**IN THE SUPREME COURT OF THE STATE OF NEVADA**



RAEKWON ROBERTSON,

Appellant,

v.

STATE OF NEVADA,

Respondent.

CASE NO: 87811

# APPELLANT'S REPLY BRIEF

## Appeal From Denial of Post-Conviction Habeas Petition

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

Counsel for Appellant

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

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

Counsel for Respondent

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## 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 19th day of March, 2024.

*/s/ Steven S. Owens*

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

Attorney for Appellant

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## ARGUMENT

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

The State reasons that because Appellant told his attorney that he was not present at the time of the murder, it was a reasonable strategy for defense counsel to pursue a theory of insufficient evidence of Appellant's identity as a perpetrator, to the exclusion of any other defense such as mental illness that would admit that Appellant was there. 8 AA 1970. This is a false choice fallacy. Presenting evidence of Appellant's mental health conditions to show the improbability of him forming any of the specific intents required for the crimes alleged does not require making a concession that Appellant was present and participated in the murder. Nor would it create an inconsistency such as when counsel concedes the defendant's participation in a crime contrary to their own client's testimony. See *Jones v. State*, 110 Nev. 730, 877 P.2d 1052 (1994). Challenging or questioning each element of the State's case is not "inconsistent" in the present case where, Appellant did not testify, no affirmative defense was raised, and no defense witnesses or evidence were presented. So, presenting mental illness evidence would not have been "inconsistent" with anything else counsel was trying to do.

The State and the district court appear to shift responsibility for the defense theory to Appellant and blame him for not informing his counsel of his own mental

health problems. Just because Appellant told his counsel that he was not present for the crime, counsel was in nowise limited to that theory and certainly was not absolved from investigating and presenting any other theory. In fact, Appellant had no objection to his attorney presenting his mental health history and mental state as factors in his defense. 8 AA 1941. It is counsel's duty to investigate and make such reasonable strategy decisions, not the client's responsibility to do so. Relying exclusively on a schizophrenic and bipolar client to determine the one and only theory of defense that counsel will pursue is an abdication of the legal role and the epitome of deficient performance. Especially because Appellant's alibi about being elsewhere on a bus at the time of the murder did not pan out in the investigation and a co-defendant would be testifying that Appellant was present and participated in the murder, continuing to adhere only to an "I-was-not-there" defense was demonstrably unreasonable. 8 AA 1953.

Appellant's serious mental health conditions were not hidden from counsel nor did they require extensive investigation to develop. Even if Appellant may have outwardly appeared to be mentally normal, his competency had been raised in court and counsel admitted that he had the competency reports of Drs. Paglini and Kapel. 8 AA 1940. Those reports document Appellant's schizophrenia, bipolar disorder, paranoia, blackouts lack of memory of the offense, and his being off his medications at the time of the offense. *Id*. Further, counsel had personally spoken to Appellant's

mother, Erika Loyd, and reviewed her voluntary statement to police which contained much of the same information. 8 AA 1943-4. Yet counsel testified he was unaware of Appellant being off his medication and had never seen the school records at all despite Appellant's family having hand-delivered them to his office. *Id*.; 8 AA 1959. Counsel's awareness of a mental illness defense in this case did not depend upon Appellant personally informing counsel about it, because it was already self-evident from the most cursory of reviews of the existing case file.

Finally, the district court concluded that the robbery/murder in this case was not a spontaneous crime of opportunity, but was part of a premeditated plan. 8 AA 1970. This is contrary to the facts from trial. In its opening statement to the jury, the prosecutor told the jury, "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 [emphasis added]; see also 5 AA 1005-6. No doubt a crime against property such as a Burglary ("hit a house") was pre-planned that night, but the resulting Robbery and Murder were crimes of opportunity that presented themselves when defendants saw Gabrielle Valenzuela pull into his driveway and check his mail. 4 AA 991-1000; 5 AA 1001-6; 6 AA 1383-4. Once shots were fired, the defendants fled without taking any of Valenzuela's property reinforcing that the discharge of the firearms was spontaneous, unexpected, and not part of any preplanning. 5 AA 1007. Despite habeas counsel's testimony that he

believed the crime was preplanned, counsel admitted that the murder itself was "spontaneous." 8 AA 1947-9. Therefore, evidence of Appellant's mental health conditions and lack of impulse control would have helped undermine the likelihood that he had acted with any kind of specific intent as required for conviction of the offenses charged. The judge's finding to the contrary is not supported by the facts or the law.

