IN THE SUPREME COURT OF THE STATE OF NEVADA

RAEKWON ROBERTSON,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 87811

RESPONDENT'S ANSWERING BRIEF

Appeal from the Denial of a Postconviction Petition for Writ of Habeas Corpus
Eighth Judicial District Court, Clark County

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

Counsel for Appellant

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

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

Counsel for Respondent

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ROUTING STATEMENT

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

STATEMENT OF THE ISSUE

I. The district court properly held that counsel was not ineffective for failing to investigate mental health issues or presenting them at sentencing.

STATEMENT OF THE CASE

On August 7, 2023, the Court of Appeals affirmed in part, and reversed in part the district court's denial of Raekwon Robertson's (hereinafter "Appellant") postconviction petition for writ of habeas corpus. The Court of Appeals determined that the district court erred in denying Appellant's petition without first conducting

an evidentiary hearing on two of Appellant's claims. The first issue that the Court of Appeals directed the district court to examine was regarding an allegation that Appellant's counsel was ineffective for failing to investigate his mental health conditions to demonstrate that he did not have the specific intent required to commit the crimes. The second topic of the evidentiary hearing was to determine if Appellant's counsel was ineffective for failing to present mitigation regarding his mental health issues. The other claims that Appellant raised in his postconviction petition were all affirmed by the Court of Appeals.

Pursuant to the partial remand, an evidentiary hearing was conducted by the district court on November 3, 2023. Appellant called two witnesses to testify at the evidentiary hearing. Appellant's trial counsel, Michael Sanft, testified first. His testimony was then followed by Erika Loyd, Appellant's mother. 8 AA 1935.

Mr. Sanft testified that he was aware of the documents that related to Appellant's mental health issues and learning difficulties, but that he did not that those issues were proper for the defense strategy. From his interactions with Appellant, he never had any concerns about his behavior. Mr. Sanft explained that the problem with this case was that the crime that led to the murder was preplanned. 8 AA 1947. The defense strategy was not that Appellant could not understand the nature of his actions, but instead that he was not there when the shooting occurred. 8 AA 1947. Mr. Sanft did not notice that Appellant had an inability to control himself

or that he had any type of mental defect that would negate his criminal culpability. Id.

Mr. Sanft further testified that Appellant was capable of aiding and preparing for a defense. 8 AA 1951. Appellant could communicate with his counsel without issue. Id. Appellant specifically informed Mr. Sanft that he was not present at the time of the murder. 8 AA 1952. Appellant told his counsel that he was on a bus when the victim was killed. 8 AA 1953. Appellant never told Mr. Sanft that he was on medication that was affecting his memory. 8 AA 1952. Mr. Sanft had his investigator try to locate evidence proving that Appellant was on a bus but his efforts were unsuccessful. 8 AA 1953. Mr. Sanft testified that Appellant told him he was dropped off by his friends and got on a bus and went home. 8 AA 1954.

Mr. Sanft further testified that Appellant never told him that he would hear voices. 8 AA 1954. Appellant never explained that his mental health was a contributing factor to his commission of the crime. Id. Furthermore, Mr. Sanft explained that the fact Appellant had an I.E.P. in school would be insufficient to argue that he lacked any criminal culpability. 8 AA 1953.

Mr. Sanft testified that Appellant never told him that he was a slow learner or that he did not understand the crimes. Id. Appellant never told him that voices made him carry out the crimes. 8 AA 1954.

With regards to the sentencing, Mr. Sanft explained that courts generally look

to the severity of crimes when sentencing and that mental health issues can, but do not always, play a significant role. 8 AA 1955. Mr. Sanft did not have any recollection of promising to go to Appellant's mother to pick up documents related to his school performance or any other potential mental health issues. However, Mr. Sanft reiterated that it would not have aided in the preparation of his defense. Id.

Appellant's mother, Erika Loyd, also testified at the evidentiary hearing. Ms. Loyd testified that she obtained records from the Clark County School District because she was concerned about her son's mental illness and learning disabilities. 8 AA 1959. Ms. Loyd stated that her son had been diagnosed as bipolar and possibly schizophrenia. 8 AA 1960. She was upset that this information was not presented to the jury at her son's murder trial or his sentencing. 8 AA 1960-1961. The district court then took the matter under advisement to issue a written order.

On December 1, 2023, the district court issued an order denying relief. The district court explained that Mr. Sanft's strategy at trial was to undermine the State's theory that Appellant was a participant in the robbery and that there was insufficient evidence to convict Appellant. 8 AA 1969. This was a reasonable strategy especially considering that Appellant did not inform Mr. Sanft of any significant mental health issues that would be relevant to the trial. Id. Presenting a theory of a lack of intent based on mental health issues would have been inconsistent with Appellant telling Mr. Sanft that he was not present at the time of the robbery/murder. 8 AA 1970.

