



**CLARK COUNTY COURTS
EIGHTH JUDICIAL DISTRICT COURT
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LAS VEGAS, NEVADA 89155-1160
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Tracie K. Lindeman

Steven D. Grierson
Clerk of the Court

May 25, 2011

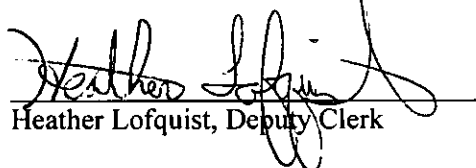
Tracie Lindeman
Clerk of the Supreme Court
201 South Carson Street, Suite 201
Carson City, Nevada 89701-4702

RE: STATE OF NEVADA vs. CARY PICKETT
S.C. CASE: 58191
D.C. CASE: C262523-2

Dear Ms. Lindeman:

Pursuant to your Order Re: Entry of Written Judgment or Order and Record on Appeal, filed May 9, 2011, attached is a certified copy of the Findings of Fact, Conclusions of Law and Order, filed May 19, 2011, in the above referenced case. If you have any questions regarding this matter, please do not hesitate to contact me at (702) 671-0512.

Sincerely,
STEVEN D. GRIERSON, CLERK OF THE COURT


Heather Lofquist, Deputy Clerk

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FILED

2011 MAY 19 P 2:12

John H. Lamm
CLERK OF THE COURT

1 **ORDR**

2 **DAVID ROGER**
3 **Clark County District Attorney**
4 **Nevada Bar #002781**
5 **ROY L. NELSON, III.**
6 **Chief Deputy District Attorney**
7 **Nevada Bar #007842**
8 **200 Lewis Avenue**
9 **Las Vegas, Nevada 89155-2212**
10 **(702) 671-2500**
11 **Attorney for Plaintiff**

DISTRICT COURT
CLARK COUNTY, NEVADA

12 **THE STATE OF NEVADA,**

13 **Plaintiff,**

14 **-vs-**

15 **CARY J. PICKETT,**
16 **#0725059**

17 **Defendant.**

CASE NO: 10C262523-2

DEPT NO: XVIII

10C262523-2
FFCO
Findings of Fact, Conclusions of Law and C
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18 **FINDINGS OF FACT, CONCLUSIONS OF**
19 **LAW AND ORDER**

20 **DATE OF HEARING: April 6, 2011**
21 **TIME OF HEARING: 8:15 A.M.**

22 **THIS CAUSE** having come on for hearing before the Honorable David Barker,
23 **District Judge**, on the 6th day of April, 2011, the Petitioner not being present, Proceeding In
24 **Forma Pauperis**, the Respondent being represented by **DAVID ROGER**, District Attorney,
25 **by and through Stephanie Graham**, Deputy District Attorney, and the Court having
26 **considered the matter**, including briefs, transcripts, no arguments of counsel, and documents
27 **on file herein**, now therefore, the Court makes the following findings of fact and conclusions
28 **of law:**

FINDINGS OF FACT

1. On February 3, 2010, Cary J. Pickett, hereinafter "Defendant," was charged by
way of Criminal Complaint with five (5) counts of Burglary While in Possession of a
Firearm, seven (7) counts of Robbery With Use of a Deadly Weapon, five (5) counts of

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1 Conspiracy to Commit Robbery, and six (6) counts of Possession of a Firearm by an Ex-
2 Felon.

3 2. On March 10, 2010, pursuant to negotiations, Defendant was charged by way
4 of Information with one count each of Burglary While in Possession of a Firearm,
5 Conspiracy to Commit Robbery, Robbery With Use of a Deadly Weapon, and Possession of
6 a Firearm by an Ex-Felon. On March 11, 2010, pursuant to a written Guilty Plea Agreement,
7 Defendant pled guilty to the same charges.

8 3. On May 10, 2010, Defendant was adjudged a Habitual Criminal and sentenced
9 as follows: as to Count 1 – Burglary While in Possession of a Firearm, to a MAXIMUM of
10 SIXTY (60) MONTHS with a MINIMUM parole eligibility of TWENTY-FOUR (24)
11 MONTHS; as to Count 2 – Conspiracy to Commit Robbery, to MAXIMUM of SIXTY (60)
12 MONTHS with a MINIMUM parole eligibility of TWENTY-FOUR (24) MONTHS; as to
13 Count 3 – Robbery with Use of a Deadly Weapon, to a MAXIMUM of TWENTY-FIVE
14 (25) YEARS with a MINIMUM parole eligibility of TEN (10) YEARS, Count 3 to run
15 CONSECUTIVE to Count 1; as to Count 4 – Possession of a Firearm by an Ex-Felon, to a
16 MAXIMUM of SIXTY (60) MONTHS with a MINIMUM parole eligibility of TWENTY-
17 FOUR (24) MONTHS, Count 4 to run CONCURRENT with Count 2, with EIGHTY-
18 EIGHT (88) DAYS credit for time served.

19 4. A Judgment of Conviction was filed on May 19, 2010.¹

20 5. Defendant did not file a Direct Appeal.

21 6. Defendant filed the instant petition on January 27, 2011.

22 7. Defendant's counsel rendered effective assistance.

23 8. Defendant stipulated to habitual criminal treatment as part of his plea
24 agreement.

