



**CLARK COUNTY COURTS  
EIGHTH JUDICIAL DISTRICT COURT  
CLERK OF THE COURT**



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Jan 19 2011 10:19 a.m.  
Tracie K. Lindeman

Steven D. Grierson  
Clerk of the Court

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January 19, 2011

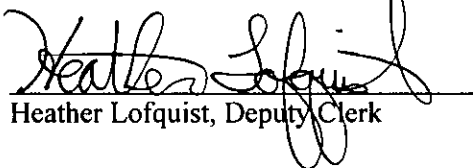
Tracie Lindeman  
Clerk of the Supreme Court  
201 South Carson Street, Suite 201  
Carson City, Nevada 89701-4702

RE: STATE OF NEVADA vs. NARCUS WESLEY  
**S.C. CASE: 57473**  
D.C. CASE: 07C232494-2

Dear Ms. Lindeman:

Pursuant to your Notice to Transmit Required Document, dated January 10, 2011, enclosed is a certified copy of the Findings of Fact, Conclusions of Law and Order filed January 4, 2011 in the above referenced case. If you have any questions regarding this matter, please contact me at (702) 671-0512.

Sincerely,  
STEVEN D. GRIERSON, CLERK OF THE COURT

  
Heather Lofquist, Deputy Clerk

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*James L. [Signature]*  
CLERK OF THE COURT

1 **ORDR**  
2 **DAVID ROGER**  
3 **Clark County District Attorney**  
4 **Nevada Bar #002781**  
5 **LISA LUZAICH**  
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7  
8 **DISTRICT COURT**  
9 **CLARK COUNTY, NEVADA**

07C232494-2  
FFCO  
Findings of Fact, Conclusions of Law and C  
1146567



10 **THE STATE OF NEVADA,**

11 **Plaintiff,**

12 **-vs-**

13 **NARCUS WESLEY,**  
14 **# 1757866**

15 **Defendant.**

**CASE NO: C232494-2**

**DEPT NO: XXIV**

16 **FINDINGS OF FACT, CONCLUSIONS OF**

17 **LAW AND ORDER**

18 **DATE OF HEARING: DECEMBER 7, 2010**  
19 **TIME OF HEARING: 8:30 A.M.**

20 **THIS CAUSE** having come on for hearing before the Honorable KATHY  
21 **HARDCASTLE**, District Judge, on the 7th day of December, 2010, the Petitioner not being  
22 present, being represented by **ARNOLD WEINSTOCK**, the Respondent being represented  
23 by **DAVID ROGER**, District Attorney, by and through **LISA LUZAICH**, Chief Deputy  
24 District Attorney, and the Court having considered the matter, including briefs, transcripts,  
25 arguments of counsel, and documents on file herein, now therefore, the Court makes the  
26 following findings of fact and conclusions of law:

27 **// RECEIVED**

28 **// JAN 4 2011**

**CLERK OF THE COURT**

1 **FINDINGS OF FACT**

- 2 1. On April 20, 2007, the State filed an Information charging Narcus S. Wesley  
3 (hereinafter "Defendant") and Delarian K. Wilson (hereinafter "Wilson") with  
4 multiple counts of Conspiracy, Burglary, Robbery, Assault, Kidnapping, Sexual  
5 Assault, Coercion, and Open or Gross Lewdness, all with use of a deadly weapon.  
6 Co-Defendant Wilson entered into negotiations with the State and pleaded guilty to  
7 two counts of Robbery with Use of a Deadly Weapon and one count of Sexual  
8 Assault.
- 9 2. Defendant's jury trial began on April 9, 2008, and concluded on April 18, 2008. The  
10 jury convicted Defendant of all eighteen (18) counts alleged in the Second Amended  
11 Information. On July 3, 2008, Defendant was adjudged guilty of all eighteen (18)  
12 counts and sentenced as follows<sup>1</sup>: as to Counts I and XVIII – TWELVE (12) months;  
13 as to Counts II, III, and XI – TWENTY-EIGHT (28) to SEVENTY-TWO (72)  
14 months; as to Counts IV, VI, VII, and IX – SIXTY (60) to ONE HUNDRED  
15 EIGHTY (180) months plus an equal and consecutive term of SIXTY (60) to ONE  
16 HUNDRED EIGHTY (180) months for the use of a deadly weapon; as to Counts V  
17 and VIII – TWENTY-FOUR (24) to SEVENTY-TWO (72) months; as to Count X –  
18 SEVENTY-TWO (72) to ONE HUNDRED EIGHTY (180) months plus an equal and  
19 consecutive term of SEVENTY-TWO (72) to ONE HUNDRED EIGHTY (180)  
20 months for the use of a deadly weapon; as to Counts XII – XV, and XVII – TEN (10)  
21 years to LIFE plus an equal and consecutive term of TEN (10) years to LIFE for the  
22 use of a deadly weapon; and as to Count XVI – TWENTY-FOUR (24) to  
23 SEVENTY-TWO (72) months plus an equal and consecutive term of TWENTY-  
24 FOUR (24) to SEVENTY-TWO (72) months for the use of a deadly weapon; all  
25 counts to run concurrently.

