



**EIGHTH JUDICIAL DISTRICT COURT
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Elizabeth A. Brown
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October 4, 2021

Elizabeth A. Brown
Clerk of the Court
201 South Carson Street, Suite 201
Carson City, Nevada 89701-4702

RE: BARRY HARRIS vs. WILLIAM GITTERE
S.C. CASE: 83516
D.C. CASE: A-20-813935-W

Dear Ms. Brown:

In response to the e-mail dated October 1, 2021, enclosed is a certified copy of the Findings of Fact, Conclusions of Law, and Order filed September 28, 2021 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

A handwritten signature in black ink, reading "Heather Ungermann".

Heather Ungermann, Deputy Clerk

FCL
STEVEN B. WOLFSON
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**DISTRICT COURT
CLARK COUNTY, NEVADA**

BARRY HARRIS,
#1946231

Petitioner,

-vs-

WILLIAM GITTERE, Warden,

Respondent.

CASE NO: A-20-813935-W

DEPT NO: XXXII

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

DATE OF HEARING: AUGUST 26, 2021
TIME OF HEARING: 12:30 PM

THIS CAUSE having come on for hearing before the Honorable CHRISTY CRAIG, District Judge, on the 26th day of August, 2021, the Petitioner being not present, represented by Allen Lichtenstein, the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through ALEXANDER CHEN, Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

POINTS AND AUTHORITIES

PROCEDURAL HISTORY

On January 17, 2018, BARRY HARRIS (hereinafter, "Petitioner") was charged by way of Information, as follows: Count 1 – BURGLARY WHILE IN POSSESSION OF A

1 FIREARM (Category B Felony – NRS 205.060); Count 2 – FIRST DEGREE KIDNAPPING
2 WITH USE OF A DEADLY WEAPON RESULTING IN SUBSTANTIAL BODILY HARM
3 (Category A Felony – NRS 200.310, 200.320, 193.165); Count 3 – ASSAULT WITH A
4 DEADLY WEAPON (Category B Felony – NRS 200.471); Count 4 – BATTERY WITH USE
5 OF A DEADLY WEAPON CONSTITUTING DOMESTIC VIOLENCE (Category B Felony
6 – NRS 200.481, 200.485, 33.018); Count 5 – BATTERY CONSTITUTING DOMESTIC
7 VIOLENCE – STRANGULATION (Category C Felony – NRS 200.481, 200.485, 33.018);
8 Count 6 – BATTERY RESULTING IN SUBSTANTIAL BODILY HARM CONSTITUTING
9 DOMESTIC VIOLENCE (Category C Felony – NRS 200.481, 200.485, 33.018); Count 7 –
10 PREVENTING OR DISSUADING WITNESS OR VICTIM FROM REPORTING CRIME
11 OR COMMENCING PROSECUTION (Category D Felony – NRS 199.305); Count 8 –
12 CARRYING CONCEALED FIREARM OR OTHER DEADLY WEAPON (Category C
13 Felony – NRS 202.350(1)(d)(3)); and Count 9 – OWNERSHIP OR POSSESSION OF
14 FIREARM BY PROHIBITED PERSON (Category B Felony – NRS 202.360) for his action
15 on or about August 22, 2017. On April 9, 2018, the State filed an Amended Information,
16 removing Count 9.

17 On April 9, 2018, Petitioner proceeded to jury trial. After five (5) days of trial, on April
18 16, 2018, the jury returned its Verdict, as follows: Count 1 – Not Guilty; Count 2 – Guilty of
19 First Degree Kidnapping Resulting in Substantial Bodily Harm; Count 3 – Guilty of Assault;
20 Count 4 – Guilty of Battery Constituting Domestic Violence; Count 5 – Not Guilty; Count 6
21 – Guilty of Battery Resulting in Substantial Bodily Harm Constituting Domestic Violence;
22 Count 7 – Not Guilty; and Count 8 – Not Guilty.

23 On August 14, 2019, Petitioner appeared for sentencing. Petitioner was adjudged guilty,
24 consistent with the jury’s verdict, and was sentenced, as follows: Count 2 – LIFE in the Nevada
25 Department of Corrections (“NDC”), with the possibility of parole after fifteen (15) years;
26 Count 3 – six (6) months in the Clark County Detention Center (“CCDC”), concurrent with
27 Count 2; Count 4 – six (6) months in CCDC, concurrent with Count 3; Count 6 – twenty-four
28

1 (24) to sixty (60) months in NDC, concurrent with Count 2. The Court credited Petitioner with
2 351 days time served. Petitioner's Judgment of Conviction was filed on August 16, 2018.

