

Electronically Filed
Jan 27 2023 11:27 AM
Elizabeth A. Brown
Clerk of Supreme Court

NOAS
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Attorney for Defendant – BARRY HARRIS

DISTRICT COURT
CLARK COUNTY, NEVADA

BARRY HARRIS,

Plaintiff,

CASE NO. A-20-813935-W
DEPT NO. 32

vs.

WILLIAM GITTERE,

Defendant.

NOTICE OF APPEAL

TO: THE STATE OF NEVADA

STEVE WOLFSON, DISTRICT ATTORNEY, CLARK COUNTY, NEVADA
and DEPARTMENT 32 OF THE EIGHTH JUDICIAL DISTRICT COURT OF
THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK.

NOTICE is hereby given that the judgment entered against said Plaintiff on the January
4, 2023.

DATED this 25th day of January 2023.

By: /s/ Dustin R. Marcello, Esq. _____
Dustin R. Marcello, Esq.
Nevada State Bar No. 10134
Attorney for Plaintiff

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CERTIFICATE OF SERVICE

I certify that the of the foregoing **NOTICE OF APPEAL** was served upon counsel of record, via Electronic Case Filing.

motions@clarkcountyda.com

DATED: January 27, 2022

/s/ DUSTIN R. MARCELLO, ESQ.

CASE SUMMARY

CASE NO. A-20-813935-W

Barry Harris, Plaintiff(s)
vs.
William Gittere, Defendant(s)

§
§
§
§
§
§
§

Location: **Department 32**
Judicial Officer: **Craig, Christy**
Filed on: **04/21/2020**
Case Number History:
Cross-Reference Case Number: **A813935**
Defendant's Scope ID #: **1946231**
Supreme Court No.: **83516**

CASE INFORMATION

Related Cases
C-17-326569-1 (Writ Related Case)

Case Type: **Writ of Habeas Corpus**

Statistical Closures
09/28/2021 Summary Judgment

Case Status: **09/28/2021 Closed**

DATE

CASE ASSIGNMENT

Current Case Assignment

Case Number A-20-813935-W
Court Department 32
Date Assigned 01/04/2021
Judicial Officer Craig, Christy

PARTY INFORMATION

Plaintiff **Harris, Barry**

Lead Attorneys
Marcello, Dustin R.
Retained
702-474-7554(W)

Defendant **Gittere, William**







Wolfson, Steven B
Retained
702-455-5320(W)

DATE

EVENTS & ORDERS OF THE COURT

INDEX

EVENTS

04/21/2020	 Motion for Appointment of Attorney [1] <i>Ex Parte Motion for Appointment of Counsel and Request for Evidentiary Hearing</i>
04/21/2020	 Filed Under Seal [2] <i>Financial Certificate</i>
04/21/2020	 Motion for Leave to Proceed in Forma Pauperis [3]
04/21/2020	 Inmate Filed - Petition for Writ of Habeas Corpus [4] <i>Petition for Writ of Habeas Corpus (Postconviction)</i>
05/01/2020	 Application to Proceed in Forma Pauperis [5] <i>Affidavit in Support of Motion to Proceed in Forma Pauperis</i>
05/08/2020	 Order to Proceed In Forma Pauperis [6] <i>Order to Proceed In Forma Pauperis</i>

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05/12/2020	 Order for Petition for Writ of Habeas Corpus <i>[7] Order for Petition for Writ of Habeas Corpus</i>
06/17/2020	 Ex Parte Motion Filed By: Plaintiff Harris, Barry <i>[8] Ex Parte Motion for Order to Transport Prisoner</i>
09/04/2020	 Motion Filed By: Plaintiff Harris, Barry <i>[9] Motion to Change Address</i>
09/23/2020	 Motion Filed By: Plaintiff Harris, Barry <i>[10] Motion and Order for Transportation of Inmate for Court Appearance or in the Alternative for Appearance by Telephone or Video Conference</i>
09/23/2020	 Notice of Motion Filed By: Plaintiff Harris, Barry <i>[11] Notice of Motion</i>
09/24/2020	 Subpoena Duces Tecum <i>[12] Subpoena Duces Tecum</i>
10/02/2020	 Response Filed by: Defendant Gittere, William <i>[13] State's Response to Petition for Writ of Habeas Corpus (Postconviction) and Ex Parte Motion for Appointment of Counsel and Request for Evidentiary Hearing</i>
10/14/2020	 Subpoena Duces Tecum Filed by: Plaintiff Harris, Barry <i>[14] Subpoena -Civil Regular / Duces Tecum</i>
10/26/2020	 Motion Filed By: Plaintiff Harris, Barry <i>[15] Motion</i>
11/04/2020	 Subpoena Electronically Issued <i>[17] Subpoena</i>
11/04/2020	 Subpoena Electronically Issued <i>[18] Subpoena</i>
11/24/2020	 Notice of Appearance <i>[19] Notice of Appearance</i>
01/04/2021	Case Reassigned to Department 32 <i>Judicial Reassignment to Judge Christy Craig</i>
02/03/2021	 Change of Address <i>[20] Motion of Change of Address</i>
04/08/2021	 Supplement



CASE SUMMARY
CASE NO. A-20-813935-W

	<p>Filed by: Plaintiff Harris, Barry [21] <i>Supplemental Petition for a Writ of Habeas Corpus</i></p>
06/03/2021	<p> Memorandum Filed By: Plaintiff Harris, Barry [22] <i>Memorandum to the Court</i></p>
06/10/2021	<p> Response [23] <i>State's Response to Supplemental Petition for Writ of Habeas Corpus (Postconviction) and Request for Evidentiary Hearing</i></p>
06/21/2021	<p> Reply Filed by: Plaintiff Harris, Barry [24] <i>Petitioner's Reply to the State's Response to the Petition for a Writ of Habeas Corpus</i></p>
08/11/2021	<p> Ex Parte Motion Filed By: Plaintiff Harris, Barry [25] <i>Ex Parte Motion for Order to Transport Prisoner</i></p>
09/14/2021	<p> Notice of Appeal [26] <i>Notice of Appeal</i></p>
09/16/2021	<p> Case Appeal Statement Filed By: Plaintiff Harris, Barry [27] <i>Case Appeal Statement</i></p>
09/28/2021	<p> Finding of Fact and Conclusions of Law Filed By: Defendant Gittere, William [28] <i>Findings of Fact, Conclusions of Law, and Order</i></p>
09/30/2021	<p> Notice of Entry of Findings of Fact, Conclusions of Law [29] <i>Notice of Entry of Findings of Fact, Conclusions of Law and Order</i></p>
10/15/2021	<p>Application to Proceed in Forma Pauperis Filed By: Plaintiff Harris, Barry [30] <i>Motion for Leave to Proceed in Forma Pauperis</i></p>
10/15/2021	<p> Motion for Withdrawal Filed By: Plaintiff Harris, Barry [31] <i>Motion for Withdrawal of Attorney of Record or in the Alternative, Request for Records /Court Case Documents</i></p>
10/15/2021	<p> Notice of Motion Filed By: Plaintiff Harris, Barry [32] <i>Notice of Motion</i></p>
10/25/2021	<p> Order to Proceed In Forma Pauperis Granted for: Plaintiff Harris, Barry [33] <i>Motion and Order for Leave to Proceed in Forma Pauperis</i></p>
03/14/2022	<p> Recorders Transcript of Hearing [35] <i>Recorders Transcript of Hearing Re: Argument: Petition for Writ of Habeas Corpus, June 24, 2021</i></p>

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03/14/2022	 Recorders Transcript of Hearing <i>[36] Recorders Transcript of Hearing Re: Petition for Writ of Habeas Corpus, November 3, 2020</i>
03/14/2022	 Recorders Transcript of Hearing <i>[37] Recorders Transcript of Hearing Re: Argument: Petition for Writ of Habeas Corpus Evidentiary Hearing, August 26, 2021</i>
09/26/2022	 NV Supreme Court Clerks Certificate/Judgment - Dismissed <i>[38] Nevada Supreme Court Clerk's Certificate/Remittitur Judgment - Dismissed</i>
10/28/2022	 Motion Filed By: Plaintiff Harris, Barry <i>[39] Motion for Amended Order or to Place on Calendar for Further Proceedings</i>
11/03/2022	 Application to Proceed in Forma Pauperis <i>[40] Application to Proceed in Forma Pauperis</i>
11/16/2022	 Clerk's Notice of Nonconforming Document <i>[41] Clerk's Notice of Nonconforming Document</i>
11/30/2022	 Motion <i>[42] Motion for Amended Order or to Place on Calendar for Further Proceedings</i>
12/01/2022	 Clerk's Notice of Hearing <i>[43] Clerk's Notice of Hearing</i>
12/09/2022	 Order to Proceed In Forma Pauperis <i>[44] Order to Proceed in Forma Pauperis</i>
01/03/2023	 Amended Order <i>[45] Amended Findings of Fact, Conclusions of Law, and Order</i>
01/04/2023	 Notice of Entry of Findings of Fact, Conclusions of Law <i>[46] Notice of Entry of Amended Findings of Fact, Conclusions of Law and Order</i>
01/25/2023	 Notice of Appeal (Criminal) Party: Plaintiff Harris, Barry <i>[47] Notice of Appeal</i>

HEARINGS

11/03/2020	 Petition for Writ of Habeas Corpus (12:00 PM) (Judicial Officer: Johnson, Eric) Granted in Part; Journal Entry Details: <i>Court noted the Petition itself is largely insufficient but it was timely filed. The Court further noted Deft. asked for assistance of as he is looking at sentence of 15 years to life, non-successive. COURT ORDRED, petition GRANTED; Clerk to contact Drew Christensen for appointment of counsel and will set a status check for confirmation of counsel upon response. CUSTODY (NDC);</i>
11/24/2020	 Confirmation of Counsel (1:45 PM) (Judicial Officer: Johnson, Eric) <i>Confirmaiton of Counsel: Allen Lichtenstein, Esq.</i> Confirmed; Journal Entry Details:

CASE SUMMARY

CASE NO. A-20-813935-W

Mr. Lichtenstein CONFIRMED AS COUNSEL and stated that he just received the case and is not that familiar with it at this time. COURT ORDERED, matter SET for a status check to set a briefing schedule. 12/08/20 12:00 PM STATUS CHECK: SET BRIEFING SCHEDULE;

12/08/2020



Status Check (12:00 PM) (Judicial Officer: Johnson, Eric)

Status Check: Set Briefing Schedule

Briefing Schedule Set;

Journal Entry Details:

Allen Lichtenstein, Esq. and Morgan Thomas, Esq. present via Bluejeans video conference.

