



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



REGIONAL JUSTICE CENTER
200 LEWIS AVENUE, 3RD FLOOR
LAS VEGAS, NEVADA 89155-1160
(702) 671-4554

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Mar 02 2012 09:23 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

Steven D. Grierson
Clerk of the Court

March 1, 2012

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

RE: STATE OF NEVADA vs. ERICK M. BROWN
S.C. CASE: 60197
D.C. CASE: C189658

Dear Ms. Lindeman:

Pursuant to your Notice to Transmit Required Document, dated February 28, 2012, enclosed is a certified copy of the Findings of Fact, Conclusions of Law and Order filed February 13, 2012 and the Notice of Entry of Decision and Order filed February 16, 2012 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 Ungermann, Deputy Clerk

ORIGINAL

56
FILED

FEB 13 2012

CLERK OF COURT

1 ORDR

2 MARY-ANNE MILLER
3 Interim Clark County District Attorney
4 Nevada Bar #001419
5 J. TIMOTHY FATTIG
6 Chief Deputy District Attorney
7 Nevada Bar #6639
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

12 DISTRICT COURT
13 CLARK COUNTY, NEVADA

14 THE STATE OF NEVADA,

15 Plaintiff,

CASE NO: 03C189658-1

16 -vs-

DEPT NO: XIV

17 ERIC M. BROWN,
18 #1895908

19 Defendant.

20 FINDINGS OF FACT, CONCLUSIONS OF
21 LAW AND ORDER

03C189658-1

FFCO

Findings of Fact, Conclusions of Law and C
1768510

22 DATE OF HEARING: January 27, 2010
23 TIME OF HEARING: 1:30 P.M.



24 THIS CAUSE having come on for hearing before the Honorable Judge Donald
25 Mosley, District Judge, on the 27th day of January, 2012, the Petitioner being present,
26 Represented By Robert Langford, Esq., the Respondent being represented by MARY-ANNE
27 MILLER, Interim Clark County District Attorney, by and through J. TIMOTHY FATTIG,
28 Chief Deputy District Attorney, and the Court having considered the matter, including briefs,
29 transcripts, the testimony of Defendant's former attorney, arguments of counsel, and
30 documents on file herein, now therefore, the Court makes the following findings of fact and
31 conclusions of law:

32 FINDINGS OF FACT

33 1. On January 28, 2003, Defendant was charged by way of Information with
34 BURGLARY WHILE IN POSSESSION OF A FIREARM, FIRST DEGREE

CLERK OF THE COURT

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2 AGE OR OLDER RESULTING IN SUBSTANTIAL BODILY HARM, FIRST DEGREE
3 KIDNAPPING WITH USE OF A DEADLY WEAPON RESULTING IN SUBSTANTIAL
4 BODILY HARM, ROBBERY WITH USE OF A DEADLY WEAPON VICTIM OVER 65
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6 An Amended Information was filed on June 26, 2006.

7 2. On June 30, 2006, a jury found Defendant guilty of all charges.

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9 maximum of one hundred twenty (120) months with a minimum parole eligibility of twenty-
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16 Count 4 – to a maximum of one hundred twenty (120) months with a minimum parole
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19 concurrent to count 3; As to Count 5 – to a maximum of one hundred twenty (120) months
20 with a minimum parole eligibility of twenty-six (26) months, plus and equal and consecutive
21 term of one hundred (120) months and twenty-six months minimum, count 5 to run
22 concurrent with count 4. The Judgment of Conviction was filed on August 16, 2006.

23 4. On August 11, 2006, Defendant filed a Notice of Appeal. On August 28, 2006,
24 Defendant filed a Pro Per Notice of Appeal. On September 13, 2007, the Nevada Supreme
25 Court issued an Order of Affirmance. Remittitur issued on October 9, 2007.

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14 Opposition on April 5, 2010. On April 30, 2010, the District Court granted Defendant's
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16 14. The evidentiary hearing was continued on December 10, 2010; March 17, 2011;
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20 January 25, Defendant's Motion came before the Court and after oral argument, Defendant
21 withdrew his Motion to Continue.

22 16. On January 27, 2012, an Evidentiary Hearing was finally held.

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24 direct appeal and is therefore, waived.

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27 jewelry found in a backpack is denied because the defendant told his attorney that he never
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2 Defendant's strategy to deny any possessory interest in the property.

3 20. Defendant's claim that his counsel was ineffective for not sharing the results of his
4 investigation with Defendant is meritless and thus, denied.

5 21. Defendant was not entitled to a "relationship" with counsel, only effective assistance
6 of counsel.

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20 the remaining two prints were run through AFIS and compared to defendant, co-defendant
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5 considering allegations of ineffective assistance of counsel is "not to pass upon the merits of
6 the action not taken but to determine whether, under the particular facts and circumstances of
7 the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94
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13 possibilities are of success." Donovan, 94 Nev. at 675, 584 P.2d at 711; citing Cooper, 551
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15 counsel's challenged conduct on the facts of the particular case, viewed as of the time of
16 counsel's conduct." Strickland, 466 U.S. at 690, 104 S.Ct. at 2066.