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

The State argues it was reasonable for counsel not to present Appellant's mental health and school records at sentencing because it would have been inconsistent with the strategy of maintaining Appellant's innocence and his desire to appeal. However, deficient performance of counsel by definition will always be "inconsistent" with reasonable standards of professional conduct. Simply labeling counsel's performance as "strategic" and everything else as "inconsistent" does not insulate it from review for reasonableness under the circumstances. If it truly was counsel's strategy to sit on his hands at sentencing and omit important mitigation under the false belief that such was necessary in order to maintain innocence and effectuate an appeal, that would be per se deficient performance because it is contrary to the law. There is no such feigned "inconsistency" in this case and

counsel was deficient for not presenting and arguing readily available mitigation evidence at sentencing.

In the Order disposing of this issue, the judge found that Appellant had waived a jury at the penalty hearing and the judge believed counsel had suggested no mitigating evidence or argument would be presented because Appellant was reserving his right to appeal. 8 AA 1971-2. It is true that Appellant signed a stipulation to the effect that in the event of a first degree murder conviction, that he was waiving his right to have the jury make the sentencing determination and that the court would sentence him instead. 1 AA 115. But this does not mean that Appellant was waiving his right to a fair sentencing hearing where mitigation evidence would be considered. All it means is that Appellant consented to have the judge rather than the jury make that determination. Likewise, maintaining one's innocence and desiring to appeal the jury's finding of guilt, cannot be construed as waiving the right to have the judge consider mitigating factors in pronouncing a fair sentence. Just because Appellant did not personally address the judge at sentencing and argue his own mitigation, does not mean that counsel was released from his obligation to do so. There was no such express and knowing waiver in this case that would excuse counsel from presenting and arguing mitigation at sentencing on Appellant's behalf. See e.g., *Kirksey v. State*, 112 Nev. 980, 923 P.2d 1102 (1996).

At the evidentiary hearing, trial counsel Michael Sanft did not rely upon any feigned excuse of a waiver by his client or the need to appeal as the reasons for omitting mitigation evidence at sentencing. Instead, counsel conceded he was not fully aware of all the mitigating circumstances of his client and should have presented it to the judge at the sentencing hearing. 8 AA 1949-50. This constitutes deficient performance and the district court erred in finding otherwise.

As to prejudice, the district court's analysis focuses almost exclusively on the overwhelming evidence of guilt against Appellant and the supposed premeditation and planning involved. 8 AA 1972-3. Appellant has already demonstrated in the argument above that while some kind of criminality was clearly planned that night, the robbery itself was a crime of opportunity and the killing of the victim was unexpected and unintended. Nowhere in the judge's analysis of prejudice is the significant mitigation evidence of Appellant's mental conditions mentioned or considered. *Id*. The specific intent element of premeditation and the characterization of the entire crime as pre-planned which the judge found so compelling, is particularly mitigated by knowledge that Appellant is bipolar and schizophrenic and was not taking the medications he needed to control his behavior. His relative culpability and need for punishment is somewhat diminished by his mental difficulties, yet the judge gave no consideration to it at all in the prejudice analysis. When, as in the instant case, judges have sentencing discretion, possession

of the fullest information possible regarding the defendant's life and characteristics is essential to the selection of an appropriate sentence. *Lockett v. Ohio*, 438 U.S. 586, 603, 98 S.Ct. 2954, 2964 (1978). A sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence. *Skipper v. South Carolina*, 476 U.S. 1, 4, 106 S.Ct. 1669, 1670 (1986).

Counsel' failure to present and argue mitigating evidence on Appellant's behalf was error serious enough to abrogate his Sixth Amendment right to counsel. Because of the gravity and sheer quantity of evidence omitted by counsel, there exists a reasonable probability that, absent counsel's errors, the sentence would have been different. *Wilson v. State*, 105 Nev. 110, 771 P.2d 583 (1989). Nowhere in her Order does the judge justify a maximum sentence on the deadly weapon enhancement of 8 to 20 years nor explain how that would have still been warranted and imposed in view of the significant mitigating evidence. Nor does the judge consider whether the need for a life tail, as opposed to a term of years, was still appropriate once the new mitigation evidence is considered. That is because the judge simply did not consider any of the mitigation evidence and so the analysis is flawed.

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 Robertson's unique and personal circumstances. Appellant's co-defendants all received sentences far less severe. 7 AA 1659-65. The district court's factual findings are not entitled to deference as they are not supported by substantial evidence and are clearly wrong as demonstrated by the record. Correct application of the law demands consideration of Appellant's significant mitigation evidence to conclude that the outcome of the case would have been different in undermining the specific intent element of the crime charged and mitigating the gravity of the sentence imposed.

## 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 19th day of March, 2024.

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

Attorney for Appellant

## CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 1,824 words and 8 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 19th day of March, 2024.

*/s/ Steven S. Owens*

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

Attorney for Appellant

## CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on March 19, 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.