3 On August 21, 2018, Petitioner filed a pro per Notice of Appeal. On December 19,
4 2020, the Nevada Supreme Court affirmed Petitioner's conviction. Remittitur issued on
5 January 16, 2020.

6 On February 7, 2020, Petitioner filed a second Notice of Appeal. On March 6, 2020,
7 the Nevada Supreme Court dismissed Petitioner's second appeal. Remittitur issued on April
8 1, 2020.

9 On April 21, 2020, Petitioner filed a pro per Petition for Writ of Habeas Corpus
10 (Postconviction) and Ex Parte Motion for Appointment of Counsel and Request for
11 Evidentiary Hearing. The State filed its Response on October 2, 2020. On November 3, 2020,
12 the Court granted Petitioner's Motion for Appointment of Counsel, and on November 24,
13 2020, Mr. Allen Lichtenstein, Esq. confirmed as counsel for Petitioner.

14 On April 8, 2021, Petitioner, through counsel, filed his Supplemental Petition for Writ
15 of Habeas Corpus (Postconviction) (his "Supplement"). On June 10, 2021, the State filed its
16 Response. On August 26, 2021, this Court held an evidentiary hearing.

17 **STATEMENT OF FACTS**

18 The court, in sentencing Petitioner, relied on the following summary of facts:

19 On August 22, 2017, officers responded to a residence in reference to a
20 call that came into 911 where they heard a female victim screaming. "Help me,
21 help me." The officers made contact with the victim who told officers she was
scared to death of her boyfriend, the defendant, Barry Harris because he had just
tried to kill her and that he had left the residence in his vehicle.

22 The victim told officers that they had been dating for six years and have
23 lived together on and off as well. She stated that on that day she was arguing
24 with him on phone while she was at work. She went home and found the
25 defendant lying on her bed. She reported that she gave him a key to the residence
26 but was not living there. She sat next to him and they started arguing again. The
27 victim told him to leave the residence and he replied, "I'm not going nowhere
28 bitch". She told the defendant that if he continued to disrespect her that she
would call the police. She reported that things escalated and the defendant
grabbed her around her throat with both hands and began squeezing. He
continued doing this until she could not breathe and felt as she was going to pass
out. He then slammed her down on the bed and began punching her in the head.
The defendant threw her on the floor and continued to punch her. The victim
was able to get up and ran into the living room screaming for help. The victim
stated that the defendant removed a firearm from his pants pocket and quickly

1 approached her. He shoved the firearm in her mouth telling her he would blow
2 her brains out and if she made any noise, he would kill her. She stated that she
3 continued to scream for help. The defendant began hitting her again on top of
4 the head and the face as she fell to the ground where he continued to hit and kick
5 her. Afterwards, he put the gun to her head and forced her to a bathroom telling
6 her to be quiet and to stop yelling or he would pull the trigger. The victim stated
7 that the defendant made her go into the restroom to keep her hostage so she
8 wouldn't run or call the police. She stated that he continued to hit her during this
9 and then poured a bottle of juice all over her while calling her names. The
10 defendant told her that he hated her and that if she contacted the police that he
11 would be back to kill her. He then gathered his belongings and left the residence.
12 She stayed sitting on the bathroom floor and police arrived by the time she got
13 up.

14 Presentence Investigation Report at 5.

15 ANALYSIS

16 **I. PETITIONER DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF** 17 **COUNSEL**

18 The Sixth Amendment to the United States Constitution provides that, “[i]n all criminal
19 prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his
20 defense.” The United States Supreme Court has long recognized that “the right to counsel is
21 the right to the effective assistance of counsel.” Strickland v. Washington, 466 U.S. 668, 686,
22 104 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323
23 (1993).