Thus, the district court found that Mr. Sanft acted reasonably. Id.

The district court also addressed the fact that Mr. Sanft did not present school and mental health records at sentencing. The district court gave both counsel and Appellant an opportunity to speak prior to the rendition of sentence. 8 AA 1971. Mr. Sanft indicated that because Appellant intended to appeal his sentence, neither was going to speak. 8 AA 1971-1972. The district court determined that Mr. Sanft's strategy at trial, based upon his client's desire to maintain his innocence, was objectively reasonable. 8 AA 1973.

While information regarding the records could have been raised at sentencing, the district court's order stated that Appellant still failed to establish prejudice. 8 AA 1972. The district court was familiar with all of the evidence presented at trial, and any records related to Appellant's school deficiencies or mental health were insufficient to show that a different sentence would have been rendered.

SUMMARY OF THE ARGUMENT

The district court properly held an evidentiary hearing in this case, which included the testimony of Appellant's prior attorney and his mother. Based upon the testimony of the witnesses, the district court found that Appellant's allegations that his attorney failed to investigate and present his mental health issues at trial was inconsistent with Appellant's explanation to his counsel that he was not present at the time of the robbery and murder.

Furthermore, Appellant's counsel to not introduce his mental health records at sentencing was consistent with the defense strategy arguing that Appellant was not present at the time of the crime. Moreover, even if counsel could have presented Appellant's mental health records at sentencing, the district court did not abuse its discretion in determining that such information would not have altered the outcome of his sentencing.

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.

I. INEFFECTIVE ASSISTANCE OF COUNSEL STANDARD OF REVIEW

Appellant argues that his attorney was ineffective for failing to put his lack of aptitude and mental health records at the forefront of his murder trial in order to

negate his criminal culpability. Any notion of this argument was dispelled at the evidentiary hearing where Appellant's counsel stated, and the district court found as a fact, that Appellant told his attorney that he was not present at the time of the murder. Therefore, the strategy was to show that the State lacked proof that Appellant was present at the time the crimes committed. Admitting that he was there, but suffered from mental health issues, would have been contrary to the defense strategy.

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.

1. Presentation of mental health issues was inconsistent with the trial strategy

The Court of Appeals Order Reversing and Remanding for an evidentiary hearing was clear as to what issues the district court needed to examine. The first

issue was whether counsel failed to investigate and present evidence that Appellant lacked the mens rea to commit the crimes in his case. The district court found that Mr. Sanft was not required to further investigate this issue because Appellant clearly told his attorney that he was not present at the time of the robbery and murder. The district court correctly noted that raising issues pertaining to Appellant's mental health issues would have been inconsistent with the trial strategy. 8 AA 1970. As such, Appellant's counsel acted reasonably in not further investigating this claim or presenting the information at trial. The district court did not abuse its discretion in coming to this conclusion, and this Court should affirm the denial Appellant's petition on this ground.

2. The decision not to present mental health issues at sentencing was reasonable and would not have altered the outcome

The district court also did not err in concluding that counsel was not ineffective for not presenting mental health and school records at sentencing. The district court found that counsel was reasonable in not going into details at sentencing because Appellant was maintaining his innocence and intended to appeal. To present Appellant's records would have been inconsistent with the strategy that Appellant wished to maintain his innocence.

However even if there were any shortcomings in not presenting the records, the district court found that such records would not have altered the outcome of the sentence. The district court explained the premeditation behind the robbery which

led to the murder in this case. The district court was familiar with the specific evidence in this case, and it determined the State presented a very strong case against Appellant. 8 AA 1973. Moreover, the victim's mother provided a devastating impact statement. Id. Based on the evidence of the trial, and the victim impact testimony, the district court held that the records would not have resulted in a different outcome. As such, the district court did not err in finding that the failure to present records was objectively unreasonable and would have resulted in a better sentence.

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 6th day of March, 2024.

Respectfully submitted,

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

BY */s/ Alexander Chen*
ALEXANDER CHEN
Chief Deputy District Attorney
Nevada Bar #010539
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

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 2,984 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 6th day of March, 2024.

Respectfully submitted,

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

BY */s/ Alexander Chen*
ALEXANDER CHEN
Chief Deputy District Attorney
Nevada Bar #010539
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on March 6, 2024. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD
Nevada Attorney General

STEVEN S. OWENS, ESQ.
Counsel for Appellant

ALEXANDER CHEN
Chief Deputy District Attorney

/s/ E. Davis
Employee, Clark County
District Attorney's Office

AC//ed