25 9. Defendant has failed to provide any evidence supporting his claim that two out
26 of seven of his previous felony convictions which were the basis for his treatment as a
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¹ Due to clerical errors, an Amended Judgment of Conviction was filed on September 24, 2010.

1 habitual criminal were constitutionally infirm.

2 10. Even if counsel had successfully challenged two of Defendant's previous
3 convictions as constitutionally infirm, five would have remained for the court to consider.
4 Defendant therefore cannot demonstrate prejudice.

5 11. Since Defendant stipulated to treatment as a habitual criminal, any arguments
6 by counsel against such treatment at sentencing would have been futile. Counsel cannot be
7 deemed ineffective for failing to make futile arguments.

8 12. Defendant's bare allegation that his counsel failed to make mitigation
9 arguments at sentencing is insufficient for relief.

10 13. The totality of the circumstances, including the relevant portions of
11 Defendant's GPA, the plea canvass, and taking into account the presence of counsel,
12 demonstrates Defendant's guilty plea was entered knowingly and voluntarily.

13 14. Defendant's claim that he was improperly sentenced as a habitual criminal is
14 not cognizable in a petition for post-conviction relief since Defendant's conviction was
15 based upon a plea of guilty.

16 15. Defendant has failed to provide evidence for consideration which supports the
17 grounds alleged.

18 CONCLUSIONS OF LAW

19 1. In order to assert a claim for ineffective assistance of counsel a defendant must
20 prove that he was denied "reasonably effective assistance" of counsel by satisfying the two-
21 prong test of Strickland v. Washington, 466 U.S. 668, 686-87, 104 S.Ct. 2052, 2063-64
22 (1984). See also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). Under this
23 test, the Defendant must show first that his counsel's representation fell below an objective
24 standard of reasonableness, and second, that but for counsel's errors, there is a reasonable
25 probability that the result of the proceedings would have been different. Strickland, 466 U.S.
26 at 687-88, 694, 104 S.Ct. at 2065, 2068; Warden, Nevada State Prison v. Lyons, 100 Nev.
27 430, 432, 683 P.2d 504, 505 (1984) (adopting Strickland two-part test in Nevada).

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1 2. The court begins with the presumption of effectiveness and then must
2 determine whether or not the petitioner has proved disputed factual allegations underlying
3 his ineffective-assistance claim by a preponderance of the evidence. Means v. State, 120
4 Nev. 1001, 1012, 103 P.3d 25, 33 (2004).

5 3. Judicial review of a lawyer's representation is highly deferential, and a
6 defendant must overcome the presumption that a challenged action might be considered
7 sound strategy. State v. LaPena, 114 Nev. 1159, 1166, 968 P.2d 750, 754 (1998) (quoting
8 from Strickland, 466 U.S. at 689, 104 S.Ct at 2052 (1984)). Strategy or decisions regarding
9 the conduct of defendant's case are "virtually unchallengeable absent extraordinary
10 circumstances." Doleman v. State, 112 Nev. 843, 848, 921 P.2d 278, 280 (1996) (quoting
11 Howard v. State, 106 Nev. 713, 722, 800P.2d 175, 180 (1990)).

12 4. Pursuant to NRS 176.165, after sentencing, a defendant's guilty plea can only
13 be withdrawn to correct "manifest injustice." See also Baal v. State, 106 Nev. 69, 72, 787
14 P.2d 391, 394 (1990). The law in Nevada clearly establishes that a plea of guilty is
15 presumptively valid and the burden is on a defendant to show that the plea was not
16 voluntarily entered. Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986) (citing
17 Wingfield v. State, 91 Nev. 336, 337, 535 P.2d 1295, 1295 (1975)). Manifest injustice does
18 not exist if defendant entered his plea voluntarily. Baal, 106 Nev. at 72, 787 P.2d at 394. To
19 determine whether a guilty plea was voluntarily entered the Court will review the totality of
20 the circumstances surrounding the defendant's plea. Bryant, 102 Nev. at 271, 721 P.2d at
21 367.

22 5. NRS 34.810(1)(a) states in relevant part:

23 1. The court shall dismiss a petition if the court determines that:

24 (a) The petitioner's conviction was upon a plea of guilty or guilty but mentally
25 ill and the petition is not based upon an allegation that the plea was
26 involuntarily or unknowingly entered or that the plea was entered without
 effective assistance of counsel.

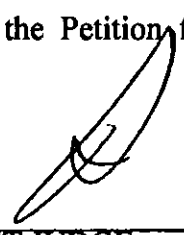
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ORDER

THEREFORE, IT IS HEREBY ORDERED that the Petition for Writ of Habeas Corpus (Post-Conviction) shall be, and it is, hereby denied.

DATED this MAY 19 2011 day of May, 2011.

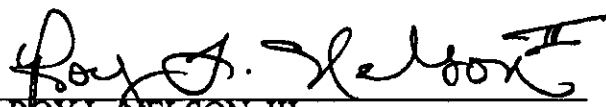


DISTRICT JUDGE

AS

DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

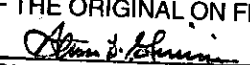
BY



ROY L. NELSON, III.
Chief Deputy District Attorney
Nevada Bar #007842

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CERTIFIED COPY
DOCUMENT ATTACHED IS A
TRUE AND CORRECT COPY
OF THE ORIGINAL ON FILE

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CLERK OF THE COURT
MAY 25 2011