Deflt. not present. Colloquy regarding briefing schedule. Following colloquy, COURT

ORDERED the following Briefing Schedule: Supplemental Brief due by April 8, 2021,

Answer/Response due by May 6, 2021, Reply due by June 10, 2020, and matter SET for

Argument. NDC 06/24/2021 8:30 AM ARGUMENT;

06/24/2021



Argument (11:00 AM) (Judicial Officer: Craig, Christy)

06/24/2021, 08/26/2021

ARGUMENT: PETITION FOR WRIT OF HABEAS CORPUS

Continued;

Denied;

Continued;

Denied;

Journal Entry Details:

Petitioner not present, incarcerated in the Nevada Dept. of Corrections. COURT ADVISED, it had read all of the pleadings and it was inclined to set this matter for an evidentiary hearing.

Mr. Jones stated he was not served with the Supplemental Brief; therefore, requested the opportunity to file a response. Mr. Lichenstein agreed that service had not originally been

effectuated; however, it was served and Mr. Vanboskerck had filed a response, and he filed a reply. Upon Court's inquiry, Mr. Lichenstein stated he did not believe that the Petitioner

needed to be present for the continuance setting and requested it be set out sixty days. COURT

ORDERED, matter SET for evidentiary hearing on a special setting. 8/26/21 - 12:30 PM -

EVIDENTIARY HEARING ... ARGUMENT: PETITION FOR WRIT OF HABEAS CORPUS;

08/26/2021

Evidentiary Hearing (12:30 PM) (Judicial Officer: Craig, Christy)

Matter Heard;

08/26/2021



All Pending Motions (12:30 PM) (Judicial Officer: Craig, Christy)

Matter Heard;

Journal Entry Details:

EVIDENTIARY HEARING ... ARGUMENT: PETITION FOR WRIT OF HABEAS CORPUS

Colloquy regarding the Deflt. not being present due to the order to transport not being served.

Ms. Marland inquired if the matters could be bifurcated. Mr. Lichtenstein agreed to bifurcate the matters. Ms. Marland stated she had Mr. Sheets and Mr. Ramsey on call but they were not

subpoenaed for this matter. Mr. Lichtenstein stated he did not plan on calling them. Sworn

testimony (see worksheet). Argument by Mr. Lichtenstein that there was not proper service, it

was by mail, which was not proper for a criminal case. Further argument by Mr. Lichtenstein

regarding ineffectiveness of counsel, the case should have been dismissed in Justice Court, and

that good cause should have been shown, that the witness couldn't have been served. Argument

by Ms. Marland noting there was due diligent efforts and there was good cause for a material

witness warrant, this did not rise to the level of ineffectiveness of counsel. COURT NOTED, the

first question was whether there should there have been an appeal, of Judge Smith's denial of

the writ, to the Nevada Supreme Court and was that ineffectiveness, and not raising that the

issue post-trial on direct appeal and it had grave concerns about that. Colloquy regarding

whether this should have been raised on the direct appeal, and if it wasn't in the direct appeal,

whether that should be considered a waiver. Ms. Marland argued that it appeared to be a

strategic decision not to include that in the direct appeal; additionally, she could call Mr.

Sheets to testify in this matter. Upon Court's inquiry, Mr. Lichtenstein agreed to reopen this

matter. Sworn witness testimony continued. Arguments by counsel regarding whether there was

ineffectiveness of counsel. COURT summarized how to prove ineffectiveness of counsel under

the laws. COURT stated its FINDINGS, as to the first issue of the preliminary hearing, and it

was not finding Mr. Ramsey was ineffective, or that Mr. Sheets was ineffective. As to the second

issue about direct appeal and the non-inclusion of that decision on the writ on the appeal,

COURT summarized the requirements of proof of ineffectiveness of appellate counsel under the

laws. COURT NOTES as to the denial of the writ in District Court, complaining about Justice

CASE SUMMARY

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Court's decision to grant a continuance, and whether or not that decision was appropriate, was not likely to have had a reasonable probability of success on appeal. COURT FINDS, Ms. Bernstein's testimony was helpful in her decision making process, it was not that she ignored the issue but had determined it was not appropriate issue to raise on appeal, and she had other more important issues, and she thought there was not a reasonable probability of success on appeal; therefore, it WAS NOT FINDING Ms. Bernstein and Mr. Sheets were ineffective on the direct appeal; therefore, ORDERED, the writ DENIED and DIRECTED, Ms. Marland to prepare the order. ;

10/21/2021



At Request of Court (8:30 AM) (Judicial Officer: Jones, Tierra)

At the Request of Court - Supreme Court Limited Remand for Appointment Counsel on Denial of Post Conviction Writ

Counsel Confirmed;

Journal Entry Details:

COURT NOTED, Mr. Marcello was confirming as counsel; therefore, ORDERED, Mr. Marcello APPOINTED as counsel, for the limited purpose of the appeal, and ADVISED, Mr. Marcello to follow the dates set in the Supreme Court.;

12/15/2022



Motion (8:30 AM) (Judicial Officer: Craig, Christy)

12/15/2022, 02/21/2023

Motion for Amended Order or to Place on Calendar for Further Proceedings

Continued;

Journal Entry Details:

Mr. Marcello stated he was not sure if the higher court needed a blanket statement indicating that all of the other claims had been denied. COURT ADVISED, they needed to go through the appeal and the original documents to ensure everything was there; ADDITIONALLY ADVISED, Mr. Marcello to go through all of the original claims, what was addressed at the evidentiary hearing, wherein nothing needed to be filed, however, DIRECTED, that information to be provided to its law clerk and JEA, and the State is DIRECTED to do the same thing; ORDERED, matter CONTINUED. CONTINUED TO: 2/21/23 - 10:00 AM;

DISTRICT COURT CIVIL COVER SHEET

County, Nevada

A-20-813935-W

Case No. _____
(Assigned by Clerk's Office)

I. Party Information *(provide both home and mailing addresses if different)*

Plaintiff(s) (name/address/phone): <div style="text-align: center; margin-top: 10px;">Barry Harris</div>	Defendant(s) (name/address/phone): <div style="text-align: center; margin-top: 10px;">William Gittere, ESP W</div>
Attorney (name/address/phone):	Attorney (name/address/phone):

II. Nature of Controversy *(please select the one most applicable filing type below)*

Civil Case Filing Types

Real Property Landlord/Tenant <input type="checkbox"/> Unlawful Detainer <input type="checkbox"/> Other Landlord/Tenant Title to Property <input type="checkbox"/> Judicial Foreclosure <input type="checkbox"/> Other Title to Property Other Real Property <input type="checkbox"/> Condemnation/Eminent Domain <input type="checkbox"/> Other Real Property	Negligence <input type="checkbox"/> Auto <input type="checkbox"/> Premises Liability <input type="checkbox"/> Other Negligence Malpractice <input type="checkbox"/> Medical/Dental <input type="checkbox"/> Legal <input type="checkbox"/> Accounting <input type="checkbox"/> Other Malpractice	Torts Other Torts <input type="checkbox"/> Product Liability <input type="checkbox"/> Intentional Misconduct <input type="checkbox"/> Employment Tort <input type="checkbox"/> Insurance Tort <input type="checkbox"/> Other Tort
Probate Probate <i>(select case type and estate value)</i> <input type="checkbox"/> Summary Administration <input type="checkbox"/> General Administration <input type="checkbox"/> Special Administration <input type="checkbox"/> Set Aside <input type="checkbox"/> Trust/Conservatorship <input type="checkbox"/> Other Probate Estate Value <input type="checkbox"/> Over \$200,000 <input type="checkbox"/> Between \$100,000 and \$200,000 <input type="checkbox"/> Under \$100,000 or Unknown <input type="checkbox"/> Under \$2,500	Construction Defect & Contract Construction Defect <input type="checkbox"/> Chapter 40 <input type="checkbox"/> Other Construction Defect Contract Case <input type="checkbox"/> Uniform Commercial Code <input type="checkbox"/> Building and Construction <input type="checkbox"/> Insurance Carrier <input type="checkbox"/> Commercial Instrument <input type="checkbox"/> Collection of Accounts <input type="checkbox"/> Employment Contract <input type="checkbox"/> Other Contract	Judicial Review/Appeal Judicial Review <input type="checkbox"/> Foreclosure Mediation Case <input type="checkbox"/> Petition to Seal Records <input type="checkbox"/> Mental Competency Nevada State Agency Appeal <input type="checkbox"/> Department of Motor Vehicle <input type="checkbox"/> Worker's Compensation <input type="checkbox"/> Other Nevada State Agency Appeal Other <input type="checkbox"/> Appeal from Lower Court <input type="checkbox"/> Other Judicial Review/Appeal
Civil Writ Civil Writ <input checked="" type="checkbox"/> Writ of Habeas Corpus <input type="checkbox"/> Writ of Mandamus <input type="checkbox"/> Writ of Quo Warrant <div style="margin-left: 150px;"> <input type="checkbox"/> Writ of Prohibition <input type="checkbox"/> Other Civil Writ </div>		Other Civil Filing Other Civil Filing <input type="checkbox"/> Compromise of Minor's Claim <input type="checkbox"/> Foreign Judgment <input type="checkbox"/> Other Civil Matters

Business Court filings should be filed using the Business Court civil coversheet.