24 To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove
25 she was denied “reasonably effective assistance” of counsel by satisfying the two-prong test
26 of Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063–64. See also Love, 109 Nev. at 1138,
27 865 P.2d at 323. Under the Strickland test, a defendant must show first that his counsel's
28 representation fell below an objective standard of reasonableness, and second, that but for
counsel's errors, there is a reasonable probability that the result of the proceedings would have
been different. 466 U.S. at 687–88, 694, 104 S. Ct. at 2065, 2068; Warden, Nevada State Prison
v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-part test).
“[T]here is no reason for a court deciding an ineffective assistance claim to approach the
inquiry in the same order or even to address both components of the inquiry if the defendant
makes an insufficient showing on one.” Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

1 The court begins with the presumption of effectiveness and then must determine
2 whether the defendant has demonstrated by a preponderance of the evidence that counsel was
3 ineffective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). “Effective counsel
4 does not mean errorless counsel, but rather counsel whose assistance is ‘[w]ithin the range of
5 competence demanded of attorneys in criminal cases.’” Jackson v. Warden, 91 Nev. 430, 432,
6 537 P.2d 473, 474 (1975).

7 Counsel cannot be ineffective for failing to make futile objections or arguments. See
8 Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Trial counsel has the
9 “immediate and ultimate responsibility of deciding if and when to object, which witnesses, if
10 any, to call, and what defenses to develop.” Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167
11 (2002). Further, a defendant who contends his attorney was ineffective because he did not
12 adequately investigate must show how a better investigation would have rendered a more
13 favorable outcome probable. Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004).

14 Based on the above law, the role of a court in considering allegations of ineffective
15 assistance of counsel is “not to pass upon the merits of the action not taken but to determine
16 whether, under the particular facts and circumstances of the case, trial counsel failed to render
17 reasonably effective assistance.” Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711
18 (1978). This analysis does not mean that the court should “second guess reasoned choices
19 between trial tactics nor does it mean that defense counsel, to protect himself against
20 allegations of inadequacy, must make every conceivable motion no matter how remote the
21 possibilities are of success.” Id. To be effective, the constitution “does not require that counsel
22 do what is impossible or unethical. If there is no bona fide defense to the charge, counsel
23 cannot create one and may disserve the interests of his client by attempting a useless charade.”
24 United States v. Cronin, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

25 “There are countless ways to provide effective assistance in any given case. Even the
26 best criminal defense attorneys would not defend a particular client in the same way.”
27 Strickland, 466 U.S. at 689, 104 S. Ct. at 689. “Strategic choices made by counsel after
28 thoroughly investigating the plausible options are almost unchallengeable.” Dawson v. State,

1 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784
2 P.2d 951, 953 (1989). In essence, the court must “judge the reasonableness of counsel’s
3 challenged conduct on the facts of the particular case, viewed as of the time of counsel’s
4 conduct.” Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.

5 Even if a defendant can demonstrate that his counsel’s representation fell below an
6 objective standard of reasonableness, he must still demonstrate prejudice and show a
7 reasonable probability that, but for counsel’s errors, the result of the trial would have been
8 different. McNelson v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing
9 Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). “A reasonable probability is a probability
10 sufficient to undermine confidence in the outcome.” Id. (citing Strickland, 466 U.S. at 687-89,
11 694, 104 S. Ct. at 2064–65, 2068).

12 The Nevada Supreme Court has held “that a habeas corpus petitioner must prove the
13 disputed factual allegations underlying his ineffective-assistance claim by a preponderance of
14 the evidence.” Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). Furthermore,
15 claims of ineffective assistance of counsel asserted in a petition for post-conviction relief must
16 be supported with specific factual allegations, which if true, would entitle the petitioner to
17 relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). “Bare” and “naked”
18 allegations are not sufficient, nor are those belied and repelled by the record. Id. NRS
19 34.735(6) states in relevant part, “[Petitioner] *must* allege specific facts supporting the claims
20 in the petition[.] . . . Failure to allege specific facts rather than just conclusions may cause your
21 petition to be dismissed.” (emphasis added).

22 When examining the effectiveness of appellate counsel under the Strickland analysis,
23 there is a strong presumption that appellate counsel’s performance was reasonable and fell
24 within “the wide range of reasonable professional assistance.” See United States v. Aguirre,
25 912 F.2d 555, 560 (2nd Cir. 1990) (citing Strickland, 466 U.S. at 689, 104 S.Ct. at 2065). A
26 claim of ineffective assistance of appellate counsel must satisfy the two-prong test set forth by
27 Strickland. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). In order to satisfy
28

1 Strickland's second prong, the defendant must show that the omitted issue would have had a
2 reasonable probability of success on appeal. Id.