17 6. Even if a defendant can demonstrate that his counsel's representation fell below an
18 objective standard of reasonableness, he must still demonstrate prejudice and show a
19 reasonable probability that, but for counsel's errors, the result of the trial would have been
20 different. McNelson v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing
21 Strickland, 466 U.S. at 687.) "A reasonable probability is a probability sufficient to
22 undermine confidence in the outcome." Id. (citing Strickland, 466 U.S. at 687-89, 694).

23 7. "A lawyer may properly make a tactical determination of how to run a trial even in
24 the face of his client's incomprehension or even explicit disapproval." Brookhart v. Janis,
25 384 U.S. 1, 8, 86 S.Ct. 1245 (1966). The client may make decisions regarding the scope and
26 ultimate objectives of representation, but the trial lawyer alone is empowered to make
27 decisions regarding legal tactics. Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002). In
28 the case of court appointed counsel, "[o]nce counsel is appointed, the day-to-day conduct of

1 the defense rests with the attorney. He, not the client, has the immediate-and ultimate-
2 responsibility of deciding if and when to object, which witnesses, if any, to call, and what
3 defenses to develop.” Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002), citing
4 Wainright v. Sykes, 433 U.S. 72, 93, 97 S.Ct. 2497 (1977). Counsel’s strategy decision is a
5 “tactical” decision and will be “virtually unchallengeable absent extraordinary
6 circumstances.” Doleman v State, 112 Nev. 843, 846, 921 P.2d 278, 280 (1996); Howard v.
7 State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990); Strickland v. Washington, 466 U.S.
8 688, 691, 104 S.Ct. 2052, 2066 (1984).

9 8. A defendant is not entitled to a “relationship” with counsel, just reasonably effective
10 representation. Morris v. Slappy, 461 U.S. 1, 103 S.Ct. 1610 (1983).

11 9. An attorney’s failure to make futile motions or objections does not constitute
12 ineffective assistance of counsel. Ennis v. State, 122 Nev. 694, 137 P.3d 1095 (2006).

13 10. There is a strong presumption that counsel’s performance was reasonable and fell
14 within “the wide range of reasonable professional assistance.” See United States v. Aguirre,
15 912 F.2d 555, 560 (2nd Cir. 1990), citing Strickland, 466 U.S. at 689, 104 S.Ct. at 2065.

16 11. The Nevada Supreme Court has held that all appeals must be “pursued in a manner
17 meeting high standards of diligence, professionalism and competence.” Burke v. State, 110
18 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). In order to prove that appellate counsel’s
19 alleged error was prejudicial, the defendant must show that the omitted issue would have had
20 a reasonable probability of success on appeal. See Duhamel v. Collins, 955 F.2d 962, 967
21 (5th Cir. 1992); Heath, 941 F.2d at 1132.

22 12. While a defendant has the ultimate authority to make fundamental decisions regarding
23 his case, the defendant does not have a constitutional right to “compel appointed counsel to
24 press non-frivolous points requested by the client, if counsel, as a matter of professional
25 judgment, decides not to present those points.” Jones v. Barnes, 463 U.S. 745, 751, 103
26 S.Ct. 3308, 3312 (1983). In reaching this conclusion the Supreme Court recognized the
27 “importance of winnowing out weaker arguments on appeal and focusing on one central
28 issue if possible, or at most on a few key issues.” Id. at 751 -752, 103 S.Ct. at 3313. In

1 particular, a "brief that raises every colorable issue runs the risk of burying good arguments .
2 . . in a verbal mound made up of strong and weak contentions." Id. at 753, 103 S.Ct. at
3 3313. The Court also held that, "for judges to second-guess reasonable professional
4 judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested
5 by a client would disserve the very goal of vigorous and effective advocacy." Id. at 754, 103
6 S.Ct. at 3314.

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ORDER

THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief shall be, and it is, hereby denied.

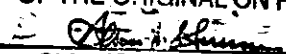
DATED this ____ day of February, 2012.


DISTRICT JUDGE 8

MARY-ANNE MILLER
Interim Clark County District Attorney
Nevada Bar #001419

BY 
J. TIMOTHY FATTIG
Chief Deputy District Attorney
Nevada Bar #6639

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


CLERK OF THE COURT

02FH1222A: hf/JTF/ckb

MAR 01 2012

FILED

FEB 16 2012

Heather Ungermann
CLERK OF COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

1 NOED

5 ERICK M. BROWN,

6 Petitioner,

7 vs.

8 THE STATE OF NEVADA,

9 Respondent,

03C189658-1

NOED

Notice of Entry of Decision and Order
1771837



Case No: 03C189658-1

Dept No: XIV

NOTICE OF ENTRY OF
DECISION AND ORDER

11 PLEASE TAKE NOTICE that on February 13, 2012, the court entered a decision or order in this matter, a
12 true and correct copy of which is attached to this notice.