4/21/20

Date

Prepared by Clerk

Signature of initiating party or representative

See other side for family-related case filings.

1 **AMOR**
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 JONATHAN VANBOSKERCK
6 Chief Deputy District Attorney
7 Nevada Bar # 6528
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

9 BARRY HARRIS,
10 #1946231

Petitioner,

-vs-

WILLIAM GITTERE, Warden,

Respondent.

CASE NO: A-20-813935-W

DEPT NO: XXXII

AMENDED 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 (24) to sixty (60) months in NDC, concurrent with Count 2. The Court credited Petitioner with

1 351 days time served. Petitioner's Judgment of Conviction was filed on August 16, 2018.

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

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

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

13 On April 8, 2021, Petitioner, through counsel, filed his Supplemental Petition for Writ
14 of Habeas Corpus (Postconviction) (his "Supplement"). On June 10, 2021, the State filed its
15 Response. On August 26, 2021, this Court held an evidentiary hearing. Findings of Fact,
16 Conclusions of Law and Order denying habeas relief were filed on September 28, 2021.
17 Notice of Entry of Order was filed on September 30, 2021.

18 Notice of Appeal was filed on September 14, 2021. On August 29, 2022, the Nevada
19 Supreme Court issued an Order Dismissing Appeal disposing of appellate proceedings because
20 the September 28, 2021, Findings of Fact, Conclusions of Law and Order "did not address all
21 of the claims raised in Harris' pleadings below." Order Dismissing Appeal filed August 29,
22 2022.

23 **STATEMENT OF FACTS**

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

25 On August 22, 2017, officers responded to a residence in reference to a
26 call that came into 911 where they heard a female victim screaming. "Help me,
27 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.

28 The victim told officers that they had been dating for six years and have
lived together on and off as well. She stated that on that day she was arguing

1 with him on phone while she was at work. She went home and found the
2 defendant lying on her bed. She reported that she gave him a key to the residence
3 but was not living there. She sat next to him and they started arguing again. The
4 victim told him to leave the residence and he replied, "I'm not going nowhere
5 bitch". She told the defendant that if he continued to disrespect her that she
6 would call the police. She reported that things escalated and the defendant
7 grabbed her around her throat with both hands and began squeezing. He
8 continued doing this until she could not breathe and felt as she was going to pass
9 out. He then slammed her down on the bed and began punching her in the head.
10 The defendant threw her on the floor and continued to punch her. The victim
11 was able to get up and ran into the living room screaming for help. The victim
12 stated that the defendant removed a firearm from his pants pocket and quickly
13 approached her. He shoved the firearm in her mouth telling her he would blow
14 her brains out and if she made any noise, he would kill her. She stated that she
15 continued to scream for help. The defendant began hitting her again on top of
16 the head and the face as she fell to the ground where he continued to hit and kick
17 her. Afterwards, he put the gun to her head and forced her to a bathroom telling
18 her to be quiet and to stop yelling or he would pull the trigger. The victim stated
19 that the defendant made her go into the restroom to keep her hostage so she
20 wouldn't run or call the police. She stated that he continued to hit her during this
21 and then poured a bottle of juice all over her while calling her names. The
22 defendant told her that he hated her and that if she contacted the police that he
23 would be back to kill her. He then gathered his belongings and left the residence.
24 She stayed sitting on the bathroom floor and police arrived by the time she got
25 up.

26 Presentence Investigation Report at 5.

27 ANALYSIS

28 **PETITIONER DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL**

1 The Sixth Amendment to the United States Constitution provides that, “[i]n all criminal
2 prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his
3 defense.” The United States Supreme Court has long recognized that “the right to counsel is
4 the right to the effective assistance of counsel.” Strickland v. Washington, 466 U.S. 668, 686,
5 104 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323
6 (1993).

7 To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove
8 she was denied “reasonably effective assistance” of counsel by satisfying the two-prong test
9 of Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063–64. See also Love, 109 Nev. at 1138,
10 865 P.2d at 323. Under the Strickland test, a defendant must show first that his counsel's
11 representation fell below an objective standard of reasonableness, and second, that but for

1 counsel's errors, there is a reasonable probability that the result of the proceedings would have
2 been different. 466 U.S. at 687–88, 694, 104 S. Ct. at 2065, 2068; Warden, Nevada State Prison
3 v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-part test).
4 “[T]here is no reason for a court deciding an ineffective assistance claim to approach the
5 inquiry in the same order or even to address both components of the inquiry if the defendant
6 makes an insufficient showing on one.” Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

7 The court begins with the presumption of effectiveness and then must determine
8 whether the defendant has demonstrated by a preponderance of the evidence that counsel was
9 ineffective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). “Effective counsel
10 does not mean errorless counsel, but rather counsel whose assistance is ‘[w]ithin the range of
11 competence demanded of attorneys in criminal cases.’” Jackson v. Warden, 91 Nev. 430, 432,
12 537 P.2d 473, 474 (1975).

13 Counsel cannot be ineffective for failing to make futile objections or arguments. See
14 Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Trial counsel has the
15 “immediate and ultimate responsibility of deciding if and when to object, which witnesses, if
16 any, to call, and what defenses to develop.” Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167
17 (2002). Further, a defendant who contends his attorney was ineffective because he did not
18 adequately investigate must show how a better investigation would have rendered a more
19 favorable outcome probable. Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004).

20 Based on the above law, the role of a court in considering allegations of ineffective
21 assistance of counsel is “not to pass upon the merits of the action not taken but to determine
22 whether, under the particular facts and circumstances of the case, trial counsel failed to render
23 reasonably effective assistance.” Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711
24 (1978). This analysis does not mean that the court should “second guess reasoned choices
25 between trial tactics nor does it mean that defense counsel, to protect himself against
26 allegations of inadequacy, must make every conceivable motion no matter how remote the
27 possibilities are of success.” Id. To be effective, the constitution “does not require that counsel
28 do what is impossible or unethical. If there is no bona fide defense to the charge, counsel

1 cannot create one and may disserve the interests of his client by attempting a useless charade.”
2 United States v. Cronic, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

3 “There are countless ways to provide effective assistance in any given case. Even the
4 best criminal defense attorneys would not defend a particular client in the same way.”
5 Strickland, 466 U.S. at 689, 104 S. Ct. at 689. “Strategic choices made by counsel after
6 thoroughly investigating the plausible options are almost unchallengeable.” Dawson v. State,
7 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784
8 P.2d 951, 953 (1989). In essence, the court must “judge the reasonableness of counsel’s
9 challenged conduct on the facts of the particular case, viewed as of the time of counsel’s
10 conduct.” Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.

11 Even if a defendant can demonstrate that his counsel’s representation fell below an
12 objective standard of reasonableness, he must still demonstrate prejudice and show a
13 reasonable probability that, but for counsel’s errors, the result of the trial would have been
14 different. McNelson v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing
15 Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). “A reasonable probability is a probability
16 sufficient to undermine confidence in the outcome.” Id. (citing Strickland, 466 U.S. at 687-89,
17 694, 104 S. Ct. at 2064–65, 2068).

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

28 When examining the effectiveness of appellate counsel under the Strickland analysis,

1 there is a strong presumption that appellate counsel's performance was reasonable and fell
2 within "the wide range of reasonable professional assistance." See United States v. Aguirre,
3 912 F.2d 555, 560 (2nd Cir. 1990) (citing Strickland, 466 U.S. at 689, 104 S.Ct. at 2065). A
4 claim of ineffective assistance of appellate counsel must satisfy the two-prong test set forth by
5 Strickland. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). In order to satisfy
6 Strickland's second prong, the defendant must show that the omitted issue would have had a
7 reasonable probability of success on appeal. Id.

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

16 I. **Supplemental Claims:**

17 ***A. Petitioner Fails to Demonstrate Ineffective Assistance of Trial Counsel***

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

23 ***B. Petitioner Fails to Demonstrate Ineffective Assistance of Appellate Counsel***

24 Petitioner also includes a claim that appellate counsel was ineffective for failing to raise
25 the issue of the unsuccessful Writ of Mandamus upon direct appeal. See Supplement at 3, 19.
26 Appellate Counsel does not provide ineffective assistance by strategically focusing on certain
27 issues. Jones, 463 U.S. at 751-52, 103 S.Ct. at 3313. Here, Appellate Counsel reviewed the
28 entire record and strategically chose not to raise this issue, as she did not believe there was a

1 reasonable probability of success on appeal. Thus, this Court denies Petitioner’s claim as he
2 fails to show that Appellate Counsel’s representation fell below an objective standard of
3 reasonableness.

4 **II. Pro Per Claims:**

5 **A. Petitioner Fails to Demonstrate Ineffective Assistance of Trial Counsel**
6 **(Grounds One and Seven)**

7 Here, Petitioner alleges his trial counsel was ineffective in two ways:

8 ***1. Pretrial Representation (Ground One)***

9 Petitioner first alleges that his counsel, Mr. Damian Sheets, Esq., was ineffective in his
10 pretrial representation by failing to adequately prepare for trial, and by failing to pursue a
11 petition for writ of mandamus. Petition at 5 (erroneously numbered “6”). More specifically,
12 Petitioner alleges that Sheets “took [Petitioner’s] case mid-way of [sic] the preliminary
13 hearing” and did not review “the whole case.” Id. Petitioner also claims Sheets was ineffective
14 for failing to pursue a writ of mandamus with the Nevada Supreme Court. Id.

