher
# 3	By end of first quarter of 2014-2015 school year, in a general education class, RAEKWON will analyze and evaluate how style and content work together to advance the ideas in a text increasing a criteria of 90% as implemented by Special Education and General Education Teacher
# 4	By annual review date, in a general education class, RAEKWON will evaluate the effectiveness of an author's use of rhetoric and how it contributes to the power, persuasiveness, or beauty of the text increasing a criteria of 90% as implemented by Special Education and General Education Teacher

MEASURABLE ANNUAL GOAL (including how progress toward the annual goal will be measured)

By annual review date, in a general education class, RAEKWON will write arguments to support claims in an analysis of substantive topics or texts, using valid reasoning and relevant and sufficient evidence. (W.11-12.1) increasing a criteria of 85% as measured by observation, documentation and work samples as implemented by Special Education and General Education Teacher

☒ Check here if this goal supports the student's postsecondary goal(s) and identify the goal(s) to which it relates:

☒ Training/Education ☐ Employment ☐ Independent Living Skills ☐ Other _____

☐ Check here if this goal will be addressed during Extended School Year Services (ESY)

BENCHMARK OR SHORT-TERM OBJECTIVE

# 1	By end of third quarter of 2013-2014 school year, in a general education class, RAEKWON will know an argument is a logical way of demonstrating that a position, belief, or conclusion is based on reasoning and evidence gained from analysis of a topic or text increasing a criteria of 85% as implemented by Special Education and General Education Teacher
# 2	By end of second semester of 2013-2014 school year, in a general education class, RAEKWON will know a claim is a debatable thesis - something on which people could have differing opinions increasing a criteria of 85% as implemented by Special Education and General Education Teacher
# 3	By end of first quarter of 2014-2015 school year, in a general education class, RAEKWON will know an analysis is an examination of a complex topic or issue increasing a criteria of 85% as implemented by Special Education and General Education Teacher
# 4	By annual review date, in a general education class, RAEKWON will know the effectiveness of an argument is grounded in valid reasoning and appropriate evidence increasing a criteria of 90% as implemented by Special Education and General Education Teacher

Date: 5/2/2014

Clark County School District

Las Vegas, Nevada

Student Support Services Division

CCF-604
9/05

INDIVIDUALIZED EDUCATIONAL PROGRAM (IEP)
SERVICES (SDI)

Student Name: RAEKWON S ROBERTSON Grade: 11 DOB: 2/6/1997 ID #: 419250

SPECIAL EDUCATION SERVICES

SPECIALLY DESIGNED INSTRUCTION	SERVICE TYPE	BEGINNING AND ENDING DATES	FREQUENCY OF SERVICES	LOCATION OF SERVICES
Behavioral/Social Skills	Direct	5/2/2014 - 7/1/2014	250 Min/Wk	Resource
Reading (Behavior)	Direct	5/2/2014 - 7/1/2014	250 Min/Wk	Resource
Behavioral/Social Skills	Consult	5/2/2014 - 1/15/2015	20 Min/Wk	General Education
Written Language	Direct	5/2/2014 - 7/1/2014	500 Min/Wk	Resource
Math	Direct	5/2/2014 - 7/1/2014	250 Min/Wk	Resource
		-		
Behavioral/Social Skills	Direct	8/1/2014 - 1/15/2015	250 Min/Wk	Self-contained
Reading in content (Behavior)	Direct	8/1/2014 - 1/15/2015	500 Min/Wk	Self-contained
Written Language	Direct	8/1/2014 - 1/15/2015	250 Min/Wk	Self-contained
Math	Direct	8/1/2014 - 1/15/2015	250 Min/Wk	Self-contained
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INDIVIDUALIZED EDUCATIONAL PROGRAM (IEP)
ACCOMMODATIONS AND MODIFICATIONS

Student Name: RAEKWON S ROBERTSON Grade: 11 DOB: 2/6/1997 ID #: 419250

SUPPLEMENTARY AIDS AND SERVICES

Includes aids, services, and other supports provided in regular education classes, other education-related settings, and in extracurricular and nonacademic settings to enable students with disabilities to be educated with non-disabled students to the maximum extent appropriate.

MODIFICATION, ACCOMMODATION, OR SUPPORT FOR STUDENT OR PERSONNEL Describe Below:	BEGINNING AND ENDING DATES	FREQUENCY OF SERVICES	LOCATION OF SERVICES
Raekwon may have extra time to complete assignments not to exceed 72 hours.	1/16/2014 - 1/15/2015	Upon student request	General Education class
Raekwon may have access to the resource room to complete assignments and or quizzes/tests.	1/16/2014 - 1/15/2015	Upon student request	General Education class
Raekwon may have access to a calculator during math problems.	1/16/2014 - 1/15/2015	Upon student request	Resource Room
Raekwon may politely ask for access to the water fountain to de-escalate if he feels overwhelmed.	1/16/2014 - 1/15/2015	Upon student request	General Education class
Raekwon has a behavior intervention plan.	5/2/2014 - 1/15/2015	Daily	School campus
	-		
	-		

PARTICIPATION IN STATEWIDE AND/OR DISTRICT-WIDE ASSESSMENTS

Indicate how the student will participate in statewide or district-wide assessments.	If the student will participate in an alternate assessment, explain why the student cannot participate in the regular assessment, and why the particular alternate assessment selected is appropriate.	If the student will participate in a regular assessment, does the student require accommodations?
State Norm-Referenced Tests (NRT) ☐ Yes ☒ N/A ☐ Alternate		☐ No ☐ Yes **If YES, list on "Accommodation(s) for the Nevada Proficiency Examination Program" (attach form).**
State Criterion-Referenced Tests (CRT) ☐ Yes ☒ N/A ☐ Alternate		☐ No ☐ Yes **If YES, list on "Accommodation(s) for the Nevada Proficiency Examination Program" (attach form).**
High School Proficiency Exam ☒ Yes ☐ N/A ☐ Alternate		☐ No ☒ Yes **If YES, list on "Accommodation(s) for the Nevada Proficiency Examination Program" (attach form).**
Proficiency Examination in Writing ☐ Yes ☒ N/A ☐ Alternate		☐ No ☐ Yes **If YES, list on "Accommodation(s) for the Nevada Proficiency Examination Program" (attach form).**
NASAA ☐ Yes ☒ N/A ☐ Alternate		☐ No ☐ Yes List accommodation(s):

ACTIVITIES ELIGIBILITY

☐ Not Necessary at this time ☒ The student will meet all CCSD and NIAA Regulations.
☐ Regulations exception(s) necessary (Noted in accommodations, must contact NIAA)

Date: 5/2/2014

Clark County School District
Las Vegas, Nevada
Student Support Services Division

CCF-539
01/06

INDIVIDUALIZED EDUCATIONAL PROGRAM (IEP)
MANIFESTATION DETERMINATION SUMMARY

Student Name: RAEKWON S ROBERTSON Grade: 11 DOB: 2/6/1997 ID #: 419250

Current School: DESERT PINES HS Disability: Specific Learning Disability

The LEA, the student's parent(s), and the following relevant IEP committee Members **(as determined by the parent and the LEA) have met to conduct a review of the relationship between the student's disability and the conduct subject to disciplinary action. The Team considered all relevant information in the student's file, in terms of the conduct subject to disciplinary action, including:**

(1) Relevant information supplied by the student parents;
(2) Teacher observations of the student; and
(3) The student's IEP.

I. Brief description of alleged infraction(s). Use backside of form or additional sheets of paper if necessary:

On April 30 between 9:55 and 10:55 a.m., Raekwon reportedly had his head down on the desk and appeared to be sleeping in his English 11 class. Students were expected to be sitting up and following along with the oral reading. Teacher asked Raekwon to sit up. Raekwon reportedly responded "You better stop fucking with me or I'm going to kick your ass right here and right now." Teacher pushed the Dean's call button and as he was pushing the button, Raekwon continued to repeat the threats multiple times as he stated how "serious" he was. Then Raekwon reportedly approached the teacher. Teacher says to diffuse the situation, he asked Raekwon to leave the classroom; Raekwon refused. Teacher went to stand in the doorway of the room to increase the distance between he and Raekwon.

II. Brief description of the results of the student's functional behavior assessment (if completed):

FBA not completed as student has a behavior plan

Brief description of the student's current behavioral intervention plan (if one exists):

Raekwon's current behavior plan addresses his history of failing to follow adult directions, disregard for school and classroom rules, and disrespect toward peers and adults. The behaviors occur in all academic settings in the school. Antecedents for the behaviors are being given assignments to complete, unstructured time, and the beginning of class. Identified functions are work avoidance and power/control. Strategies implemented include ensuring a clear understanding of expectations and consequences, redirection, verbal praise, adjusted tone of delivery, time out/break period, access to trusted adult, earning free time.