3 The professional diligence and competence required on appeal involves "winnowing
4 out weaker arguments on appeal and focusing on one central issue if possible, or at most on a
5 few key issues." Jones v. Barnes, 463 U.S. 745, 751-52, 103 S.Ct. 3308, 3313 (1983). In
6 particular, a "brief that raises every colorable issue runs the risk of burying good
7 arguments...in a verbal mound made up of strong and weak contentions." Id. at 753, 103 S.Ct.
8 at 3313. "For judges to second-guess reasonable professional judgments and impose on
9 appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve
10 the very goal of vigorous and effective advocacy." Id. at 754, 103 S.Ct. at 3314.

11 ***1. Petitioner Fails to Demonstrate Ineffective Assistance of Trial Counsel***

12 Petitioner claims Trial Counsel was ineffective for failing to appeal the justice court's
13 denial of his pretrial Petition for Writ of Mandamus. However, Petitioner told his attorneys
14 that he did not want to appeal the decision. Instead, he desired to have a jury trial as soon as
15 possible. Petitioner may not direct Counsel to not seek an appeal and then later claim
16 ineffective assistance of counsel. Thus, this Court denies Petitioner's claim.

17 ***2. Petitioner Fails to Demonstrate Ineffective Assistance of Appellate Counsel***

18 Petitioner also includes a claim that appellate counsel was ineffective for failing to raise
19 the issue of the unsuccessful Writ of Mandamus upon direct appeal. See Supplement at 3, 19.
20 Appellate Counsel does not provide ineffective assistance by strategically focusing on certain
21 issues. Jones, 463 U.S. at 751-52, 103 S.Ct. at 3313. Here, Appellate Counsel reviewed the
22 entire record and strategically chose not to raise this issue, as she did not believe there was a
23 reasonable probability of success on appeal. Thus, this Court denies Petitioner's claim as he
24 fails to show that Appellate Counsel's representation fell below an objective standard of
25 reasonableness.

26 //

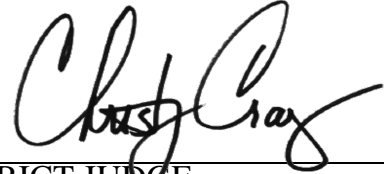
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1 **ORDER**

2 Based on the foregoing IT IS HEREBY ORDERED that the Petition for Writ of Habeas
3 Corpus (Post-Conviction) shall be, and is, hereby denied

4
5 Dated this 28th day of September, 2021

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7 

8 DISTRICT JUDGE

9 STEVEN B. WOLFSON
10 Clark County District Attorney
Nevada Bar #001565

338 DC1 E429 573A
Christy Craig
District Court Judge

11 BY /s/ Alexander Chen
12 ALEXANDER CHEN
13 Chief Deputy District Attorney
Nevada Bar #0010539

14 **CERTIFICATE OF SERVICE**

15 I hereby certify that service of Findings of Fact, was made this 22nd day of
16 September, 2021, by Mail via United States Postal Service to:
17 BARRY HARRIS #95363
18 Ely State Prison, P.O. BOX 989
4569 North State Rd. 490
19 Ely, Nevada 89301

20 /s/ Kristian Falcon
21 KRISTIAN FALCON
22 Secretary for the District Attorney's Office

23 October 4, 2021



CERTIFIED COPY
ELECTRONIC SEAL (NRS 1.190(3))

1 **CSERV**

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3 DISTRICT COURT
CLARK COUNTY, NEVADA

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6 Barry Harris, Plaintiff(s)

CASE NO: A-20-813935-W

7 vs.

DEPT. NO. Department 32

8 William Gittere, Defendant(s)
9

10 **AUTOMATED CERTIFICATE OF SERVICE**

11 This automated certificate of service was generated by the Eighth Judicial District
12 Court. The foregoing Finding of Fact and Conclusions of Law was served via the court's
13 electronic eFile system to all recipients registered for e-Service on the above entitled case as
listed below:

14 Service Date: 9/28/2021

15 Allen Lichtenstein

allaw@lvcoxmail.com

16 District Attorney

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17 District Court 32

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