13 You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you
14 must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is
15 mailed to you. This notice was mailed on February 16, 2012.

16 STEVEN D. GRIERSON, CLERK OF THE COURT

17 By: *Heather Ungermann*

18 Heather Ungermann, Deputy Clerk

19 CERTIFICATE OF MAILING

20 I hereby certify that on this 16 day of February 2012, I placed a copy of this Notice of Entry of Decision
21 and Order in:

22 The bin(s) located in the Office of the District Court Clerk of:
23 Clark County District Attorney's Office
Attorney General's Office - Appellate Division

24 ☒ The United States mail addressed as follows:

25 Erick M. Brown # 92713
26 P.O. Box 208
Indian Springs, NV 89070

Robert L. Langford, Esq.
616 S. Eighth St.
Las Vegas, NV 89101

27 *Heather Ungermann*
28 Heather Ungermann, Deputy Clerk

ORIGINAL

FILED

FEB 13 2012

CLERK OF COURT

1 **ORDR**

2 **MARY-ANNE MILLER**
3 Interim Clark County District Attorney
4 Nevada Bar #001419
5 **J. TIMOTHY FATTIG**
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7 Nevada Bar #6639
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

7 **DISTRICT COURT**
8 **CLARK COUNTY, NEVADA**

8 **THE STATE OF NEVADA,**

9 Plaintiff,

CASE NO: 03C189658-1

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DEPT NO: XIV

11 **ERIC M. BROWN,**
12 **#1895908**

13 Defendant.

14 **FINDINGS OF FACT, CONCLUSIONS OF**
15 **LAW AND ORDER**

16 **DATE OF HEARING: January 27, 2010**
17 **TIME OF HEARING: 1:30 P.M.**

03C189658-1
FFCO
Findings of Fact, Conclusions of Law and C
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21 MILLER, Interim Clark County District Attorney, by and through J. TIMOTHY FATTIG,
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24 documents on file herein, now therefore, the Court makes the following findings of fact and
25 conclusions of law:

26 **FINDINGS OF FACT**

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28 **BURGLARY WHILE IN POSSESSION OF A FIREARM, FIRST DEGREE**

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8 688, 691, 104 S.Ct. 2052, 2066 (1984).

9 8. A defendant is not entitled to a "relationship" with counsel, just reasonably effective
10 representation. Morris v. Slappy, 461 U.S. 1, 103 S.Ct. 1610 (1983).

11 9. An attorney's failure to make futile motions or objections does not constitute
12 ineffective assistance of counsel. Ennis v. State, 122 Nev. 694, 137 P.3d 1095 (2006).

13 10. There is a strong presumption that counsel's performance was reasonable and fell
14 within "the wide range of reasonable professional assistance." See United States v. Aguirre,
15 912 F.2d 555, 560 (2nd Cir. 1990), citing Strickland, 466 U.S. at 689, 104 S.Ct. at 2065.

16 11. The Nevada Supreme Court has held that all appeals must be "pursued in a manner
17 meeting high standards of diligence, professionalism and competence." Burke v. State, 110
18 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). In order to prove that appellate counsel's
19 alleged error was prejudicial, the defendant must show that the omitted issue would have had
20 a reasonable probability of success on appeal. See Duhamel v. Collins, 955 F.2d 962, 967
21 (5th Cir. 1992); Heath, 941 F.2d at 1132.

22 12. While a defendant has the ultimate authority to make fundamental decisions regarding
23 his case, the defendant does not have a constitutional right to "compel appointed counsel to
24 press non-frivolous points requested by the client, if counsel, as a matter of professional
25 judgment, decides not to present those points." Jones v. Barnes, 463 U.S. 745, 751, 103
26 S.Ct. 3308, 3312 (1983). In reaching this conclusion the Supreme Court recognized the
27 "importance of winnowing out weaker arguments on appeal and focusing on one central
28 issue if possible, or at most on a few key issues." Id. at 751 -752, 103 S.Ct. at 3313. In

1 particular, a "brief that raises every colorable issue runs the risk of burying good arguments .
2 . . in a verbal mound made up of strong and weak contentions." Id. at 753, 103 S.Ct. at
3 3313. The Court also held that, "for judges to second-guess reasonable professional
4 judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested
5 by a client would disserve the very goal of vigorous and effective advocacy." Id. at 754, 103
6 S.Ct. at 3314.

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ORDER


THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief shall be, and it is, hereby denied.

DATED this ____ day of February, 2012.


DISTRICT JUDGE 8

MARY-ANNE MILLER
Interim Clark County District Attorney
Nevada Bar #001419

BY


J. TIMOTHY FATTIG
Chief Deputy District Attorney
Nevada Bar #6639

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

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CLERK OF THE COURT

MAR 01 2012