15 As a preliminary matter, Petitioner’s claim regarding preparedness is a naked assertion
16 warranting only summary denial under Hargrove. 100 Nev. at 502, 686 P.2d at 225. Even on
17 the merits of Petitioner’s claim, Petitioner cannot meet his burden under Strickland because
18 Petitioner fails to specifically argue how Sheets’s representation fell below a reasonable
19 standard. 466 U.S. at 687–88, 104 S. Ct. at 2065; NRS 34.735(6). Petitioner cannot meet the
20 second prong of Strickland because Petitioner fails to substantively argue, much less
21 demonstrate, how Sheets’s alleged failure to adequately prepare prejudiced Petitioner. 466
22 U.S. at 694, 104 S. Ct. at 2068; NRS 34.735(6). Indeed, Petitioner’s failure to state, much less
23 show, how Sheets’s performance would have been different had Sheets adequately prepared
24 renders Petitioner unable to meet his burden under Strickland. Molina, 120 Nev. at 192, 87
25 P.3d at 538.

26 Likewise, Petitioner’s mandamus claim amounts to a conclusory allegation, lacking any
27 specificity or support. Therefore, as Petitioner does not identify any specific issue that could
28 have been raised in a petition for writ of mandamus, or how that issue would have changed the

posture of Petitioner's case, Petitioner's claim is suitable only for summary denial. NRS. 34.735(6); Hargrove, 100 Nev. at 502, 686 P.2d at 225.

Because Petitioner's claim consists of conclusory allegations lacking specificity, Petitioner is not entitled to relief on Ground One of his Petition.

2. Witness Impeachment (Ground Seven)

Petitioner also asserts ineffective assistance due to Sheets's failure "to impeach key witness." Petition at 11. Specifically, Petitioner alleges that a witness, "Ms. Dotson," could have been impeached with prior inconsistent statements, and that Sheets's failure to pursue that impeachment constituted ineffective assistance. Id.

Petitioner does not specify which parts of Dotson's testimony could have been impeached with prior inconsistent statements. Petition at 11; NRS 34.735(6). Further, a review of Sheets's cross-examination of Dotson belies Petitioner's claims. See, e.g., Transcript of Proceedings, Jury Trial – Day 2, dated April 10, 2018 (filed March 4, 2019) ("JT2") at 166 (confronting Dotson with prior inconsistent testimony about when she saw a gun), 187 (confronted Dotson about her testimony differing between her police statement, the preliminary hearing, and at trial). Because Sheets confronted Dotson about prior inconsistent statements, and Petitioner offers no substantive examples of opportunities to further impeach Dotson's testimony, Petitioner's claim is suitable only for summary denial under Hargrove. 100 Nev. at 502, 686 P.2d at 225.

Even on its merits, Petitioner's claim does not warrant relief under Strickland. Petitioner does not allege, much less substantiate, that he was prejudiced by Sheets's allegedly-deficient performance. Moreover, the jury returned verdicts of "Not Guilty" on multiple counts, and found Petitioner guilty of multiple lesser-included crimes, rather than what was charged in the Amended Information. Therefore, Petitioner certainly does not establish prejudice sufficient to warrant relief under Strickland. 466 U.S. at 697, 104 S. Ct. at 2069 (when a petitioner fails to meet one prong of the Strickland analysis, examination of the other prong is unnecessary).

Because Petitioner's claim is belied by the record, and because Petitioner fails to

1 demonstrate prejudice, Petitioner is not entitled to relief on Ground Seven of his Petition.

2 **B. This Court Lacks Jurisdiction to Review Decisions of the Nevada Supreme**
3 **Court (Grounds Two and Six)**

4 Petitioner also alleges that the Nevada Supreme Court violated his rights. Specifically,
5 he alleges “the [S]upreme [C]ourt of [N]evada forced this petitioner to go through my direct
6 appeal with counsel I had conflict with,” and that the Court erred by “not allowing Mr. Harris
7 to have motion reviewed in that court[.]” Petition at 6 (erroneously numbered “7”), 10.

8 Article 6, § 6 of the Nevada Constitution vests district courts with “appellate
9 jurisdiction in cases arising in Justices Courts and such other inferior tribunals as may be
10 established by law.” Only the Nevada Supreme Court has “appellate jurisdiction...on
11 questions of law alone in all criminal cases[.]” NEV. CONST. ART. 6, § 4. District courts “lack
12 jurisdiction to review the acts of other district courts.” State v. Sustacha, 108 Nev. 223, 225,
13 826 P.2d 959, 960 (1992); accord, Rohlfing v. Dist. Court, 106 Nev. 902, 803 P.2d 659 (1990)
14 (district courts have equal and coextensive jurisdiction and thus the various district courts lack
15 jurisdiction to review acts of other district courts).

16 District courts have jurisdiction to adjudicate petitions for habeas corpus relief. NEV.
17 CONST. ART. 6, § 4. Such jurisdiction is limited, in relevant part, to petitions claiming that a
18 conviction or sentence is constitutionally infirm or in violation of state law. NRS 34.724(1).
19 However, habeas is not “a substitute for...the remedy of direct review of the sentence or
20 conviction.” NRS 34.724(2)(a). The limitations on the authority of the district courts to
21 entertain habeas relief are strictly enforced by the Nevada Supreme Court. McConnell v. State,
22 125 Nev. 243, 212 P.3d 307 (2009) (challenge to lethal injection protocol not cognizable in a
23 post-conviction petition for writ of habeas corpus, as it is a challenge to the manner in which
24 death will be carried out, rather than the validity of the judgment or conviction); Warden v.
25 Owens, 93 Nev. 255, 563 P.2d 81 (1977) (district court may not order relief in habeas corpus
26 proceedings that is beyond its power or authority); Sanchez v. Warden, 89 Nev. 273, 510 P.2d
27 1362 (1973) (post-conviction proceedings are not intended to be utilized as a substitute for
28 appeal and, as such, failure to challenge identification procedure on appeal waived the issue

1 for purposes of post-conviction review).

2 By raising claims of Nevada Supreme Court error, Petitioner effectively asks this Court
3 to review the actions of the Nevada Supreme Court. Such a request is inappropriate, as this
4 Court lacks jurisdiction to conduct such a review. Therefore, Petitioner's Grounds Two and
5 Six must be dismissed.

6 **C. Petitioner's Claim Regarding the Body Camera Footage does not Warrant**
7 **Relief (Ground Three)**

8 Petitioner's next ground alleges a violation of his Fifth and Fourteenth Amendment
9 rights when the trial court "told Petitioner's lawyer to tread lightly on body cam evidence."
10 Petition at 7 (erroneously numbered "8"). This claim is procedurally barred and is nothing
11 more than a naked assertion; therefore, it does not entitle Petitioner to relief.

12 The Nevada Supreme Court has held that "challenges to the validity of a guilty plea and
13 claims of ineffective assistance of trial and appellate counsel must first be pursued in post-
14 conviction proceedings.... [A]ll other claims that are appropriate for a direct appeal must be
15 pursued on direct appeal, or they will be *considered waived in subsequent proceedings.*"
16 Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added)
17 (disapproved of on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)).
18 "A court must dismiss a habeas petition if it presents claims that either were or could have
19 been presented in an earlier proceeding, unless the court finds both cause for failing to present
20 the claims earlier or for raising them again and actual prejudice to the petitioner." Evans v.
21 State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001), overruled on other grounds by Lisle v.
22 State, 131 Nev. 356, 351 P.3d 725 (2015). Additionally, substantive claims are beyond the
23 scope of habeas and waived. NRS 34.724(2)(a); see also Evans, 117 Nev. at 646-47, 29 P.3d
24 498 at 523; Franklin, 110 Nev. at 752, 877 P.2d 1058 at 1059.

25 Petitioner's claim does not challenge the validity of a guilty plea, nor does it allege
26 ineffective assistance of counsel; therefore, this claim should have been raised on direct appeal.
27 Franklin, 110 Nev. at 752, 877 P.2d at 1059. Petitioner's failure to raise the claim in that effort
28 results in a waiver thereof. Id. Petitioner does not allege that good cause exists to overcome

1 this default, and cannot, as his allegation revolves around an occurrence at his trial; therefore,
2 all of the facts and law necessary to raise this complaint were clearly available for Petitioner's
3 direct appeal. Evans, 117 Nev. at 646-47, 29 P.3d at 523. Nor does Petitioner claim that some
4 impediment external to the defense prevented him from properly raising this claim on direct
5 appeal. Pellegrini v. State, 117 Nev. 860, 886, 34 P.3d 519, 537 (2001) (citing Harris v.
6 Warden, 114 Nev. 956, 959, 964 P.2d 785, 787 (1998) (abrogated on other grounds by Rippo
7 v. State, 134 Nev. 411, 423 n.12, 423 P.3d 1084, 1097 n.12 (2018)). Likewise, Petitioner does
8 not specify how he was prejudiced by the trial court's comment about the body cam. Petition
9 at 7. Even assuming *arguendo* that the trial court warned or admonished Petitioner's counsel
10 regarding the body cam footage, that simple fact would not itself demonstrate any prejudice
11 or error. Therefore, Petitioner cannot demonstrate prejudice sufficient to overcome his default,
12 much less to demonstrate he is entitled to relief.

13 Furthermore, even if the underlying claim was not defaulted by Petitioner's failure to
14 raise it on direct appeal, Petitioner does not substantiate his claim with any specific factual
15 allegations or citations to the record. Therefore, Petitioner's claim is suitable only for summary
16 denial as a naked assertion. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

17 Because Petitioner's claim is defaulted, with no good cause or prejudice shown, and
18 because the claim itself is a naked assertion, Petitioner's Ground Three is insufficient to
19 warrant relief.