Brief description of relevant information supplied by the student's parents:

Brief description of teacher observations of the student:

Some teachers report that Raekwon does not do his school work, is unmotivated and can be disruptive in class. After redirection, he typically exhibits the same behavior. Some teachers report he asks for a passes to the bathroom or counselor and fails to return to class. Other teachers report that Raekwon is polite and respectful in class, does his work and behaves like a gentleman. One teacher said he thinks Raekwon's behavior is improving.

Date: 05/02/2014

Clark County School District
Las Vegas, Nevada
Student Support Services Division

CCF-539
01/06

INDIVIDUALIZED EDUCATIONAL PROGRAM (IEP)
MANIFESTATION DETERMINATION SUMMARY cont.

Student Name: RAEKWON S ROBERTSON Grade: 11 DOB: 02/06/1997 ID #: 419250

III. Action(s) taken at time of offense:

- [x] Suspension
- [ ] Maintained Placement in School Setting
- [ ] Home Instruction
- [ ] Placement in Interim Alternative Educational Setting (describe):

- [x] Other (describe):

Pending revocation of trial enrollment.

IV. After consideration of relevant information, the team reached the following conclusions.
Provide short answers to these questions on the following page:

Questions: (in relation to the conduct for which the student is being disciplined)	Yes	No
Was the conduct in question caused by, or did it have a direct and substantial relationship to the student's disability?	☒	☐
Was the conduct in question a direct result of the LEA's failure to implement the IEP?	☐	☒

A "Yes" answer to either question indicates that the conduct subject to disciplinary action IS a manifestation of the student's disability.

Therefore, the team finds that the conduct subject to disciplinary action ☒ IS ☐ IS NOT a manifestation of the student's disability.

Name	Signature	Date
Erika Loyd	participated via phone	05/02/2014
	Parent Signature	Date
Name	Parent Signature	Date
Suzanne Strosser		05/02/2014
Name	LEA Representative Signature	Date
Pauline Bell	Pauline Bell	05/02/2014
Name	Special Education Teacher Signature	Date
Shannon Beserra	Shannon Beserra	05/02/2014
Name	Regular Education Signature	Date
Name	Signature/Position	Date
Name	Signature/Position	Date
Name	Signature/Position	Date

DISTRIBUTION: 1 - Confidential Folder 2 - Parent/Guardian/Surrogate 3 - Special Education Teacher 4 - Case Manager/Seigle Diagnostic Center

INDIVIDUALIZED EDUCATIONAL PROGRAM (IEP)
MANIFESTATION DETERMINATION SUMMARY cont.

Student Name: RAEKWON S ROBERTSON Grade: 11 DOB: 2/6/1997 ID #: 419250

CONSIDERATIONS AND ADDITIONAL COMMENTS

The team has determined that Raekwon's actions are a manifestation of his disability. We also believe that his conduct is related to possible emotional problems. September 2013 assessments indicate behavior concerns should be "explored further." Based on teacher observations, behavior data, and student input, it appears that Raekwon prefers and may be more successful in a smaller setting. The team also feels that stability of environment and the opportunity for Raekwon to build trusting relationships is a significant factor that could assist Raekwon in managing his emotions.

Date: 5/2/2014

Clark County School District

Las Vegas, Nevada

Student Support Services Division

CCF-606
08/07

INDIVIDUALIZED EDUCATIONAL PROGRAM (IEP)
PLACEMENT

Student Name: RAEKWON S ROBERTSON Grade: 11 DOB: 2/6/1997 ID #: 419250

PLACEMENT: 5/2/2014 to 7/1/2014 Total minutes per week in school: 1855

PLACEMENT CONSIDERATIONS			PERCENTAGE OF TIME IN REGULAR EDUCATION ENVIRONMENT
Selected	Rejected		
☐	☒	Regular class with supplementary aids and services (no removal)	37 %
☒	☐	Regular class and special education class (e.g. resource) combination	
☐	☒	Self-contained program	
☐	☐	Special School	
☐	☐	Residential	
☐	☐	Hospital	
☐	☐	Home	
☐	☒	Other:	

JUSTIFICATION FOR PLACEMENT INVOLVING REMOVAL FROM REGULAR EDUCATION ENVIRONMENTS*

Raekwon requires specialized instruction to address deficits in the area of math, written expression, and behavior/social. He has an inability to learn through independent practice in the general education setting. He is unable to benefit from direct instruction in the general education setting due to his learning disabilities. He requires slower paced instruction, specialized methods and materials, continual assistance, modeling and role playing, and sometimes one-on-one instruction. Raekwon has been unable to make appropriate academic progress in a less restrictive setting. Meeting his needs in a general education setting would result in a significant disruption to the delivery and pacing of the course content. A possible harmful effect of this placement may include decreased exposure to general education peers and curriculum.

*Regular education environments include academic classes (which might include field trips linked to the curriculum), nonacademic settings (such as recess), and extra-curricular activities (for example, sports, after-school clubs, band, etc.).

IEP IMPLEMENTATION

☒ As the parent, I agree with the components of this IEP. I understand that its provisions will be implemented as soon as possible after the IEP goes into effect.

☐ As the parent, I disagree with all or part of this IEP. I understand that the school district must provide me with written notice of any intent to implement this IEP. If I wish to prevent the implementation of this IEP, I must submit a written request for a due process hearing to the local school district superintendent.

☐ Parent not in attendance. ☒ Parent participated via telephone.

☒ A copy of this IEP was provided to the student's parent on: 5/2/2014 (date) by: Pauline Bell (name) TOR (title)

Parent Signature: by phone

☒ Additional Form Needed

Distribution: Original - Confidential Folder | 1st Copy - Parent/Guardian/Adult Student | 2nd Copy - Special Education Teacher/School

Date: 5/2/2014

Clark County School District

Las Vegas, Nevada

Student Support Services Division

CCF-606
08/07

INDIVIDUALIZED EDUCATIONAL PROGRAM (IEP)
PLACEMENT

Student Name: RAEKWON S ROBERTSON Grade: 11 DOB: 2/6/1997 ID #: 419250

PLACEMENT: 7/2/2014 to 1/15/2015 Total minutes per week in school: 1855

PLACEMENT CONSIDERATIONS			PERCENTAGE OF TIME IN REGULAR EDUCATION ENVIRONMENT
Selected	Rejected		
☐	☒	Regular class with supplementary aids and services (no removal)	37 %
☐	☒	Regular class and special education class (e.g. resource) combination	
☒	☐	Self-contained program	
☐	☐	Special School	
☐	☐	Residential	
☐	☐	Hospital	
☐	☐	Home	
☐	☐	Other:	

JUSTIFICATION FOR PLACEMENT INVOLVING REMOVAL FROM REGULAR EDUCATION ENVIRONMENTS*

Raekwon requires specialized instruction to address deficits in the area of math, written language, and behavior/social. He has an inability to learn through independent practice in the general education setting. He is unable to benefit from direct instruction in the general education setting due to his learning disabilities. He requires slower paced instruction, specialized methods and materials, continual assistance, modeling and role playing, and sometimes one-on-one instruction. Raekwon has been unable to make appropriate academic progress in a less restrictive setting. Meeting Raekwon's needs in a general education setting would result in a significant disruption to the delivery and pacing of the course content. A possible harmful effect of this placement could include decreased exposure to general education peers and curriculum.

*Regular education environments include academic classes (which might include field trips linked to the curriculum), nonacademic settings (such as recess), and extra-curricular activities (for example, sports, after-school clubs, band, etc.).

IEP IMPLEMENTATION

☒ As the parent, I agree with the components of this IEP. I understand that its provisions will be implemented as soon as possible after the IEP goes into effect.

☐ As the parent, I disagree with all or part of this IEP. I understand that the school district must provide me with written notice of any intent to implement this IEP. If I wish to prevent the implementation of this IEP, I must submit a written request for a due process hearing to the local school district superintendent.

☐ Parent not in attendance. ☒ Parent participated via telephone.