26 //

27  
28 <sup>1</sup> The State filed a Motion to Correct Illegal Sentence as to Counts 12-15, and 17 as the court had previously given Wesley EIGHT (8) to TWENTY (20) years instead of TEN (10) to LIFE as called for under the Statute. The court corrected the sentence at a hearing on September 23, 2008. Defendant was present with counsel during said hearing. The corrected sentence is listed above.

- 1 3. Judgment of Conviction was filed on July 18, 2008, and an Amended Judgment of  
2 Conviction reflecting a correction in the sentence to Counts XII – XV, and XVII was  
3 filed on October 8, 2008. Defendant filed a Notice of Appeal with the Supreme  
4 Court of Nevada on July 24, 2008. The Nevada Supreme Court affirmed Defendant's  
5 conviction on March 11, 2010. Remittitur was issued on April 8, 2010.
- 6 4. On October 8, 2010, Defendant filed a petition for writ of habeas corpus to which the  
7 State filed an opposition on December 6, 2010.
- 8 5. There is no evidence to support Defendant's first ground for relief that his counsel  
9 was ineffective.
- 10 6. Defendant's first claim of ineffective assistance regarding his lawyer's failure to use a  
11 police report that purportedly contradicted the victim's testimony fails as it is a bare  
12 allegation wholly unsupported by anything in the record. Additionally, Defendant  
13 failed to demonstrate any actual prejudice stemming from the failure to use this  
14 report.
- 15 7. Defendant's second and tenth claims of ineffective assistance regarding his lawyer's  
16 purported acceptance of the Government's version of the facts surrounding the sexual  
17 assault fails because Defendant presented a duress defense that conceded that he did  
18 commit the sexual assault upon the victim. To the extent that Defendant argued his  
19 counsel was ineffective in this respect because Defendant disagreed with this theory  
20 of defense, this argument also fails because defense counsel is entitled to handle trial  
21 strategy and the day-to-day decision-making during a trial. Furthermore, Defendant  
22 failed to demonstrate how a different theory of defense would have led to a better  
23 result in his case.
- 24 8. Defendant's third claim of ineffective assistance regarding his lawyer's purported  
25 failure to conduct a sufficient pretrial investigation fails as Defendant failed to show  
26 how a better investigation in these respects would have rendered a more favorable  
27 outcome.

28 //

- 1 9. Defendant's fourth, ninth and twelfth claims of ineffective assistance regarding that  
2 Defendant's belief that there was a conflict of interest between his trial counsel and  
3 himself fails as Defendant could not demonstrate that an actual conflict existed  
4 between he and his counsel.
- 5 10. Defendant's fifth claim of ineffective assistance regarding Defendant's belief that his  
6 lawyer failed to force Danielle Browning to undergo physical and psychological  
7 examination to test her credibility is without merit as Defendant failed to demonstrate  
8 how such an examination would have led to a more favorable outcome. Moreover, it  
9 would have been futile for defense counsel to make such a request.
- 10 11. Defendant's sixth claim of ineffective assistance regarding Defendant's belief that his  
11 lawyer did not to present a series of witnesses that would testify to Defendant's good  
12 character fails because the trial tactics and day-to-day decision-making during a trial  
13 are up to the attorney and not the client. Moreover, Defendant failed to demonstrate  
14 how the introduction of such good character evidence would have led to a better  
15 result in his case.
- 16 12. Defendant's seventh claim of ineffective assistance regarding Defendant's belief that  
17 his lawyer was ineffective for admitting his Co-Defendant's hearsay statements and  
18 Guilty Plea agreement was in fact an issue raised on direct appeal and is now barred  
19 the doctrine of law of the case. Even if considered on the merits, the argument fails  
20 as the trial tactics and day-to-day decision-making during a trial are up to the attorney  
21 and not the client. Moreover, Defendant failed to demonstrate how the absence of  
22 such statements from his co-defendant would have led to a better result in his case.  
23 Moreover, since the Nevada Supreme Court deemed the admission of this evidence to  
24 be proper it would have been futile for counsel to raise this issue at trial.
- 25 13. Defendant's eighth claim of ineffective assistance regarding his belief that his lawyer  
26 failed to object to acts of prosecutorial misconduct, the introduction of irrelevant and  
27 prejudicial testimony of Grant Heib is not an actual ineffective assistance claim, but  
28 rather a claim that should have been raised on direct appeal. Since Defendant failed to