20 **D. Petitioner Fails to Demonstrate Appellate Counsel was Ineffective**
21 **(Grounds Four and Eight)**

22 Petitioner also argues that Sheets was ineffective as appellate counsel. Petition at 8
23 (erroneously numbered "9"), 12. Petitioner alleges that Sheets should have raised an
24 "insufficient evidence" claim regarding kidnapping, and that Sheets should have petitioned for
25 rehearing under NRAP 40(a)(1). Id.

26 When examining the effectiveness of appellate counsel under the Strickland analysis,
27 there is a strong presumption that appellate counsel's performance was reasonable and fell
28 within "the wide range of reasonable professional assistance." See United States v. Aguirre,

1 912 F.2d 555, 560 (2nd Cir. 1990) (citing Strickland, 466 U.S. at 689, 104 S.Ct. at 2065). A
2 claim of ineffective assistance of appellate counsel must satisfy the two-prong test set forth by
3 Strickland. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). In order to satisfy
4 Strickland's second prong, the defendant must show that the omitted issue would have had a
5 reasonable probability of success on appeal. Id.

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

14 Petitioner does not support his claims of ineffective assistance of appellate counsel with
15 any substance or reference to the record. Petition at 8, 12. He simply states issues that he
16 submits should have been raised. Id. These claims, therefore, amount to nothing more than
17 naked assertions suitable only for summary denial. Hargrove, 100 Nev. at 502, 686 P.2d at
18 225.

19 Furthermore, Petitioner does not substantiate how his submitted claim (insufficient
20 evidence of kidnapping) was any more meritorious than the issues presented on direct appeal
21 by Sheets. Petition at 8; Jones, 463 U.S. at 751-52, 103 S.Ct. at 3313. Likewise, Petitioner
22 does not demonstrate that there were grounds for a rehearing on his direct appeal, or that Sheets
23 had a duty to provide Petitioner with discovery. Petition at 12; Aguirre, 912 F.2d at 560.
24 Therefore, Petitioner fails to overcome the presumption of effectiveness, and subsequently,
25 the presumption that Sheets made a virtually unchallengeable strategic decision regarding
26 which claims to raise, and whether to pursue a rehearing. Rhyne, 118 Nev. at 8, 38 P.3d at 167.
27 Indeed, Sheets did not have a duty to raise any issues, or pursue any actions, that would have
28 been futile. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Finally, Petitioner does not explain how

1 the outcome of his direct appeal would have been different, much less show the likelihood of
2 that purported outcome, had Sheets raised the issue, provided Petitioner with discovery, and
3 petitioned for rehearing. Kirksey, 112 Nev. at 998, 923 P.2d at 1114. Therefore, Petitioner fails
4 to meet his burden under Strickland for demonstrating ineffective assistance of appellate
5 counsel.

6 Because Petitioner's claims are mere naked assertions, and because Petitioner fails to
7 meet his burden under Strickland regarding appellate counsel, Petitioner's grounds Four and
8 Eight do not entitle Petitioner to relief.

9 **E. Petitioner Waived His Speedy Trial Claim by Failing to Raise it on Direct**
10 **Appeal (Ground Five)**

11 Petitioner's fifth claim alleges a violation of his right to a speedy trial. Petition at 9. He
12 also appears to allege a derivative ineffective assistance of counsel claim because Sheets
13 "ask[ed] for more time" to prepare for trial at the calendar call. Id.

14 As a preliminary matter, Petitioner's claim should have been raised on direct appeal,
15 and his failure to raise it there results in a waiver thereof. NRS 34.724(2)(a), 34.810(1)(b)(2);
16 Franklin, 110 Nev. at 752, 877 P.2d at 1059; Evans, 117 Nev. at 646-47, 29 P.3d at 523.
17 Petitioner does not allege good cause for his failure to raise this claim on direct appeal, and
18 cannot, as all of the facts and law necessary to raise it were available at the time Petitioner
19 filed his direct appeal. Evans, 117 Nev. at 646-47, 29 P.3d at 523. Nor does Petitioner claim
20 an impediment external to the defense prevented him from properly raising this claim on direct
21 appeal. Pellegrini, 117 Nev. at 886, 34 P.3d at 537. Likewise, Petitioner cannot demonstrate
22 prejudice sufficient to overcome his default, as his claim itself is without merit.

23 The Sixth Amendment to the United States Constitution guarantees that, "[i]n all
24 criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." In Barker
25 v. Wingo, the United States Supreme Court set out a four-part test to determine if a defendant's
26 speedy trial right has been violated: "[l]ength of the delay, the reason for the delay, the
27 defendant's assertion of his right, and prejudice to the defendant." 407 U.S. 514, 530, 92 S.Ct.
28 2182, 2192 (1972); see Prince v. State, 118 Nev. 634, 640, 55 P.3d 947, 951 (2002).

1 As to the first factor, in order to trigger a speedy trial analysis, “an accused must allege
2 that the interval between accusation and trial has crossed the threshold dividing ordinary from
3 ‘presumptively prejudicial’ delay.” Doggett v. United States, 505 U.S. 650, 651-52, 112 S.Ct.
4 2686, 2690 (1992). Courts have generally found post-accusation delays to be “presumptively
5 prejudicial” as they approach the one-year mark. Id. at 652 n.1, 112 S.Ct. at 2691 n.1.

6 As to the second factor, different reasons for trial delay should be attributed different
7 weights. Barker, 407 U.S. at 531, 92 S.Ct. at 2192. A deliberate delay in order to hamper the
8 defense is weighed heavily against the State, while negligence is weighed less heavily. Id. “[A]
9 valid reason, such as a missing witness, should serve to justify appropriate delay.” Id.
10 However, when a petitioner is responsible for most of the delay, he is not entitled to relief.
11 Middleton v. State, 114 Nev. 1089, 1110, 968 P.2d 296, 310-11 (1998).

12 Regarding the third factor, the Barker Court emphasized, “failure to assert the [speedy
13 trial] right will make it difficult for a [petitioner] to prove that he was denied a speedy trial.
14 407 U.S. at 531, 92 S.Ct. at 2192.

15 The fourth factor, prejudice, should be assessed by looking to “oppressive pretrial
16 incarceration, anxiety and concern of the accused, and the possibility that the [accused’s]
17 defense will be impaired by dimming memories and loss of exculpatory evidence.” Doggett,
18 505 U.S. at 654, 112 S.Ct. at 2692 (internal citations omitted).

19 Here, the Information against Petitioner was filed on January 17, 2018. Petitioner
20 proceeded to trial on April 9, 2018. Therefore, less than ninety (90) days passed between
21 Petitioner being formally charged and Petitioner proceeding to trial. As such, the delay does
22 not come close to approaching the one-year, “presumptively prejudicial” timeline as expressed
23 in Doggett. 505 U.S. at 652 n.1, 112 S.Ct. at 2691 n.1. Therefore, the first Barker factor does
24 not weigh in Petitioner’s favor.

25 Further, Petitioner recognizes that counsel requested more time to prepare for trial.
26 Petition at 9. Because at least some of the delay, which itself was minimal, was accounted to
27 Petitioner’s counsel needing to prepare for trial, Petitioner cannot demonstrate that the second
28 factor weighs in his favor.

1 Petitioner alleges that counsel requested additional time “over [Petitioner’s]
2 objections.” Petition at 9. However, a review of the Court Minutes demonstrated that, at the
3 calendar call, Petitioner’s counsel stated that they could not announce ready, but that they were
4 trying to be ready by the invoked trial date. See, Court Minutes dated February 27, 2018 (filed
5 on March 2, 2018) (“2/27 Minutes”). Thereafter, Petitioner’s counsel advised his intention to
6 file certain pretrial motions that would be beneficial to Petitioner, and requested a 30-day
7 continuance. 3/16 Minutes. Counsel recognized that Petitioner preferred to proceed to trial;
8 however, the Court informed Petitioner that there were no judges available to conduct
9 Petitioner’s trial, and granted the 30-day continuance. Id. Therefore, the third prong should
10 weigh against Petitioner due to his counsel’s request for a continuance. Even if the delay were
11 not due to Petitioner, the Court placed on the record that there were no available trial options;
12 therefore, in any event, the third prong could not weigh heavily in Petitioner’s favor.

13 Finally, Petitioner does not allege that the delay in trial was detrimental to Petitioner’s
14 defense at trial. Petition at 9. Therefore, Petitioner does not meet his burden for demonstrating
15 prejudice, and this prong cannot weigh in Petitioner’s favor. Likewise, Petitioner’s failure to
16 allege, much less demonstrate, precludes Petitioner’s ability to properly plead his derivative
17 ineffective assistance claim. Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

18 Because Petitioner’s claim was waived by his failure to raise it on direct appeal, and
19 because the claim itself is without merit, Petitioner is not entitled to relief on Ground Five of
20 his Petition.

21 **F. Petitioner Waived His Perjury Claim by Failing to Raise it on Direct Appeal**
22 **(Ground Nine)**

23 Petitioner also includes claim that his conviction was the result of perjury at trial.
24 Petition at 13. He does not specify which witness allegedly committed perjury, but alleges that
25 “the evidence at trial was totally contrary to police report and affidavit.” Id.