☒ A copy of this IEP was provided to the student's parent on: 5/2/2014 (date) by: Pauline Bell (name) TOR (title)

Parent Signature: by phone

☐ Additional Form Needed

Distribution: Original - Confidential Folder | 1st Copy - Parent/Guardian/Adult Student | 2nd Copy - Special Education Teacher/School

Exhibit 5

Ron Zedek, M.D.
6889 S. Eastern Avenue
Las Vegas, Nevada 89119
Telephone: 702-434-1200 – Fax: 702-434-7231

Name: ROBERTSON, RAEKWON **No.**

05/11/2015 - HISTORY, EXAMINATION AND PROGRESS NOTES

INITIAL PSYCHIATRIC REPORT

IDENTIFICATION:

The patient is an 18-year-old single Black male who has no kids and lives with mom in Las Vegas, Nevada.

PSYCHIATRIC ASSESSMENT:

Please note that the patient is not currently taking any medications. The patient does not recall the name of the last treating psychiatrist, but does recall he has been diagnosed with mood disorder not otherwise specified in the past. The patient has never, ever been psychiatrically hospitalized. The patient has never, ever tried to take his life and does not think he would ever try to do such a thing. The patient comes in today with a history and set of complaints that meet diagnostic criteria for bipolar disorder, mixed, without psychotic features. The patient has never, ever had any psychotic episodes or experiences. No known problems with alcohol or drug abuse. There is a family psychiatric history for bipolar disorder with multiple family members affected.

MENTAL STATUS EXAM:

Mental status exam is remarkable for no suicidal ideation, no homicidal ideation, no paranoid ideation, no delusions, no visual hallucinations, and no auditory hallucinations. Mood is depressed; affect is irritable with mood swings. The patient is alert and oriented to person, place, and situation. Insight and judgment are fair to good. Please note that the patient is seen to have well-delineated futuristic thoughts and plans.

MEDICAL ASSESSMENT:

The patient is not known to have any medical problems or issues. Review of Systems and physical exam are being deferred to the primary care physician.

DIAGNOSIS:

Bipolar disorder, mixed, without psychotic features

PLAN:

Please note that we will put the patient on Abilify 10 mg p.o. q. h.s.

No signs of any TD. The patient is aware of the risk of developing TD.

We will get a full metabolic workup.

Weight 142 pounds; blood pressure 103/80; pulse 55.

We will put the patient in for some counseling and some psychosocial rehabilitation.

The patient gave informed consent for the proposed medical treatment plan after a careful evaluation of the risk/benefit analysis involved as well as alternative treatment options. The patient was informed of potential side effects and what to do should they arise.

The patient shall return to the clinic for followup in a few weeks.

Ron Zedek, M.D.

RZ/mo #59239

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of October, 2023, I served a true and correct copy of the foregoing document entitled **EXHIBITS IN SUPPORT OF EVIDENTIARY HEARING** to the Clark County District Attorney's Office by sending a copy via electronic mail to:

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

BY:

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

Attorney for Petitioner
RAEKWON ROBERTSON

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Steven D. Grierson
CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

RAEKWON ROBERTSON, Petitioner, vs. STATE OF NEVADA, Respondent.	CASE NO. A-20-823892-W DEPT. NO. XII

BEFORE THE HONORABLE MICHELLE LEAVITT, DISTRICT COURT JUDGE

FRIDAY, NOVEMBER 3, 2023

RECORDER'S TRANSCRIPT OF PROCEEDINGS
EVIDENTIARY HEARING

APPEARANCES:

For the Petitioner: STEVEN S. OWENS, ESQ.

For the Respondent: ALEXANDER G. CHEN
Chief Deputy District Attorney

RECORDED BY: BRENDA SCHROEDER, COURT RECORDER

INDEX OF WITNESSES

LIST OF EXHIBITS

LAS VEGAS, NEVADA, FRIDAY, NOVEMBER 3, 2023, 9:11 A.M.

* * * * *

THE COURT: -- Robertson?

MR. OWENS: We are.

THE COURT: Okay. Mr. Robertson is present and he's appearing via BlueJeans and he's -- what -- where's his location?

MR. OWENS: He is in Ely.

THE COURT: Okay. All right. You can make your appearances.

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

MR. CHEN: Good morning, Your Honor.

THE COURT: Good morning.

MR. CHEN: Alex Chen on behalf of the State. John Afshar may take over part of the hearing as well depending on how long it goes. I also have with me one of my law clerks, Elizabeth Ierulli, she's going to help me with some of the exhibits.

THE COURT: Do you have to go somewhere?

MR. CHEN: Around 10:00.

THE COURT: Okay.

MR. CHEN: But we don't even know it's going to last that long.

THE COURT: All right.

MR. CHEN: I just -- it was in case.

THE COURT: All right. Perfect. Okay. I see Mr. Sanft here. Are you going to call him first?

MR. OWENS: Yes, Michael Sanft.

THE COURT: All right.

///

MICHAEL SANFT

[having been called as a witness and first duly sworn, testified as follows:]

THE CLERK: You may be seated. Please state and spell your first and last name for the record.

MR. CHEN: Your Honor, I'm sorry. Right before he gets sworn in, I suppose because they could have two people testifying that one should -- Ms. Loyd's on the camera, but it probably is best that they separate their testimony, that the exclusionary rule is invoked.

THE COURT: Oh, is Ms. Loyd going to testify?

MR. OWENS: Ms. Loyd is going to testify. She's the only other witness I'd planned on along with Mr. Sanft. And so, yeah, I don't know how we --

THE COURT: Can we do that? Do we have to disconnect her?

THE CLERK: There has to be a way to tell her to hop back on though.

So if you have contact with her?

MR. OWENS: I've got a phone number.

THE CLERK: As long as --

THE COURT: Okay. So --

THE CLERK: -- I mean, maybe -- she's on mute right now, so --

MR. CHEN: That's okay, Your Honor. I'll waive the exclusionary rule. But I just -- it's okay. We'll just move forward.

THE COURT: I mean, I can disconnect it and then when Mr. Owens is ready to call her, he can tell her to sign back in.

MR. CHEN: I don't think it's the end-all-be-all, Your Honor. Thank you though.

THE COURT: Okay. All right. Go ahead.

Good morning.

THE WITNESS: Good morning, Your Honor.

THE COURT: Was he sworn in?

THE CLERK: I just need him to state and spell his first and last name.

THE WITNESS: Michael Sanft, M-I-C-H-A-E-L, S-A-N-F-T.

THE CLERK: Thank you.

DIRECT EXAMINATION OF MICHAEL SANFT

BY MR. OWENS:

Q Mr. Sanft, you're a criminal defense attorney here in town?

A Yes, sir.

Q And you represented Mr. Raekwon Robertson in the underlying murder case associated with this habeas proceeding; is that correct?

A Yes.

Q And so you represented him, that was 2020 was the trial; do you recall that?

A I do.

Q Are you familiar with the issues that we are here today to discuss?

A I'm familiar. I'm not specific as to what exactly we're going to be asking about today, but I'm familiar.

Q Okay. Do you recall whether or not you saw a copy of the remand order and the issues that came back for an evidentiary hearing?

A Yes.

Q So specifically, we're talking about Mr. Robertson's mental illnesses and disability. That's something you were familiar with at the time of trial; is that correct?

A In terms of the fact that he had mental health issues and disabilities?

Q Yes. There had been some competency reports in the criminal case, I believe it was Doctors Paglini and Kapel, K-A-P-E-L; are those competency reports something that you remember seeing?

A I do remember seeing those.

MR. OWENS: Your Honor, we've marked those competency reports as Exhibit B; I would like to approach the witness and have him look at that.

THE COURT: Sure.

THE CLERK: This is not yet admitted.

THE COURT: Do you want to admit it?

MR. OWENS: Yes. I believe there's been a stipulation that Exhibits A, which are the five school records that were filed with the court just a week or two ago; and Exhibit B here, the two competency reports, which are also already part of the court's record, the prosecution has no objection to their admission.

MR. CHEN: No objection, Your Honor.

THE COURT: Okay. They're admitted.

[PETITIONER'S EXHIBITS A AND B ADMITTED]

THE CLERK: And those are Plaintiff's Exhibits. Thank you.

THE COURT: Petitioner's, I guess. They're your --

MR. OWENS: Yes. They're mine.

THE COURT: Right. They're Petitioner's.

THE CLERK: Okay.

THE COURT: Mr. Robertson's exhibits.

BY MR. OWENS:

Q All right. Mr. Sanft, you've been able to thumb through those

competency reports a little bit; is that correct?

A Yes, sir.

Q You see there that the -- in the third page in, Dr. Kapel reports that Raekwon Robertson had been off his medication for a year prior to his arrest; do you remember anything about him being off his meds and that being an issue in the case?