- 1 raise this matter on direct appeal, the issue is now waived. Even if considered on the  
2 merits the issue fails as it is a bare allegation devoid of any factual support.
- 3 14. Defendant's eleventh claim of ineffective assistance regarding Defendant's belief that  
4 his lawyer purportedly forced Defendant into arguing the duress defense during trial  
5 is without merit as trial tactics and day-to-day decision-making during a trial are up to  
6 the attorney and not the client. Moreover, Defendant failed to demonstrate how an  
7 alternative defense strategy would have led to a better result in his case.
- 8 15. Defendant's thirteenth claim of ineffective assistance regarding Defendant's belief  
9 that his lawyer failed to challenge the sufficiency of the evidence on the sexual  
10 assault charge fails as Defendant already raised a challenge to the sufficiency of the  
11 evidence used to convict him on direct appeal and the Nevada Supreme Court held  
12 that there was sufficient evidence to convict him for the eighteen counts.  
13 Accordingly, such a motion at trial would have been futile.
- 14 16. Defendant's fourteenth claim of ineffective assistance regarding Defendant's belief  
15 that his lawyer failed to investigate the purported "motives" for the witnesses' false  
16 accusations fails as it a bare allegation wholly unsupported by anything in the factual  
17 record. Moreover, Defendant failed to show how a better investigation in these  
18 respects would have rendered a more favorable outcome.
- 19 17. Defendant's second, fourth and sixth grounds for relief are procedurally barred  
20 pursuant to NRS 34.810(1)(b) as they should have been raised on direct appeal and  
21 are now waived.
- 22 18. Defendant failed to establish any good cause to overcome the procedural bar of NRS  
23 34.810(1)(b).
- 24 19. Defendant's third and fifth grounds for relief are barred by the doctrine of law of the  
25 case.
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(quoting from Strickland, 466 U.S. at 689, 104 S.Ct at 2052 (1984)). An attorney cannot be deemed ineffective for failing to make futile motions or objections. Ennis v. State, 122 Nev. 694, 137 P.3d 1095 (2006).

3. In order to meet the second “prejudice” prong of the test, “the defendant must show a reasonable probability that, but for counsel’s errors, the result of the trial would have been different.” Kirksey, 112 Nev. at 988, 825 P.2d at 1107 (citing Strickland, 466 U.S. at 694, 104 S.Ct. at 2068).

4. Strategy or decisions regarding the conduct of defendant’s case are “virtually unchallengeable absent extraordinary circumstances.” Doleman v. State, 112 Nev. 843, 848, 921 P.2d 278, 280 (1996), quoting Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990). There is a “*strong presumption* that counsel’s conduct falls within the wide range of reasonable professional assistance.” Strickland, *supra* at 689, 2065, emphasis added.

5. 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). In sum, the framework for analysis is as follows:

Therefore, when a petitioner alleges ineffective assistance of counsel, he must establish the factual allegations which form the basis for his claim of ineffective assistance by a preponderance of the evidence. Next, as stated in Strickland, the petitioner must establish that those facts show counsel’s performance fell below a standard of objective reasonableness, and finally the petition must establish prejudice by showing a reasonable probability that, but for counsel’s deficient performance, the outcome would have been different.

Means, *supra* at 1013, 33.

6. Any claims for relief 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) (emphasis added). “Bare” and “naked” allegations are not sufficient, nor are those belied and repelled by the record. Id.

