

## CRYSTAL YVONNE AUSTIN

VS.

**Respondent.**

## RESPONDENT'S ANSWERING BRIEF

## ATTORNEYS FOR RESPONDENTS

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1        **STATEMENT OF CASE AND ISSUES PRESENTED FOR REVIEW**

2            Appellant Austin alleges three instances of ineffective counsel.

3            The first claim is that trial counsel failed to inform the court of errors in  
4 the pre-sentence report that resulted in a longer sentence for Austin.

5            The second claim is that trial counsel failed to retain an investigator to  
6 investigate the case and interview witnesses prior to entry of the guilty plea.

7            The third claim is that trial counsel failed to impeach the victim witness at  
8 sentencing, resulting in a harsher sentence.

9            The first and third claims must be disregarded because they occurred after  
10 the plea was entered.

11           The only claim left is that trial counsel failed to retain an investigator that  
12 could have prepared counsel for the Motion to Exclude Blood Test Results.

13          Petition offers no specific facts that hiring an investigator could have changed  
14 the outcome of the Motion. Austin merely concludes that the investigator would  
15 have been an invaluable resource.

16           The court order denying that motion concluded the dispatcher logs  
17 showed the time of the accident was within two hours of the relevant blood  
18 draw. (Appx. 0154).

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Both parties agreed to recommend the minimum sentence of 24-60 months in the Nevada Department of Corrections. *Id.*

Austin was ultimately sentenced to a maximum term of 15 years and a minimum of 4 years. (Appx. 0211)

Ineffective assistance of counsel claims has two elements: (1) that counsel's performance was deficient; and (2) that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); *Warden v. Lyons*, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984).

To meet the first prong, the defendant would have to show that his

1 attorney's performance fell below an objective standard of reasonableness.  
2 *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2064. To do that, he must first  
3 "identify the acts or omissions of counsel that are alleged not to have been the  
4 result of reasonable professional judgment." *Id.* at 690, 104 S. Ct. at 2066.  
5 When scrutinizing the attorney's performance, the reviewing court must be  
6 highly deferential and "indulge a strong presumption that counsel's conduct falls  
7 within the wide range of reasonable professional assistance; that is, the  
8 defendant must overcome the presumption that, under the circumstances, the  
9 challenged action 'might be considered sound trial strategy.'" *Id.* at 689, 104 S.  
10 Ct. at 2065 (citation omitted). "[C]ounsel is strongly presumed to have rendered  
11 adequate assistance and made all significant decisions in the exercise of  
12 reasonable professional judgment." *Id.* at 690, 104 S. Ct. at 2066.

13 To meet the second prong, prejudice, the defendant would have to  
14 demonstrate "a reasonable probability that, but for counsel's unprofessional  
15 errors, the result of the proceeding would have been different. A reasonable  
16 probability is a probability sufficient to undermine confidence in the outcome."  
17 *Id.* at 694, 104 S. Ct. at 2068. Moreover, in order to prevail on such a claim, the  
18 defendant bears the burden of proving the disputed underlying factual  
19 allegations by a preponderance of the evidence. *Means v. State*, 120 Nev. 1001,  
20 1012-13, 103 P.3d 25, 33 (2004).

1 To demonstrate prejudice regarding the decision to enter a guilty plea, a  
2 petitioner must demonstrate a reasonable probability, but for counsel's errors,  
3 petitioner would not have pleaded guilty and would have insisted on going to  
4 trial. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985); Kirksey v. State, 112 Nev.  
5 980, 988, 923 P.2d 1102, 1107 (1996).

6 A habeas petitioner who makes only "bare" or "naked" claims for relief,  
7 unsupported by specific factual allegations that would, if true, entitle the  
8 petitioner to relief, or makes only factual allegations belied or repelled by the  
9 record, will not even be entitled to an evidentiary hearing, much less relief on  
10 those claims. *See Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225  
11 (1984).

12 "Trial management is the lawyer's province: Counsel provides his or her  
13 assistance by making decisions such as 'what arguments to pursue, what  
14 evidentiary objections to raise, and what agreements to conclude regarding the  
15 admission of evidence.'" *McCoy v. Louisiana*, 138 S. Ct. 1500, 1508, 200 L.  
16 Ed. 2d 821, 830 (2018) (citing *Gonzalez v. United States*, 553 U. S. 242, 248,  
17 128 S. Ct. 1765, 170 L. Ed. 2d 616 (2008)). "Tactical decisions are virtually  
18 unchallengeable absent extraordinary circumstances." *Howard v. State*, 106  
19 Nev. 713, 722, 800 P.2d 175, 180 (1990), *abrogated on other grounds by Harte*  
20 *v. State*, 116 Nev. 1054, 1072 n.6, 13 P.3d 420, 432 n.6 (2000). In the instant

1 case, the record supports neither a finding that trial counsel's performance was  
2 deficient, nor a finding that the defendant has been prejudiced.

3 In the instant case, the record supports neither a finding that trial counsel's  
4 performance was deficient, nor a finding that the defendant has been prejudiced.