A I don't know about it being an issue in the case, but I do recall that that was something that was documented.

Q Okay. Also on that same first page it says that Dr. Kapel reported that the defendant had no objection to his attorney presenting his mental health history and mental state as factors in his defense; do you see that?

A Yes.

Q Turning the page, you see that Mr. Robertson reported to Dr. Kapel that he had been hearing stuff, hearing voices, reported that he was paranoid, he did not remember the incident, the crime, that he had blackouts, he had mood swings, he reported anger, that's like the third paragraph down; do you remember those facts in the case?

A I don't remember that specifically.

Q Okay.

A In terms of the report, I mean, I see it in front of me. But I don't remember that being a factor in my head in terms of what I recall about the case.

Q Okay. Turning a few more pages in where it starts, Dr. John Paglini, competency evaluation.

A Yes.

Q It says on that page, "He exhibits erratic behavior, severe mood swings,

occasional emotional or history manic behavior."

A I see that.

Q And the next page over it talks about that he was in special education in school in 8th grade. He was diagnosed as bipolar. He dropped out in 11th grade, that's down at the bottom of that -- page 2 of Paglini's report.

A Yes, sir.

Q And the next page, again, Mr. Robertson reported to his doctor that he was bipolar, that he has mood swings, and then he becomes irritable, he has auditory hallucinations. The next page he stated he's hearing people to hurt people; hears voices telling him to hurt other people. Is that something that stands out in your mind? Do you remember seeing this report?

A About the issues of him hearing things?

Q Yes.

A I did read that. I remember reading that. I thought that that was something to think about, but I did.

Q And on Page 5 of Paglini's report, up at the top, he told his doctor, "I want to kill anybody in my presence," he wants to hurt people. Do you see that?

A I do.

Q So that's something that would jump out at you as a defense attorney as you have to interact with your client and defend him in a murder trial, the fact that he had this tendency to want to hurt people and that he had this medical diagnosis of being bipolar; is that correct?

A Well, definitely being in his presence would be a concern for me.

Q Okay.

A I don't recall ever being concerned being around Raekwon at all. I

didn't think he -- there was no time that, in my interactions with him, that I felt like I was threatened or in danger. He was, as far as I can remember, he was completely normal to me.

Q Okay. How about the name Erika Loyd; do you remember that from the discovery in the case? If I told you it was Raekwon's mother, did that ring a bell?

A It does ring a bell. Yes.

Q Okay. In fact, do you recall, there was a search warrant in the discovery, search warrant at Ms. Loyd's home where they found the 22 --

A Firearm?

Q -- firearm that was the subject of the murder case, so that's the Erika Loyd; do you remember her doing a voluntary statement in the discovery?

A I do.

Q And in there do you remember her talking about her son's learning disabilities, his diagnosis as bipolar and schizophrenic and being off his medication specifically; do you remember that?

A I do remember her talking to police. I did review that report in preparation for trial.

Q Okay.

A But in terms of, like, specifics about whether or not he was taking his medication, I don't recall that.

Q Do you recall ever talking to Ms. Erika Loyd about her statement or getting more details from her about the learning disability and what kind of meds he was on or was supposed to be on?

A I believe that we did meet. I don't recall the specifics of our conversation.

Q Okay. Why don't you give me back Exhibit B and I want to hand you Exhibit A. As you can see from the cover sheet, I just filed these a week or two ago in this case. There's five numbered exhibits in there. Just real quickly, if you'll shuffle through it, you'll see that they purport to be school records of Mr. Robertson and incidents that he had at school with his learning disability, how he was in special education; does any of that look familiar to you?

A No. I don't -- I mean, there was a lot of documents. I don't recall specifically looking through high school records or school records.

Q Would you be surprised that Ms. Erika Loyd furnished these to me but she had actually prepared them a few years ago for you and was expecting to give them to you but you never contacted her with them; does that ring a bell at all?

A I never contacted her for the records?

Q She had them in her possession, I believe is what her testimony will be, and that she had obtained these to give to you, and was expecting to hear from you and to give you the records to use in the trial; was there any -- do you remember anything about using school records or Mr. Robertson's mental health issues in the trial?

A I never brought up his mental health issues during the course of the trial. I didn't think that that was part of the strategy in this case, quite honestly. I, you know, I do remember speaking with Erika, but I don't remember, I mean, I'm not sure if she was even at the trial, but I don't know why I wouldn't have the records if she had them. I mean, you know, I have an office, I have a phone number, I don't recall as to why I don't have these records.

Q Okay. In the school records specifically if you want to turn to -- well, there's just so many things in here, in the sake of in -- time, I don't want to go over

all of them, but there was at least one incident, this is on Exhibit 4, Page 3 of 14 in Exhibit 4, which is actually Exhibit A.

A All right. Let's see here.

Q Actually, I want to go to Page 2 of 14 in that Exhibit 4.

A I see 5 and I see 3, but let me --

MR. OWENS: May I approach the witness, Your Honor?

THE COURT: You may.

BY MR. OWENS:

Q Look at Exhibit 4 --

A 3, 5, that's what I'm trying to find. So this is 3 here.

Q Yeah.

A I don't know if it's in here. I don't see [indiscernible]. I'll look for it. Oh, here we go, got it.

Q Got it? Okay.

A Got it.

Q Turn to the second page of Exhibit 4, it says "2 of 14." Under assessment results there was an incident on April 30th, 2014, this is when Raekwon was in 11th grade. If you can just read that first paragraph to yourself, "He acted out in school in front of teacher, threatened a teacher, threatened to be physical with the teacher." And on the right it says, "Raekwon has a history of problems with appropriate behavior, he sometimes makes bad choices and poor decisions in classroom situations."

A I see it.

Q Do you see that?

A I do.

Q So if you had these records, that you would have been something that you would have been aware of that he had emotional and threatening pattern of behavior in school; is that correct?

A Yes.

Q And turning to Exhibit -- in that same packet, Page 12 of 14, going from 2 of 14 to 12 of 14.

A Got it.

Q "The team has determined that Raekwon's actions are a manifestation of his disability. We also believe that his conduct is related to possible emotional problems." So the team that's evaluating him in school, you realize, attributed his -- his misconduct, his bad behavior to his disability.

A Okay. I see it.

Q Do you think that would have been something that you could have used in the trial in this case?

A For mitigation purposes? For sentencing purposes?

Q Well, both, let's start with at trial, could you have used this is in trial because you said that you didn't use any of this and so the jury was unaware of any of what we've just gone through with the competency evaluations or the school records, could that have been of use to you in the trial?

A No.

Q Don't you think that the jury could have, like, the school administrators, they could have blamed some of this bad behavior and the murder and the robbery specifically in this case on, at least to some degree, on Mr. Robertson's learning disability and his mental health issues?

A No.

Q Why not?

A The problem with this case was is that it was preplanned. My recollection of the case was there was communication between Raekwon and other people prior to this where they wanted to do a lick, something along those lines. And as a result of that information, this was preplanned, they got together at a specific place, they targeted a specific geographical area, they went to that location, they sat there, they waited, they looked around for something, you know, which target are we going to go after. Some jogger jogs by, sees what happens, you know, documents in his head, like, hey, you know what, maybe -- I want to call my wife and make sure we locked the door. A lot of this information that I'm seeing in front of me is spontaneous type of stuff. You know, it's like a reaction that happens in school and he gets agitated, then something happens. This case was all about preplanning and that's the problem with it overall.

My defense of Raekwon was he wasn't even there, that during the shooting he wasn't there. We were looking at potential angles, like, you know, the bus and so forth as to whether or not he was there. But outside of that, I never had a sense that Raekwon was unable to control of himself even in the courtroom, even when I was talking to him during the course of the trial, no outbursts, nothing that would indicate to me that, hey, Raekwon's suffering from something that he can't control. So in terms of the defense in this case, I did not believe that, you know, this issue of some type of mental defect that he would have to be unable to control himself was going to be an element that I could, you know, use and somehow say that he's not guilty of the crime.

Q Isn't it true that while the robbery or at least a house burglary may have been preplanned because we had a text message about hitting a house or

something, but the murder itself, there's no indication that was preplanned as part of the robbery, we're going to rob this guy and we're going to murder him; that was a spontaneous action, was it not?

A Sure. You had other people that were there as well. I mean, I just don't know how that, you know, all comes about. I don't know if the victim -- I think the victim struggled, I think the victim resisted.