26 Petitioner’s claim is another claim that is suitable for direct appeal, but was not raised
27 therein. Therefore, this claim is waived. NRS 34.724(2)(a), 34.810(1)(b)(2); Evans, 117 Nev.
28 at 646-47, 29 P.3d at 523; Franklin, 110 Nev. at 752, 877 P.2d at 1059. Petitioner does not,

1 and could not successfully, allege good cause for his failure to raise this claim on direct appeal,
2 as all of the facts and law necessary to raise it were available at the time of Petitioner's direct
3 appeal. Evans, 117 Nev. at 646-47, 29 P.3d at 523. Petitioner similarly does not claim an
4 impediment external to the defense prevented him from properly raising this claim on direct
5 appeal. Pellegrini, 117 Nev. at 886, 34 P.3d at 537. Petitioner cannot demonstrate prejudice to
6 overcome his procedural default because his claim itself is without merit.

7 As stated *supra.*, Petitioner makes an allegation of perjury, but does not identify which
8 witness allegedly perjured themselves. Petition at 13. In the event Petitioner is referencing his
9 earlier claim against Dotson, Petitioner's claims against Dotson are belied by the record. See,
10 Section I(A)(2), *supra.*; see also, JT2 at 166, 187 (Petitioner's counsel confronting Dotson
11 about inconsistencies in her testimony). In the event Petitioner is referring to another witness,
12 Petitioner's failure to identify that witness, much less support his allegation of perjury with
13 specific references to evidence or the trial, results in Petitioner's claim being naked and
14 suitable only for summary denial under Hargrove. 100 Nev. at 502, 686 P.2d at 225. Finally,
15 Petitioner does nothing to show how the alleged perjury was detrimental to his case, other than
16 making the conclusory allegation that the perjury denied Petitioner due process and a fair trial.
17 Petition at 13; see, NRS 34.735(6) (making conclusory allegations without specific factual
18 support renders a claim suitable for dismissal).

19 Because Petitioner's claim was waived by his failure to raise it on direct appeal, and
20 because the claim itself is meritless, Ground Nine does not entitle Petitioner to relief.

21 **G. Cumulative Error does not Entitle Petitioner to Relief (Ground Ten)**

22 Petitioner finally asserts that he is entitled to relief due to the "accumulation of errors"
23 in his case. Petition at 13. Petitioner does not identify which errors should be cumulated;
24 instead, he simply references the other claims in his Petition. Id.

25 The Nevada Supreme Court has not endorsed application of its direct appeal cumulative
26 error standard to the post-conviction habeas relief context. McConnell v. State, 125 Nev. 243,
27 259, 212 P.3d 307, 318 (2009). Nor should cumulative error apply on post-conviction review.
28 Middleton v. Roper, 455 F.3d 838, 851 (8th Cir. 2006), cert. denied, 549 U.S. 1134, 1275 S.Ct.

1 980 (2007) (“a habeas petitioner cannot build a showing of prejudice on series of errors, none
2 of which would by itself meet the prejudice test.”); see United States v. Rivera, 900 F.2d 1462,
3 1471 (10th Cir. 1990) (“[A] cumulative-error analysis should evaluate only the effect of
4 matters determined to be error, not the cumulative effect of non-errors.”). Because Petitioner
5 has not demonstrated any claim warrants relief individually, there is nothing to cumulative;
6 therefore, Petitioner’s cumulative error claim should be denied.

7 Defendant fails to provide the standard for cumulative error, much less demonstrate
8 cumulative error sufficient to warrant relief. In addressing a claim of cumulative error, the
9 relevant factors to consider include: “(1) whether the issue of guilt is close, (2) the quantity
10 and character of the error, and (3) the gravity of the crime charged.” Mulder v. State, 116 Nev.
11 1, 17, 992 P.2d 845, 855 (2000). However, the Nevada Supreme Court has explained that a
12 defendant “is not entitled to a perfect trial, but only a fair trial.” Ennis v. State, 91 Nev. 530,
13 533, 539 P.2d 114, 115 (1975).

14 Here, the issue of guilt at trial was not close, as the jury was able to hear testimony from
15 the victim, see body camera footage of the responding officers, and review medical records of
16 victim’s injuries. Further, as demonstrated *supra.*, Petitioner has failed to sufficiently
17 substantiate any claims of error – his conclusory allegations cannot be aggregated to form a
18 basis for relief. Even assuming *arguendo* that Petitioner had properly substantiated any one of
19 his claims, he has certainly not claimed or shown that he had a likelihood of a better outcome
20 at trial, or upon direct appeal, had that error not occurred. Therefore, while the charges against
21 Petitioner are indeed grave, Petitioner’s claim of cumulative error is without merit and does
22 not entitle Petitioner to relief.

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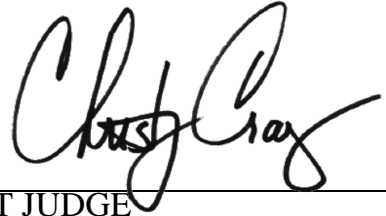
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ORDER

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



DISTRICT JUDGE

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

B89 DE3 0EFC 0921
Christy Craig
District Court Judge

BY /s/ Jonathan Vanboskerck
JONATHAN VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #6528

JV/kf/DVU

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
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 Amended Order was served via the court's electronic eFile system to
13 all recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 1/3/2023

15 Allen Lichtenstein

allaw@lvcoxmail.com

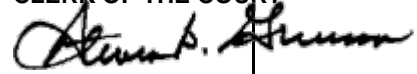
16 District Attorney

motions@ClarkCountyDA.com

17 District Court 32

DC32inbox@clarkcountycourts.us

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28



1 NEFF

2 **DISTRICT COURT**
3 **CLARK COUNTY, NEVADA**

4
5 BARRY HARRIS,

6 Petitioner,

7 vs.

8 WILLIAM GITTERE,

9 Respondent,

Case No: A-20-813935-W

Dept No: XXXII

10 **NOTICE OF ENTRY OF AMENDED FINDINGS
OF FACT, CONCLUSIONS OF LAW AND
ORDER**

11
12 **PLEASE TAKE NOTICE** that on January 3, 2023, the court entered a decision or order in this matter, a
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 mailed
15 to you. This notice was mailed on January 4, 2023.

16 STEVEN D. GRIERSON, CLERK OF THE COURT

17 /s/ Amanda Hampton

Amanda Hampton, Deputy Clerk

18
19 **CERTIFICATE OF E-SERVICE / MAILING**

20 I hereby certify that on this 4 day of January 2023, I served a copy of this Notice of Entry on the
21 following:

22 ☒ By e-mail:

Clark County District Attorney's Office
Attorney General's Office – Appellate Division-

23
24 ☒ The United States mail addressed as follows:

25 Barry Harris # 95363
P.O. Box 650
26 Indian Springs, NV 89070

Dustin R. Marcello, Esq.
601 Las Vegas Blvd., So.
Las Vegas, NV 89101

27
28 /s/ Amanda Hampton

Amanda Hampton, Deputy Clerk

1 **AMOR**
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 JONATHAN VANBOSKERCK
6 Chief Deputy District Attorney
7 Nevada Bar # 6528
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

9 BARRY HARRIS,
10 #1946231

Petitioner,

-vs-

WILLIAM GITTERE, Warden,

Respondent.

CASE NO: A-20-813935-W

DEPT NO: XXXII

AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

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

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

POINTS AND AUTHORITIES

PROCEDURAL HISTORY

27 On January 17, 2018, BARRY HARRIS (hereinafter, "Petitioner") was charged by way
28 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 (24) to sixty (60) months in NDC, concurrent with Count 2. The Court credited Petitioner with

1 351 days time served. Petitioner's Judgment of Conviction was filed on August 16, 2018.

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

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

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

13 On April 8, 2021, Petitioner, through counsel, filed his Supplemental Petition for Writ
14 of Habeas Corpus (Postconviction) (his "Supplement"). On June 10, 2021, the State filed its
15 Response. On August 26, 2021, this Court held an evidentiary hearing. Findings of Fact,
16 Conclusions of Law and Order denying habeas relief were filed on September 28, 2021.
17 Notice of Entry of Order was filed on September 30, 2021.

18 Notice of Appeal was filed on September 14, 2021. On August 29, 2022, the Nevada
19 Supreme Court issued an Order Dismissing Appeal disposing of appellate proceedings because
20 the September 28, 2021, Findings of Fact, Conclusions of Law and Order "did not address all
21 of the claims raised in Harris' pleadings below." Order Dismissing Appeal filed August 29,
22 2022.

23 **STATEMENT OF FACTS**

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

25 On August 22, 2017, officers responded to a residence in reference to a
26 call that came into 911 where they heard a female victim screaming. "Help me,
27 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.

28 The victim told officers that they had been dating for six years and have
lived together on and off as well. She stated that on that day she was arguing

1 with him on phone while she was at work. She went home and found the
2 defendant lying on her bed. She reported that she gave him a key to the residence
3 but was not living there. She sat next to him and they started arguing again. The
4 victim told him to leave the residence and he replied, "I'm not going nowhere
5 bitch". She told the defendant that if he continued to disrespect her that she
6 would call the police. She reported that things escalated and the defendant
7 grabbed her around her throat with both hands and began squeezing. He
8 continued doing this until she could not breathe and felt as she was going to pass
9 out. He then slammed her down on the bed and began punching her in the head.
10 The defendant threw her on the floor and continued to punch her. The victim
11 was able to get up and ran into the living room screaming for help. The victim
12 stated that the defendant removed a firearm from his pants pocket and quickly
13 approached her. He shoved the firearm in her mouth telling her he would blow
14 her brains out and if she made any noise, he would kill her. She stated that she
15 continued to scream for help. The defendant began hitting her again on top of
16 the head and the face as she fell to the ground where he continued to hit and kick
17 her. Afterwards, he put the gun to her head and forced her to a bathroom telling
18 her to be quiet and to stop yelling or he would pull the trigger. The victim stated
19 that the defendant made her go into the restroom to keep her hostage so she
20 wouldn't run or call the police. She stated that he continued to hit her during this
21 and then poured a bottle of juice all over her while calling her names. The
22 defendant told her that he hated her and that if she contacted the police that he
23 would be back to kill her. He then gathered his belongings and left the residence.
24 She stayed sitting on the bathroom floor and police arrived by the time she got
25 up.