5 The Opening Brief quotes the District Court's ruling that the issue of  
6 errors in the PSI was not perceivably related to a challenge of the guilty plea and  
7 must be dismissed. (Appx 0315).

8 Instead of responding to this ruling counsel quotes his own client's  
9 Petition for Writ of Habeas Corpus filed on 7/17/2020 which does not address  
10 the Guilty Plea Agreement.

11 The Opening Brief then quotes the District Court's lengthy discussion and  
12 ruling regarding the failure to retain an investigator.

13 "Petitioner's second argument appears to largely focus upon an  
14 investigation being an invaluable resource. Petitioner alleges that an investigator  
15 could have interviewed witnesses who saw the alleged altercation between the  
16 Petitioner and Ms. Cox prior to her arrest and the Petitioner's driving pattern at  
17 the time of the alleged incident; that an investigation of the time of her alleged  
18 driving prior to the blood draw would have been an invaluable resource in  
19 preparation of the Motion to Exclude the Blood results; and that an investigator  
20 would have assisted Trial Counsel into the allegations that as a result of the



1 accident, Ms. Cox's mother suffered an injury that caused her death" (Appx.  
2 0317)

3 "Petitioner's arguments regarding the hiring of an investigator are bare,  
4 largely speculative, and she has not raised specific allegations as to what, if any,  
5 evidence that an investigator would have found that could have changed the  
6 outcome of the case." (Appx. 0317)

7 "Further, even if Counsel's actions fell below the objective standard of  
8 reasonableness, the Petitioner has not established that she suffered prejudice.  
9 While Petitioner claims an investigator would have been a valuable resource,  
10 nothing is offered as to how any discovered facts would have affected the  
11 outcome of the Motion to Exclude Blood Test Results. Further, to the extent the  
12 Petitioner concentrates on the reliability of Ms. Cox as a witness and an  
13 investigator would have Petitioner's recollection to be more accurate than Ms.  
14 Cox, the Petitioner plead to Driving Under the Influence of Alcohol, with Prior  
15 Felony DUI Conviction, which was supported by the record and the outcome of  
16 the Motion to Exclude Blood Test Results. The Motion itself did not turn upon  
17 Ms. Cox's testimony." (Appx. 0317-0318)

18 "As such, because the Petitioner's claims are bare and she cannot show  
19 that she suffered prejudice, this claim must be dismissed." (Appx. 0318)

20 Finally, Austin claims the Trial Counsel's failure to impeach the

1 testimony of the victim resulted in a harsher sentence. The District Court  
2 disagreed.

3 After review of the pleadings, this court finds that this ground is not  
4 perceivably related to a challenge of entering the guilty plea and it must be  
5 dismissed pursuant to NRS 34.810(1)(a) and the logic of Gonzales. (Appx.  
6 0316)

7 **CONCLUSION**

8 The Opening Brief is merely a repeat of previous arguments that did not  
9 merit an evidentiary hearing. Based on that the State is requesting the appeal be  
10 denied.

11 **DATED** this 21<sup>st</sup> day of December 2021.

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1                                   **CERTIFICATE OF COMPLIANCE**

2           I hereby certify that I have read this appellate brief, and to the best of my  
3 knowledge, information, and belief, it is not frivolous or interposed for any  
4 improper purpose. I further certify that this brief complies with all applicable  
5 Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires  
6 every assertion in the brief regarding matters in the record to be supported by  
7 appropriate references to the record on appeal. I understand that I may be  
8 subject to sanctions in the event that the accompanying brief is not in conformity  
9 with the requirements of the Nevada Rules of Appellate Procedure.

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## VERIFICATION

1  
2 1. I hereby certify that this brief complies with the formatting  
3 requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5)  
4 and the type style requirements of NRAP 32(a)(6) because:

5 ☒ This brief has been prepared in a proportionally spaced typeface  
6 using Microsoft Word in Times New Roman, 14 pt. font; or

7 ☐ This brief has been prepared in a monospaced typeface using  
8 Microsoft Word in \_\_\_\_\_ with [*state number of characters per*  
9 *inch and name of type style*].

10 2. I further certify that this brief complies with the page- or type-  
11 volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief  
12 exempted by NRAP 32(a)(7)(C), it is either:

13 ☐ Proportionately spaced, has a typeface of 14 points or more and  
14 contains approximately 1,595 words as per NRAP 32(a)(7)(A)(ii);  
15 or

16 ☐ Monospaced, has 10.5 or fewer characters per inch, and contains  
17 \_\_\_\_ words or \_\_\_\_ lines of text; or

18 ☒ Does not exceed 30 pages.

19 3. Finally, I hereby certify that I have read this appellate brief, and to  
20 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

1 record to be supported by a reference to the page and volume number, if any, of  
2 the transcript or appendix where the matter relied on is to be found. I understand  
3 that I may be subject to sanctions in the event that the accompanying brief is not  
4 in conformity with the requirements of the Nevada Rules of Appellate Procedure

5 DATED this 21<sup>st</sup> day of December 2021.

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