Q And isn't that precisely the type of spontaneous, irresistible breakout that you could have argued Mr. Robertson had when he's confronted now with the robbery suspect who's not doing what he was told to do, unexpectedly resists and in an impulse, bad decision in part, at least, due to his diminished mental capabilities, you don't think that would have played well with the jury?

A No. I think at that point what we're doing is we're just, we're using this idea of being victim as a defense and I don't believe that the jury would have resonated with that. My opinion of what happened on that particular night was the preplanning, in and of itself, yeah, if the person resists and Raekwon decides he wants to shoot that person -- I don't know how you can get around the fact that, look, if Raekwon has had mental health issues and outbursts over years, why did he put himself in a situation to do something like this, I don't know if the jury would sit there and vibe with this idea that somehow he should get something less like a voluntary manslaughter, for instance, right? I mean, that's kind of where we would have been going with this. I don't believe we had enough for that.

And I would not, you know, difficult cases like that require a very nuanced sort of approach. I do not, I -- ever subscribe to this idea that somehow I'm going to throw something completely outrageous up on the wall and hope that it sticks in front of this jury. So as a result of that, no, I never considered that as an

issue because I don't believe that that was something I could have argued in front of this jury.

Q You think that's too outrageous, wouldn't have stuck on the wall for the jury to know that he had these kind of learning disabilities, that that wouldn't have -- that would have, perhaps, offended them in making their decision about how culpable he was relative to his codefendants and for the actual shooting that took place?

A I think, you know, if he was -- if it was Raekwon by himself, I think I would have a better argument with that. If it was Raekwon by himself walking to the bus and this thing happens, I would have a way better argument with exactly what you're saying, but not when they're going into a convenience store, getting something to drink, everyone -- you know, somebody has an open carry and then they go and they scout out an area after having this discussion beforehand that, hey, let's go do a lick. To me, that's not something that I could argue with a straight face even with these kinds of documented issues because they are spontaneous issues. And like I said, being in a group of people going out to do a lick, I don't know, I just didn't feel that that would be something that would be a viable defense.

Q Okay. How about in sentencing? Because you didn't bring this up in mitigation with the judge in sentencing at all, why not? This is clearly mitigating, would you agree?

A I agree. I agree with that and you are correct, on that particular issue, maybe the Court should have been aware of that and I should have emphasized more of those issues during that time period. So I agree with that.

Q It's not that you just didn't emphasize it, you didn't bring it up at all at the sentencing hearing.

A Sure.

Q Do you recall that your argument at sentencing was pretty much you just submitted it to the judge because she had sat through the trial and you asked that the counts all run concurrent and that was about it, do you remem --

A That's correct.

Q Okay. Do you think that could have made a difference in the sentencing here if you had perhaps done a sentencing memorandum or filed some of these school records with the court, let the judge get a chance to look them over like she's doing now several years later, wouldn't that have been advisable to do in preparation for sentencing when your client's facing life?

A Yes. That would have been something that the Court should have been aware of.

Q And in particular, the prosecution in this case at sentencing asked for a lengthy sentence on the deadly weapon and you didn't respond to that argument at all. Do you remember that?

A No, I don't.

Q Raekwon got 20 to life for murder and then he got a consecutive 8 to 20 for the deadly weapon, so he's looking at 28 years to life. If you had brought up some of this mental health stuff, do you think that might have resulted in a little bit more lenient sentence, at least you could have been arguing for that, correct?

A I could have been arguing for that, but, I mean, what somebody will do with that information, I have no idea. But you are right, I did not argue that.

MR. OWENS: I'll pass the witness.

THE COURT: Cross-examination.

MR. CHEN: Thank you. Your Honor, just because we've already kind of

started this witness, I assume that the client has waived all attorney-client privileges for the purpose of this hearing, correct?

MR. OWENS: Yes, for purposes of the issues that we're discussing, absolutely.

THE COURT: Okay. All right. And, Mr. Robertson, you understand that, that you are waiving the attorney-client privilege as it applies to this specific hearing?

THE DEFENDANT: Yes, I understand.

THE COURT: Okay. Thank you very much.

CROSS-EXAMINATION OF MICHAEL SANFT

BY MR. CHEN:

Q Mr. Sanft, when you received Raekwon as a client I assume you met with him?

A I did.

Q And do you meet with all your clients when you're appointed or you're assigned to handle their case?

A Yes.

Q And do you start to prepare a defense with that client?

A Yes.

Q Was there -- I assume in this particular case you did the same thing, you met with Raekwon and then began to prepare a defense?

A Yes. With my investigator.

Q Okay. Was he able to help you in preparing for a defense?

A Yes.

Q Was he communicating with you in a way that you could understand?

A I never had any thought in my head that somehow Raekwon was not

able to understand or cooperate or participate with me on his defense.

Q Did he inform you if he was at the scene of the crime on the day that it happened?

A He did not.

Q All right. So he never told you, “I was not there”?

A He did not. He said that he was not there.

Q Okay. Did he say that he didn’t have any recollection of what happened that night?

A No. He said he was not there.

Q Okay. Did he ever tell you that he was off of a medication and that was making him not be aware of what was going on in this case?

A We never discussed his medication ever. He never brought it up with me as an issue.

Q All right. Now, he did get sent to competency at some point, correct?

A He did in the beginning.

Q Was that your referral for him to go?

A No. It was not.

Q Okay. So did you come on to the case after he had been to competency court?

A Yes. And I want to say it was in district court.

Q Okay.

A No, maybe it was in justice court. I can’t remember for sure. Sorry.

Q Now, I just want to have a couple -- I have a couple specific questions with regards to some of the things Mr. Owens asked you about, so in terms of going into this case, you would have -- it was a felony murder theory, was it not?

A Yes.

Q So you would have to prove that somehow he was either not part of the felony or at least that would be one of your defenses, correct?

A Correct.

Q And that's the strategy that you went with, that he wasn't part of the felony?

A That's the only strategy I have. I mean, to me it would have been great if just I could prove that he was on a bus somewhere and going somewhere else at the time it happened, which is, I believe, that was the defense he had given me, that he wasn't present, he was on a bus.

Q Did you try to investigate that any further?

A We did. We did. My investigator tried finding, through the bus company, whether or not there was any documentation for that. But, I mean, by the time I took over the case, I want to say -- I don't know how long it was after, I'm not sure what it was. But we were trying to find information that would help with his defense that he wasn't there.

Q In terms of this idea though that he was either not on medication or not understanding what was going on, to what extent could that or would that even help you in negating the *mens rea* of a felony murder case?

A Well, at that point what would happen is is that, in my head, you have an individual now who can't form the requisite *mens rea* to commit the crime if he's off of his medication. If that was the number one thing that he was saying, hey, this is my -- I'm off my medication, I don't know what's going on right now, for instance, I would had to have done something about that. I mean, it's a central issue.

Q And the fact that an individual, for instance, has an I.E.P. in school or

that they're a slow learner, is that enough in your experience to negate an entire *mens rea* defense?

A No.

Q Did he ever tell you that he was hearing any voices and that the voices made him do this?

A No.

Q And just to be clear, based upon the Supreme corridor -- Supreme Court order, I'm sorry, did he ever tell you that he had no memory of this offense?

A No. My very specific recollection of our defense was he was somewhere else when it happened. He was dropped off by his friends, his friends continued to drive around the area, he got on a bus, and he went home. That was my recollection as to what he had said had happened that night.

Q Going into trial, did you feel that you were prepared to articulate that defense?

A Well, without putting him up on the stand, absolutely. I mean, the way to do it is to challenge the fact that there was, you know, that you couldn't articulate who was who and what was what. The only eyewitness we really had was the jogger who had gone by. But the thing that we couldn't get around was the convenience store videotape prior to the robbery or the murder.

Q And is that the one where Mr. Wheeler has the open carry and your client is seen inside the convenience store?

A Right.

Q Just want to ask you a little bit about the sentencing then, I assume that this client would not be the only one that you've ever had with some type of history of either mental health issues, drugs, things like that, is that a pretty common thing

for you?

A Yes.

Q And so you have a lot of experience having those clients get sentenced within the criminal justice system I would assume?

A Yes.

Q In your experience, when a crime to this severity happens does that type of information make much of a difference on the courts?

A It depends on the audience. It depends on the court. You know, there are certain judges that will vibe a little different on something like this and there are other judges that I believe at some level with this kind of crime and the facts surrounding the crime to which they've heard during the course of the trial that would not vibe as well.

Q And so it would just really depend on the court is what you're saying?

A It depends on your audience. I mean, if you want to get a certain point across you have to understand your audience more than anything else.