26 Presentence Investigation Report at 5.

27 ANALYSIS

28 **PETITIONER DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL**

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

To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove she was denied “reasonably effective assistance” of counsel by satisfying the two-prong test of Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063–64. See also Love, 109 Nev. at 1138, 865 P.2d at 323. Under the Strickland test, a defendant must show first that his counsel's representation fell below an objective standard of reasonableness, and second, that but for

1 counsel's errors, there is a reasonable probability that the result of the proceedings would have
2 been different. 466 U.S. at 687–88, 694, 104 S. Ct. at 2065, 2068; Warden, Nevada State Prison
3 v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-part test).
4 “[T]here is no reason for a court deciding an ineffective assistance claim to approach the
5 inquiry in the same order or even to address both components of the inquiry if the defendant
6 makes an insufficient showing on one.” Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

7 The court begins with the presumption of effectiveness and then must determine
8 whether the defendant has demonstrated by a preponderance of the evidence that counsel was
9 ineffective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). “Effective counsel
10 does not mean errorless counsel, but rather counsel whose assistance is ‘[w]ithin the range of
11 competence demanded of attorneys in criminal cases.’” Jackson v. Warden, 91 Nev. 430, 432,
12 537 P.2d 473, 474 (1975).

13 Counsel cannot be ineffective for failing to make futile objections or arguments. See
14 Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Trial counsel has the
15 “immediate and ultimate responsibility of deciding if and when to object, which witnesses, if
16 any, to call, and what defenses to develop.” Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167
17 (2002). Further, a defendant who contends his attorney was ineffective because he did not
18 adequately investigate must show how a better investigation would have rendered a more
19 favorable outcome probable. Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004).

20 Based on the above law, the role of a court in considering allegations of ineffective
21 assistance of counsel is “not to pass upon the merits of the action not taken but to determine
22 whether, under the particular facts and circumstances of the case, trial counsel failed to render
23 reasonably effective assistance.” Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711
24 (1978). This analysis does not mean that the court should “second guess reasoned choices
25 between trial tactics nor does it mean that defense counsel, to protect himself against
26 allegations of inadequacy, must make every conceivable motion no matter how remote the
27 possibilities are of success.” Id. To be effective, the constitution “does not require that counsel
28 do what is impossible or unethical. If there is no bona fide defense to the charge, counsel

1 cannot create one and may disserve the interests of his client by attempting a useless charade.”
2 United States v. Cronic, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

3 “There are countless ways to provide effective assistance in any given case. Even the
4 best criminal defense attorneys would not defend a particular client in the same way.”
5 Strickland, 466 U.S. at 689, 104 S. Ct. at 689. “Strategic choices made by counsel after
6 thoroughly investigating the plausible options are almost unchallengeable.” Dawson v. State,
7 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784
8 P.2d 951, 953 (1989). In essence, the court must “judge the reasonableness of counsel’s
9 challenged conduct on the facts of the particular case, viewed as of the time of counsel’s
10 conduct.” Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.

11 Even if a defendant can demonstrate that his counsel’s representation fell below an
12 objective standard of reasonableness, he must still demonstrate prejudice and show a
13 reasonable probability that, but for counsel’s errors, the result of the trial would have been
14 different. McNelson v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing
15 Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). “A reasonable probability is a probability
16 sufficient to undermine confidence in the outcome.” Id. (citing Strickland, 466 U.S. at 687-89,
17 694, 104 S. Ct. at 2064–65, 2068).

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

28 When examining the effectiveness of appellate counsel under the Strickland analysis,

1 there is a strong presumption that appellate counsel's performance was reasonable and fell
2 within "the wide range of reasonable professional assistance." See United States v. Aguirre,
3 912 F.2d 555, 560 (2nd Cir. 1990) (citing Strickland, 466 U.S. at 689, 104 S.Ct. at 2065). A
4 claim of ineffective assistance of appellate counsel must satisfy the two-prong test set forth by
5 Strickland. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). In order to satisfy
6 Strickland's second prong, the defendant must show that the omitted issue would have had a
7 reasonable probability of success on appeal. Id.

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

16 I. **Supplemental Claims:**

17 ***A. Petitioner Fails to Demonstrate Ineffective Assistance of Trial Counsel***

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

23 ***B. Petitioner Fails to Demonstrate Ineffective Assistance of Appellate Counsel***

24 Petitioner also includes a claim that appellate counsel was ineffective for failing to raise
25 the issue of the unsuccessful Writ of Mandamus upon direct appeal. See Supplement at 3, 19.
26 Appellate Counsel does not provide ineffective assistance by strategically focusing on certain
27 issues. Jones, 463 U.S. at 751-52, 103 S.Ct. at 3313. Here, Appellate Counsel reviewed the
28 entire record and strategically chose not to raise this issue, as she did not believe there was a

1 reasonable probability of success on appeal. Thus, this Court denies Petitioner’s claim as he
2 fails to show that Appellate Counsel’s representation fell below an objective standard of
3 reasonableness.

4 **II. Pro Per Claims:**

5 **A. Petitioner Fails to Demonstrate Ineffective Assistance of Trial Counsel**
6 **(Grounds One and Seven)**

7 Here, Petitioner alleges his trial counsel was ineffective in two ways:

8 ***1. Pretrial Representation (Ground One)***

9 Petitioner first alleges that his counsel, Mr. Damian Sheets, Esq., was ineffective in his
10 pretrial representation by failing to adequately prepare for trial, and by failing to pursue a
11 petition for writ of mandamus. Petition at 5 (erroneously numbered “6”). More specifically,
12 Petitioner alleges that Sheets “took [Petitioner’s] case mid-way of [sic] the preliminary
13 hearing” and did not review “the whole case.” *Id.* Petitioner also claims Sheets was ineffective
14 for failing to pursue a writ of mandamus with the Nevada Supreme Court. *Id.*

15 As a preliminary matter, Petitioner’s claim regarding preparedness is a naked assertion
16 warranting only summary denial under *Hargrove*. 100 Nev. at 502, 686 P.2d at 225. Even on
17 the merits of Petitioner’s claim, Petitioner cannot meet his burden under *Strickland* because
18 Petitioner fails to specifically argue how Sheets’s representation fell below a reasonable
19 standard. 466 U.S. at 687–88, 104 S. Ct. at 2065; NRS 34.735(6). Petitioner cannot meet the
20 second prong of *Strickland* because Petitioner fails to substantively argue, much less
21 demonstrate, how Sheets’s alleged failure to adequately prepare prejudiced Petitioner. 466
22 U.S. at 694, 104 S. Ct. at 2068; NRS 34.735(6). Indeed, Petitioner’s failure to state, much less
23 show, how Sheets’s performance would have been different had Sheets adequately prepared
24 renders Petitioner unable to meet his burden under *Strickland*. *Molina*, 120 Nev. at 192, 87
25 P.3d at 538.

26 Likewise, Petitioner’s mandamus claim amounts to a conclusory allegation, lacking any
27 specificity or support. Therefore, as Petitioner does not identify any specific issue that could
28 have been raised in a petition for writ of mandamus, or how that issue would have changed the

posture of Petitioner's case, Petitioner's claim is suitable only for summary denial. NRS. 34.735(6); Hargrove, 100 Nev. at 502, 686 P.2d at 225.

Because Petitioner's claim consists of conclusory allegations lacking specificity, Petitioner is not entitled to relief on Ground One of his Petition.

2. Witness Impeachment (Ground Seven)

Petitioner also asserts ineffective assistance due to Sheets's failure "to impeach key witness." Petition at 11. Specifically, Petitioner alleges that a witness, "Ms. Dotson," could have been impeached with prior inconsistent statements, and that Sheets's failure to pursue that impeachment constituted ineffective assistance. Id.

Petitioner does not specify which parts of Dotson's testimony could have been impeached with prior inconsistent statements. Petition at 11; NRS 34.735(6). Further, a review of Sheets's cross-examination of Dotson belies Petitioner's claims. See, e.g., Transcript of Proceedings, Jury Trial – Day 2, dated April 10, 2018 (filed March 4, 2019) ("JT2") at 166 (confronting Dotson with prior inconsistent testimony about when she saw a gun), 187 (confronted Dotson about her testimony differing between her police statement, the preliminary hearing, and at trial). Because Sheets confronted Dotson about prior inconsistent statements, and Petitioner offers no substantive examples of opportunities to further impeach Dotson's testimony, Petitioner's claim is suitable only for summary denial under Hargrove. 100 Nev. at 502, 686 P.2d at 225.

Even on its merits, Petitioner's claim does not warrant relief under Strickland. Petitioner does not allege, much less substantiate, that he was prejudiced by Sheets's allegedly-deficient performance. Moreover, the jury returned verdicts of "Not Guilty" on multiple counts, and found Petitioner guilty of multiple lesser-included crimes, rather than what was charged in the Amended Information. Therefore, Petitioner certainly does not establish prejudice sufficient to warrant relief under Strickland. 466 U.S. at 697, 104 S. Ct. at 2069 (when a petitioner fails to meet one prong of the Strickland analysis, examination of the other prong is unnecessary).

Because Petitioner's claim is belied by the record, and because Petitioner fails to

1 demonstrate prejudice, Petitioner is not entitled to relief on Ground Seven of his Petition.

2 **B. This Court Lacks Jurisdiction to Review Decisions of the Nevada Supreme**
3 **Court (Grounds Two and Six)**

4 Petitioner also alleges that the Nevada Supreme Court violated his rights. Specifically,
5 he alleges “the [S]upreme [C]ourt of [N]evada forced this petitioner to go through my direct
6 appeal with counsel I had conflict with,” and that the Court erred by “not allowing Mr. Harris
7 to have motion reviewed in that court[.]” Petition at 6 (erroneously numbered “7”), 10.