- 1 7. If a claim is denied on appeal further consideration of those issues presented on  
2 appeal are barred by the doctrine of law of the case. Hall v. State, 91 Nev. 314,  
3 315-16, 535 P.2d 797, 798-99 (1975). In Hall, the Supreme Court of Nevada  
4 stated that "[t]he law of a first appeal is the law of the case on all subsequent  
5 appeals in which the facts are substantially the same." Id. This doctrine also  
6 "cannot be avoided by a more detailed and precisely focused argument  
7 substantially made after reflection upon previous proceedings." Id. at 316.
- 8 8. It is well established in this State that trial tactics and day-to-day decision-making  
9 during a trial are up to the attorney and not the client. Rhyne v. State, 118 Nev. 1,  
10 38 P.3d 163 (2002).
- 11 9. If a defendant claims that his attorney is ineffective for failing to pursue a specific  
12 strategy, a defendant must demonstrate how a different strategy would have led to  
13 a better result in his case. Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538  
14 (2004).
- 15 10. If there is an actual conflict of interest that results in an adverse effect in a  
16 lawyer's performance a presumption of prejudice to Defendant is created. Clark v.  
17 State, 108 Nev. 324, 831 P.2d 1374 (1992). However, "[c]onflict of interest and  
18 divided loyalty situations can take many forms, and whether an actual conflict  
19 exists must be evaluated on the specific facts of each case. In general, a conflict  
20 exists when an attorney is placed in a situation conducive to divided loyalties." Id.  
21 (quoting Smith v. Lockhart, 923 F.2d 1314, 1320 (8th Cir.1991)).
- 22 11. If it would have been futile for defense counsel to make a specific type of request,  
23 counsel cannot be deemed ineffective in this respect. Ennis v. State, 122 Nev. 694,  
24 137 P.3d 1095 (2006).

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1 12. NRS 34.810(1)(b) provides:

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

3 The petitioner's conviction was the result of a trial and the grounds  
4 for the petition could have been: (1) Presented to the trial court; (2)  
5 Raised in a direct appeal or a prior petition for writ of habeas corpus  
6 or post conviction relief; or (3) Raised in any other proceeding that  
7 the petitioner has taken to secure relief from his conviction and  
8 sentence, unless the court finds both cause for the failure to present  
9 the grounds and actual prejudice to the petitioner.

10 (Emphasis added).

11 13. "A court must dismiss a habeas petition if it presents claims that *either were or*  
12 *could have been presented* in an earlier proceeding, unless the court finds both  
13 cause for failing to present the claims earlier or for raising them again and actual  
14 prejudice to the petitioner." Evans v. State, 117 Nev. 609, 646-647, 29 P.3d 498,  
15 523 (2001) (emphasis added); Franklin v. State, 110 Nev. 750 (1994).

16 14. "In order to demonstrate good cause, a petitioner must show that an impediment  
17 external to the defense prevented him or her from complying with the state  
18 procedural default rules." Hathaway v. State, 119 Nev. 248, 71 P.3d 503, 506  
19 (2003); *citing* Pellegrini, 117 Nev. at 886-87, 34 P.3d at 537; Lozada, 110 Nev. at  
20 353, 871 P.2d at 946. Such an external impediment could be "that the factual or  
21 legal basis for a claim was not reasonably available to counsel, or that 'some  
22 interference by officials' made compliance impracticable". Hathaway, 71 P.3d at  
23 506; *quoting* Murray v. Carrier, 477 U.S. 478, 488, 106 S.Ct. 2639, 2645 (1986);  
24 *see also* Gonzalez, 53 P.3d at 904; *citing* Harris v. Warden, 114 Nev. 956, 959-60  
25 n. 4, (64 P.2d 785 n. 4 (1998)).

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**ORDER**

THEREFORE, IT IS HEREBY ORDERED that the Petition for Writ of Habeas Corpus shall be, and is, denied without prejudice.

DATED this 12 day of December, 2010.

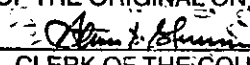
  
DISTRICT JUDGE

DAVID ROGER  
DISTRICT ATTORNEY  
Nevada Bar #002781

BY   
LISA LOZAICH  
Chief Deputy District Attorney  
Nevada Bar #005056

hjc/SVU

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CLERK OF THE COURT

JAN 19 2011