Q Was there ever a time that you can remember in your representation of Raekwon that he was insisting that you go talk to his mother and that she was going to provide you anything?

A I don't recall that. I don't recall promising his mother that I would go and pick up documents from her home or contact her, but I don't remember that at all, quite honestly.

Q And as you've mentioned, even if you would have seen, for instance, the documents that were presented to you from his school records in court today, you don't find that that would have been helpful in the preparation of your defense?

A Not for the defense, no.

MR. CHEN: Okay. Thank you, Your Honor. Pass the witness.

THE COURT: Any redirect?

MR. OWENS: Nothing further. No.

THE COURT: Oh, you said "No"?

MR. OWENS: No. Sorry.

THE COURT: Okay. Thank you.

And can I excuse Mr. Sanft?

MR. OWENS: Yes.

MR. CHEN: Yes, Your Honor.

THE COURT: Okay. Thank you very much for your testimony here today.

THE WITNESS: Oh, sorry. Thank you.

THE COURT: You may step down and you are excused.

And you may call your next witness. I'm assuming you're going to call Ms. Loyd?

MR. OWENS: Yes, Erika Loyd, please.

There she is.

THE COURT: Okay. There she is.

Ms. Loyd, if you'll raise your right hand so you can be sworn by the clerk.

MS. LOYD: Yes, Your Honor.

THE COURT: Thank you.

ERIKA LOYD

[having been called as a witness and first duly sworn, testified as follows:]

THE CLERK: Can you please state and spell your first and last name for the record?

THE WITNESS: Erika, E-R-I-K-A; Loyd -- let me turn this down, I'm sorry -- Loyd, L-O-Y-D.

THE CLERK: She might get feedback because the defendant's unmuted. So we'll need him to mute.

THE COURT: Okay. Mr. Robertson, if you don't mind muting your microphone so we don't get the feedback.

THE DEFENDANT: Okay.

THE COURT: Thank you.

DIRECT EXAMINATION OF ERIKA LOYD

BY MR. OWENS:

Q Okay. Ms. Loyd, you currently reside in Texas, is that correct?

A Yes, sir.

Q And that's where you're testifying from right now?

A Yes, sir.

Q And you're able to see and hear me okay?

A Yes, sir.

Q What is your relationship with the petitioner in this case, Raekwon Robertson?

A That is my youngest son.

Q Earlier, maybe a couple, two or three weeks ago, did you send me a packet of school records for Mr. Robertson for me to use here in court today?

A Yes, sir.

Q In fact, you have a copy of those with you that I emailed back to you; is that right?

A Yes, sir.

Q And so you sent me several school records, I repackaged them, put exhibit numbers on them, filed them in court with a cover sheet, a caption that says Exhibits in Support of Evidentiary Hearing, filed on October 23rd, and that's what you got back with you right now?

A Yes, sir.

Q And those are the same documents that you sent me, you recognize the documents and your signature in fact appears on many of them; is that right?

A Of course.

Q Where did these documents come from that you sent me?

A School. Clark County -- Clark County School District.

Q And when did you obtain those records?

A Oh my gosh, that would have been while my son was incarcerated at C.C.D.C.

Q And do you know his -- who his attorney was, Michael Sanft, who just testified in this case?

A Yes, sir.

Q Did you have communication with Mr. Sanft at that time?

A Depending on what you mean by communication.

Q Well, specifically about these school records, did you have a conversation with him about getting him these school records?

A Oh, yes, sir.

Q And, in fact, that's why you went out and got the school records; is that right?

A Yes, sir, my son and I.

Q And did you -- so did your son ask you to get these --

Raekwon Robertson, did he ask you to get these school records for use in his trial?

A No.

Q Did the attorney? How did you know to go get the attorney -- the documents, I guess?

A Because I had explained to his attorney that he had mental -- that he had a mental illness and he had learning disabilities.

Q Okay. And did Mr. Sanft seem interested in that information?

A He did ask for a copy.

Q And did you ever send him the copy or did he contact you to get the copies?

A Well, actually, my eldest son and I physically had took them to his office.

Q Okay. So you did give a copy to Sanft's office not to him personally?

A Correct. He was actually kind of hard to get in contact with.

Q Okay. So tell me about your son, Raekwon's, learning disabilities. The Court's already looked somewhat at the school records. But what, as a mother, tell me about Raekwon's acting out, his impulsive behavior that might have made a difference in this trial.

A From what -- Raekwon is actually -- I know I've had a couple of occasions where Raekwon would sit, he would kind of just hit his head against the walls. Just constantly bouncing off of the wall. As far as being at home, for the most part, he was I would say a typical boy. He was -- he was active.

Q But he didn't do well in school?

A No, sir.

Q What kind of problems did he have at school?

A I couldn't keep a job with Raekwon at school because I was getting called so much to where employers got to the point to where, you know, you can't continue to leave like this. That's how the school psychologist actually got involved due to the behavior that was at school.

Q And they diagnosed Raekwon specifically with bipolar and schizophrenia; is that right?

A Bipolar for sure. The schizophrenia is something that -- well, the school, yes, let me go back, yes, with the school, yes.

Q And he was prescribed some medication throughout his school years, were you responsible for giving that to him?

A Yes, sir.

Q And did you?

A I did in the beginning and then I stopped.

Q And why was that?

A The medication that they had my son at seven years old was Abilify, 10 milligram, my son was like a zombie, dry mouth, no appetite. He would just sit in the middle of a floor.

Q And so because you didn't want him being a zombie you saw to it that he didn't take that Abilify anymore; is that right?

A That is correct, sir.

Q But then the consequence is that he had acting out problems at school?

A Exactly, yes, sir.

Q Is Raekwon's mental health history something you think the jury should have heard about in his murder trial?

A Yes, sir, I do.

Q And why is that? How does -- how does his mental condition affect his culpability for a crime like murder?

A I feel like because of just of thinking and not being able to have the ability to understand what you're doing. On paperwork it clearly, I mean, he's not at a level that he should have -- should have been.

Q And what about at sentencing, is this information something that you think the sentencing judge should have had when deciding how many years to send your son to prison for?

A Yes, sir, I do.

MR. OWENS: I'll pass the witness.

THE COURT: Cross?

MR. CHEN: No questions for this witness. Thank you.

THE COURT: Okay. Ms. Loyd, thank you very much for your testimony.

Does -- do you have any further witnesses?

MR. OWENS: I do not.

THE COURT: Okay. Do you want to be heard in argument?

MR. OWENS: Sure. Judge, we're here on remand today from appeal on two of several issues that I raised. Specifically, the court -- the appellate court wanted to have testimony on the defendant's mental health issues, his learning disability, things we'd alleged in the petition that were not introduced at trial, either during the guilt phase or the sentencing phase.

I do understand that at guilt phase it's a little more difficult to make an argument that it would have made a difference to the jury. It was felony murder, but it does appear that the actions here of the murder were impulsive. It may have been planned and thought out to carry a gun and to do a robbery or some sort of home

burglary, but you don't know. In a murder case like this you want to find one juror who's going to find some sort of doubt in their mind as to the elements and so there may have been something with the robbery itself or with the felony murder and the specific intent. How well did Raekwon understand these people that he's associated with and what they were going to do and the consequences of going out with and doing an armed robbery that death can result very quickly and, specifically, the spontaneity of shooting the victim when he resisted, that seems directly attributable to his mental disease.

He's capable and functional in many aspects of life, but it's something the jury should have been made aware of then we wouldn't have to be here today arguing would it have made a difference in their mind. So I think it could have been used at guilt to reduce the severity of the charges, certainly at sentencing. Even Mr. Sanft admitted it should have been admitted at sentencing. This is the type of evidence that would be run up the flag pole.

Even if Your Honor was somewhat familiar with the competency reports and maybe some of this information was in the case file, it wasn't in there to the degree and extent that has been presented here today and through these documents. It certainly should have been referenced during the sentencing hearing and now we're in the kind of weird position of wondering would this have changed your mind, I guess, you were the sentencing judge. Would this have made a difference?

And it's kind of hard to unring that bell now so many years later, but maybe you wouldn't have given the 8 to 20 on the deadly weapon. Maybe if this had been emphasized in sentencing it would have been reduced a little bit. The 28 to life is a hefty sentence for this young man and it's in line with someone who's very

malicious and evil intent who has no mental illness. So where's the consideration for this Raekwon Robertson who was at a disadvantage compared to everyone else?

So it's something that should have been taken into account that I think the jurors and sentencing judges would have expected and the appellate court certainly expected this sort of thing. It should have been taken into account and I think it could have been to -- probably would have been to Mr. Robertson's advantage in some way to mitigate something somewhere to lessen the sentence or the counts and I'll submit it.

THE COURT: Mr. Chen?

MR. CHEN: Thank you, Your Honor. Because this is a Supreme Court remand, I would just refer to the Court of Appeals remand where it says that Robertson alleged three things, and I would ask that the Court find that based upon this evidentiary hearing none of these three things has been shown, one, that was he was off his mental health medications at the time of the offense; two, when he was off his meds he would hear voices and suffer from paranoia and blackouts; and, three, he had no memory of the offense. Those weren't proven by even a preponderance of evidence.

The fact that he had some learning disabilities is perhaps true, but the medications, there was nothing about that especially as it relates to this offense. And as Mr. Sanft said, he had conversations with Raekwon and Raekwon was able to tell him that he wasn't even at the place at the time. So I don't think Mr. Sanft can be found objectively -- his performance can be objectively unreasonable when he's had a communication with the defendant and the defendant says he wasn't there.

THE COURT: Right. And wouldn't this be inconsistent with his strategy?

Because if you're contending it happened because of these issues, then you're admitting he's there and he participated.

MR. CHEN: Correct, Judge. And that was one -- the reason that I asked Mr. Sanft the question, Did he ever tell you that he was at the place or that he wasn't at the place, and Mr. Sanft affirmatively said, I was -- he was insistent that he was never even at the scene of the crime. So, therefore, it really wouldn't help in terms of any argument from Mr. Sanft. And as this Court knows, anything that's been shown today as well would not have changed the outcome based upon the jury instructions and based upon the law of what it takes to commit a felony murder. So that leads -- so basically there's nothing objectively unreasonable about Mr. -- what Mr. Sanft did.

It takes us to the second part which has to do with the sentencing. Ultimately, again, those records, perhaps, they could have been shown by Mr. Sanft, but based upon the heinous acture [*sic*] of this crime and based upon the evidence that was eventually found, I think that the -- there wouldn't have been a difference had this Court been aware of these extra records. So based upon that, Your Honor, I would ask that you make those findings and that this petition be denied.

THE COURT: Mr. Owens?

MR. OWENS: Well, the fact that he was off his medications at the time and that he would hear voices, suffer from paranoia and blackouts and had no memory of the offense, that's all in the competency reports that have been marked and admitted. So it is in the record. It's something that Mr. Sanft could have used.

As far as inconsistent strategies go, I do understand that and there are some people that may say you just pick one strategy and you go with it, but in a case like this where you had a codefendant who came in and said that Raekwon

was actually there and fired a gun, you can't just marry yourself to the not-there defense. In cross-examining the codefendant, you've got to go with their version of it: You're saying that Raekwon was there, well, if he was there are you aware that he had these mental illnesses. This is not the sort of behavior that my client would have done if he had been there.

So there's a way to argue alternatively. Attorneys do it all the time without conceding a point you can still buttress your defense on several fronts without having blinders on with the one defense that the jury may not buy and clearly they didn't buy it here.

And I see my client waving at me. I'm done with my argument, but I think he wants to talk to me. I don't --

THE COURT: You want to talk to your attorney?

THE RECORDER: Let me unmute.

THE CLERK: He's muted, Judge, one second.

THE COURT: I think you're muted, so you have to unmute your microphone.

THE RECORDER: He's unmuted now.

THE COURT: Okay.

THE DEFENDANT: Okay. Can you hear me now?

THE COURT: Did you want to talk Mr. Owens?

THE DEFENDANT: I just wanted to address something to the Court because something that the prosecutor said kind of stood out to me. He said -- he stated that I can comprehend, I can talk; and, yes, I can talk; yes, yes, I can be normal, but that don't -- that doesn't, you know, affect what goes on in my head. I still have things going in my head. Yes, I can have a full-blown conversation; yes, I can do those type of things. But what goes on in my head, I know that it's not right, and I just

want the Court to know, you know, just because somebody can have a full-blown conversation, just because he can dress nice, just because he can cut his hair, things of that nature, doesn't mean that there's not nothing going on inside his head.

THE COURT: Okay.

MR. OWENS: Thank you for -- for considering --

THE COURT: Thank you.

MR. OWENS: -- Mr. Robertson's argument on that. I don't think I have any other points to make. So I'll submit it.

THE COURT: Anything else?

MR. CHEN: Nothing.

THE COURT: Okay. Then I will issue an order, thank you very much.

MR. CHEN: Thank you.

MR. OWENS: Thank you, Judge.

THE COURT: And we'll see you next time.

MR. OWENS: I'll be in touch, Raekwon. She's taking it under advisement. Okay?

THE DEFENDANT: All right.

PROCEEDING CONCLUDED AT 9:56 A.M.

* * * * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio-video recording of this proceeding in the above-entitled case.

Sara Richardson

SARA RICHARDSON
Court Recorder/Transcriber

Electronically Filed
12/6/2023 9:12 AM
Steven D. Grierson
CLERK OF THE COURT

NEOJ

DISTRICT COURT
CLARK COUNTY, NEVADA

RAEKWON ROBERTSON,

Petitioner,

vs.

STATE OF NEVADA,

Respondent,

Case No: A-20-823892-W

Dept. No: XII

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that on December 1, 2023, the court entered a decision or order in this matter, a true and correct copy of which is attached to this notice.

You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is mailed to you. This notice was mailed on December 6, 2023.

STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Cierra Borum
Cierra Borum, Deputy Clerk

CERTIFICATE OF E-SERVICE / MAILING

I hereby certify that on this 6 day of December 2023, I served a copy of this Notice of Entry on the following:

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

☑ The United States mail addressed as follows:

Raekwon Robertson # 1235056
P.O. Box 1989
Ely, NV 89301

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

/s/ Cierra Borum
Cierra Borum, Deputy Clerk

Electronically Filed
12/01/2023 4:14 PM
CLERK OF THE COURT

ORDR

DISTRICT COURT
CLARK COUNTY, NEVADA

RAEKWON ROBERTSON, Petitioner, vs. STATE OF NEVADA, Respondent.	Case No.: A-20-823892-W DEPT. No.: XII

ORDER REGARDING EVIDENTIARY HEARING ON PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

DATE OF HEARING: 11/3/23
TIME OF HEARING: 9:00 AM

The court conducted an evidentiary hearing on November 3, 2023 pursuant to an Order Affirming In Part, Reversing In Part and Remanding dated August 7, 2023. (*See* Order No. 85932-COA, August 7, 2023, In the Court of Appeals of the State of Nevada). The State of Nevada was represented by Mr. Alex Chen, Esq., and Mr. Robertson was present, appearing via Bluejeans and represented by Mr. Steve Owens, Esq.

The court limited the hearing to whether counsel for Mr. Robertson was ineffective at the time of trial for failing to investigate petitioner's mental health conditions or present evidence of them during the trial to demonstrate he did not have the specific intent to commit the crimes. The Petitioner alleged (1) he was off his mental health medications at the time of the offenses; (2) when he was off his medication, he would hear voices and suffer from paranoia and blackouts; and (3) he had no memory of the offense. Further, petitioner contends his counsel was ineffective for failing to argue for a specific sentence and present to the court his mental health issues or other mitigating evidence during the sentencing hearing.

To demonstrate ineffective assistance of counsel, Petitioner must show counsel's performance was deficient in that it fell below an objective standard of reasonableness. Further, petitioner must demonstrate prejudice resulted in that there was a reasonable probability of a different outcome absent counsel's errors. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984; *Warden v. Lyons*, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in *Strickland*). Both components must be shown. The court is not required to approach the inquiry in the same order or even to address both components of the inquiry if petitioner makes an insufficient showing on one. *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069.

Petitioner called two witnesses to testify and introduced his mental health and school district records. 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.

Mr. Robertson was tried with a co-defendant, Mr. Wheeler. The defense at the time of trial was that the State of Nevada could not prove petitioner was present at the time of the robbery and responsible for the death of the victim by proof beyond a reasonable doubt. Mr. Sanft attempted to undermine the certainty of petitioner's participation in the robbery/ murder. The defense argued Mr. Robinson –the testifying co-defendant-was not credible and should not be believed. He was motivated by his desire to avoid adult custody and responsibility for the death of the victim. Mr. Sanft cast doubt on a photographic depiction of petitioner. From the start Mr. Sanft clearly sought to establish there was insufficient evidence to convict petitioner because he was not in fact responsible for the murder of Mr.

Valenzuela. Mr. Sanft testified that Mr. Robertson participated in the preparation for trial and he never gave his counsel the impression he (petitioner) suffered from any significant mental health issues that were relevant to the trial proceedings.

Raising Petitioner's mental health issues to disprove specific intent would be inconsistent with defense counsel's theory at trial. It would further be inconsistent with the representations made to Mr. Sanft by the petitioner, who indicated he was not there. Petitioner's counsel sought to establish the state could not prove Mr. Robertson was present at the scene. Raising the mental health issues would be a tactic admission the petitioner was present during the robbery /murder. Petitioner's counsel acted reasonably.

Petitioner further is critical of trial counsel for not presenting the mental health issues and school records of petitioner's emotional, threatening behavior in school. Mr. Robertson contends these records would have been mitigation evidence presented to the court and he may have received a less severe sentence.

The underlying robbery/murder was not a spontaneous event based on opportunity. The evidence presented at trial indicated the robbery was a premeditated plan. The state introduced text messages wherein Petitioner sought the participation of his co-defendant's to "hit a house tonight. " All four co-defendants were together at a convenience store shortly before the murder occurred. Petitioner's co-defendant, Mr. Wheeler can be seen on video surveillance open carrying a firearm. The state alleged thereafter the four men drove to Dewey and Lindell in Lofton-Robinson (Co-defendant) white mercury Grand Marquis. The four men were seen loitering around the area by a jogger who made a mental note of the license plate of the vehicle. Shortly after midnight Gabriel Valenzuela, a young nursing student returned to his home. He retrieved the family's mail from the mailbox and walked passed the group of men on his way back to his house. Petitioner and his co-defendants demanded the victim turn over all his property. The victim was then shot three times in the head and torso. All four left the scene without taking any property from the victim.

Petitioner's counsel was not ineffective in failing to raise petitioner's mental health issues and/or petitioner's school records and the emotional problems presented in the

records. Counsel made reasonable strategic decisions based on the facts and circumstances presented at trial and based on petitioner's representations he was not present and was not the shooter. The court is not required to second guess reasoned choices between trial tactics. Counsel is not required to raise every issue or present inconsistent theories of defense to protect him against allegations of inadequacy

Petitioner further contends his counsel was ineffective at sentencing. He contends counsel was ineffective for failing to argue a specific sentence and present to the court his mental health issues or other mitigating evidence. Petitioner contends that had the court heard about his mental health struggles and reviewed his school records, his sentence would not have been so harsh.

Prior to the commencement of jury selection, petitioner signed a Stipulation and Order waiving his right to a penalty hearing if convicted of first degree murder. *(See* Stipulation and Order filed February 11, 2020.) He agreed that should the jury return a verdict of guilty on any offense, including First Degree Murder; the parties hereby waive the penalty hearing before the jury as normally required under NRS 175.552(1) (a). The parties agreed any sentence on any charge for which the defendant may be convicted would be imposed by the court. *Id.*

To establish ineffectiveness in this context, the inquiry must focus on counsel's performance as a whole. *Kirksey v. State,* 112 Nev. 980, 998, 923 P.2d 1102 (1996). Even if petitioner can demonstrate his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice. He must show a reasonable probability that the result would have been different but for counsel's errors. *McNelton v. State,* 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999). A reasonable probability is a probability sufficient to undermine the confidence in the outcome. *Id.* (citing *Strickland,* 466 U.S. at 694, 104 S. Ct. at 2068).

The court permitted both counsel and the petitioner to speak prior to the imposition of sentence. Neither offered mitigation or other evidence. Counsel stated:

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

> this, Mr. Robertson is intent on filing an appeal, is intent on going forward with that aspect of it. I believe that ultimately what we have here is a situation where Mr. Robertson's in a position where the reason why he's not talking to the court or saying anything to the court is because he wants to reserve that—that right.

See Sentencing Transcript at 5-6.

Petitioner's mental health issues and other evidence contained in the school records could have been raised at the sentencing hearing. *See* NRS 175.552(3).Mr. Sanft, Esq. conceded this fact at the evidentiary hearing. However, even if that amounts to ineffectiveness on behalf of Mr. Sanft, petitioner failed to establish the requisite prejudice for a valid ineffective assistance of counsel claim. Even if the records were presented and his mental health issues presented to the court, there is not a reasonable probability of a different outcome more favorable to petitioner.

The sentencing court heard all the evidence presented during the trial. The state introduced evidence that petitioner and his three accomplices got together on August 8, 2017, with the intent to "hit a house". TT, day 3 at 24. The accomplices drove to a neighborhood surveilling the area until they decided upon a victim. All but one of the accomplices was carrying firearms. The court heard evidence of how the group decided upon a plan to rob Gabriel Valenzuela, a young nursing student, and how they discharged multiple bullets into the victim and left him to die on the driveway without taking any of his property. Mr. Robinson testified that petitioner was the first one to fire on the victim with a .22 caliber gun. The victim's wounds included a gunshot wound to his abdomen from a .22 caliber gun. The petitioner was the only person who carried a .22 caliber firearm on the night of the murder and the police recovered a .22 caliber gun with petitioner's DNA on it from his home. The bullet recovered from the victim's abdomen at autopsy was too damaged to be matched to the firearm recovered from petitioner's home. However, the gun could not be eliminated as the firearm used. Moreover, ballistics evidence matched petitioner's firearm to a cartridge case found at the crime scene.

The victim's mother provided a devastating victim impact statement. She testified about the horrible suffering she endured since the death of her only child.

The petitioner could have received only three possible sentences all of which carried a 20 year minimum prior to parole eligibility. *See* NRS 200.030(4) (b). The jury found the murder was perpetrated with the use of a deadly weapon, and therefore, the court was required to impose a consecutive sentence of 1-20 years. *See* NRS 193.165. In determining the appropriate sentence the court must consider the facts and circumstances of the crime and the criminal history of the defendant. The court shall also consider the impact of the crime on any victim, and any other mitigating factors or relevant information.

The state presented a very strong case against the petitioner. The robbery and murder was a very violent event perpetrated by four young men carrying firearms looking to "hit a house". It was planned and premeditated. Three of the co-defendants used a firearm and the state presented overwhelming evidence the petitioner was a shooter. The victim's mother testified at the hearing and provided a devastating victim impact statement about her horrible suffering since the death of her only child.

Based on the foregoing, Mr. Sanft acted reasonably at the sentencing hearing especially in light of his clients desire to maintain his innocence and proceed with the appellate process. Even if counsel representation was ineffective, petitioner failed to show a reasonable probability that offering evidence regarding his mental health and school records would have resulted in a different outcome. Accordingly, the claim must be denied.

IT IS HEREBY ORDERD, ADJUDGED AND DECREED, that the Petition for Writ of Habeas Corpus (post-conviction) is denied.

DATED THIS 1ST DAY OF DECEMBER, 2023.

Dated this 1st day of December, 2023

350 DD6 FD4A 0149
Michelle Leavitt
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify on the date filed, this document was electronically served to the email addresses and/or by Fax transmission or by standard mail to:

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Steve Owens, Esq.
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Pamela Osterman

Pamela Osterman
Judicial Executive Assistant
to the Honorable Michelle Leavitt
District Court Department XII

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

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

AUTOMATED CERTIFICATE OF SERVICE

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

Service Date: 12/1/2023

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DISTRICT COURT
CLARK COUNTY, NEVADA

RAEKWON ROBERTSON, Petitioner, vs. STATE OF NEVADA. Respondent.	CASE NO.: A-20-823892-W DEPT NO.: XII **NOTICE OF APPEAL**

TO: THE STATE OF NEVADA, Respondent.

TO: DEPARTMENT XII OF EIGHTH JUDICIAL DISTRICT COURT

Notice is hereby given that RAEKWON ROBERTSON, Petitioner in the above-entitled action, appeals to the Nevada Supreme Court from the Order Regarding Evidentiary Hearing on Petition for Writ of habeas Corpus (Post-Conviction), filed on December 1, 2023.

DATED this 19th day of December, 2023.

/s/ Steven S. Owens, Esq.
STEVEN S. OWENS, ESQ.
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Attorney for Petitioner
RAEKWON ROBERTSON

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of December, 2023, I served a true and correct copy of the foregoing document entitled **NOTICE OF APPEAL** to the Clark County District Attorney's Office by sending a copy via electronic mail to:

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

BY:

/s/ Steven S. Owens, Esq.
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Attorney for Petitioner
RAEKWON ROBERTSON

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 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.