8 Article 6, § 6 of the Nevada Constitution vests district courts with “appellate
9 jurisdiction in cases arising in Justices Courts and such other inferior tribunals as may be
10 established by law.” Only the Nevada Supreme Court has “appellate jurisdiction...on
11 questions of law alone in all criminal cases[.]” NEV. CONST. ART. 6, § 4. District courts “lack
12 jurisdiction to review the acts of other district courts.” State v. Sustacha, 108 Nev. 223, 225,
13 826 P.2d 959, 960 (1992); accord, Rohlfing v. Dist. Court, 106 Nev. 902, 803 P.2d 659 (1990)
14 (district courts have equal and coextensive jurisdiction and thus the various district courts lack
15 jurisdiction to review acts of other district courts).

16 District courts have jurisdiction to adjudicate petitions for habeas corpus relief. NEV.
17 CONST. ART. 6, § 4. Such jurisdiction is limited, in relevant part, to petitions claiming that a
18 conviction or sentence is constitutionally infirm or in violation of state law. NRS 34.724(1).
19 However, habeas is not “a substitute for...the remedy of direct review of the sentence or
20 conviction.” NRS 34.724(2)(a). The limitations on the authority of the district courts to
21 entertain habeas relief are strictly enforced by the Nevada Supreme Court. McConnell v. State,
22 125 Nev. 243, 212 P.3d 307 (2009) (challenge to lethal injection protocol not cognizable in a
23 post-conviction petition for writ of habeas corpus, as it is a challenge to the manner in which
24 death will be carried out, rather than the validity of the judgment or conviction); Warden v.
25 Owens, 93 Nev. 255, 563 P.2d 81 (1977) (district court may not order relief in habeas corpus
26 proceedings that is beyond its power or authority); Sanchez v. Warden, 89 Nev. 273, 510 P.2d
27 1362 (1973) (post-conviction proceedings are not intended to be utilized as a substitute for
28 appeal and, as such, failure to challenge identification procedure on appeal waived the issue

1 for purposes of post-conviction review).

2 By raising claims of Nevada Supreme Court error, Petitioner effectively asks this Court
3 to review the actions of the Nevada Supreme Court. Such a request is inappropriate, as this
4 Court lacks jurisdiction to conduct such a review. Therefore, Petitioner's Grounds Two and
5 Six must be dismissed.

6 **C. Petitioner's Claim Regarding the Body Camera Footage does not Warrant**
7 **Relief (Ground Three)**

8 Petitioner's next ground alleges a violation of his Fifth and Fourteenth Amendment
9 rights when the trial court "told Petitioner's lawyer to tread lightly on body cam evidence."
10 Petition at 7 (erroneously numbered "8"). This claim is procedurally barred and is nothing
11 more than a naked assertion; therefore, it does not entitle Petitioner to relief.

12 The Nevada Supreme Court has held that "challenges to the validity of a guilty plea and
13 claims of ineffective assistance of trial and appellate counsel must first be pursued in post-
14 conviction proceedings.... [A]ll other claims that are appropriate for a direct appeal must be
15 pursued on direct appeal, or they will be *considered waived in subsequent proceedings.*"
16 Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added)
17 (disapproved of on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)).
18 "A court must dismiss a habeas petition if it presents claims that either were or could have
19 been presented in an earlier proceeding, unless the court finds both cause for failing to present
20 the claims earlier or for raising them again and actual prejudice to the petitioner." Evans v.
21 State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001), overruled on other grounds by Lisle v.
22 State, 131 Nev. 356, 351 P.3d 725 (2015). Additionally, substantive claims are beyond the
23 scope of habeas and waived. NRS 34.724(2)(a); see also Evans, 117 Nev. at 646-47, 29 P.3d
24 498 at 523; Franklin, 110 Nev. at 752, 877 P.2d 1058 at 1059.

25 Petitioner's claim does not challenge the validity of a guilty plea, nor does it allege
26 ineffective assistance of counsel; therefore, this claim should have been raised on direct appeal.
27 Franklin, 110 Nev. at 752, 877 P.2d at 1059. Petitioner's failure to raise the claim in that effort
28 results in a waiver thereof. Id. Petitioner does not allege that good cause exists to overcome

1 this default, and cannot, as his allegation revolves around an occurrence at his trial; therefore,
2 all of the facts and law necessary to raise this complaint were clearly available for Petitioner's
3 direct appeal. Evans, 117 Nev. at 646-47, 29 P.3d at 523. Nor does Petitioner claim that some
4 impediment external to the defense prevented him from properly raising this claim on direct
5 appeal. Pellegrini v. State, 117 Nev. 860, 886, 34 P.3d 519, 537 (2001) (citing Harris v.
6 Warden, 114 Nev. 956, 959, 964 P.2d 785, 787 (1998) (abrogated on other grounds by Rippo
7 v. State, 134 Nev. 411, 423 n.12, 423 P.3d 1084, 1097 n.12 (2018)). Likewise, Petitioner does
8 not specify how he was prejudiced by the trial court's comment about the body cam. Petition
9 at 7. Even assuming *arguendo* that the trial court warned or admonished Petitioner's counsel
10 regarding the body cam footage, that simple fact would not itself demonstrate any prejudice
11 or error. Therefore, Petitioner cannot demonstrate prejudice sufficient to overcome his default,
12 much less to demonstrate he is entitled to relief.

13 Furthermore, even if the underlying claim was not defaulted by Petitioner's failure to
14 raise it on direct appeal, Petitioner does not substantiate his claim with any specific factual
15 allegations or citations to the record. Therefore, Petitioner's claim is suitable only for summary
16 denial as a naked assertion. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

17 Because Petitioner's claim is defaulted, with no good cause or prejudice shown, and
18 because the claim itself is a naked assertion, Petitioner's Ground Three is insufficient to
19 warrant relief.

20 **D. Petitioner Fails to Demonstrate Appellate Counsel was Ineffective**
21 **(Grounds Four and Eight)**

22 Petitioner also argues that Sheets was ineffective as appellate counsel. Petition at 8
23 (erroneously numbered "9"), 12. Petitioner alleges that Sheets should have raised an
24 "insufficient evidence" claim regarding kidnapping, and that Sheets should have petitioned for
25 rehearing under NRAP 40(a)(1). Id.

26 When examining the effectiveness of appellate counsel under the Strickland analysis,
27 there is a strong presumption that appellate counsel's performance was reasonable and fell
28 within "the wide range of reasonable professional assistance." See United States v. Aguirre,

1 912 F.2d 555, 560 (2nd Cir. 1990) (citing Strickland, 466 U.S. at 689, 104 S.Ct. at 2065). A
2 claim of ineffective assistance of appellate counsel must satisfy the two-prong test set forth by
3 Strickland. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). In order to satisfy
4 Strickland's second prong, the defendant must show that the omitted issue would have had a
5 reasonable probability of success on appeal. Id.

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

14 Petitioner does not support his claims of ineffective assistance of appellate counsel with
15 any substance or reference to the record. Petition at 8, 12. He simply states issues that he
16 submits should have been raised. Id. These claims, therefore, amount to nothing more than
17 naked assertions suitable only for summary denial. Hargrove, 100 Nev. at 502, 686 P.2d at
18 225.

19 Furthermore, Petitioner does not substantiate how his submitted claim (insufficient
20 evidence of kidnapping) was any more meritorious than the issues presented on direct appeal
21 by Sheets. Petition at 8; Jones, 463 U.S. at 751-52, 103 S.Ct. at 3313. Likewise, Petitioner
22 does not demonstrate that there were grounds for a rehearing on his direct appeal, or that Sheets
23 had a duty to provide Petitioner with discovery. Petition at 12; Aguirre, 912 F.2d at 560.
24 Therefore, Petitioner fails to overcome the presumption of effectiveness, and subsequently,
25 the presumption that Sheets made a virtually unchallengeable strategic decision regarding
26 which claims to raise, and whether to pursue a rehearing. Rhyne, 118 Nev. at 8, 38 P.3d at 167.
27 Indeed, Sheets did not have a duty to raise any issues, or pursue any actions, that would have
28 been futile. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Finally, Petitioner does not explain how

1 the outcome of his direct appeal would have been different, much less show the likelihood of
2 that purported outcome, had Sheets raised the issue, provided Petitioner with discovery, and
3 petitioned for rehearing. Kirksey, 112 Nev. at 998, 923 P.2d at 1114. Therefore, Petitioner fails
4 to meet his burden under Strickland for demonstrating ineffective assistance of appellate
5 counsel.

6 Because Petitioner's claims are mere naked assertions, and because Petitioner fails to
7 meet his burden under Strickland regarding appellate counsel, Petitioner's grounds Four and
8 Eight do not entitle Petitioner to relief.

9 **E. Petitioner Waived His Speedy Trial Claim by Failing to Raise it on Direct**
10 **Appeal (Ground Five)**

11 Petitioner's fifth claim alleges a violation of his right to a speedy trial. Petition at 9. He
12 also appears to allege a derivative ineffective assistance of counsel claim because Sheets
13 "ask[ed] for more time" to prepare for trial at the calendar call. Id.

14 As a preliminary matter, Petitioner's claim should have been raised on direct appeal,
15 and his failure to raise it there results in a waiver thereof. NRS 34.724(2)(a), 34.810(1)(b)(2);
16 Franklin, 110 Nev. at 752, 877 P.2d at 1059; Evans, 117 Nev. at 646-47, 29 P.3d at 523.
17 Petitioner does not allege good cause for his failure to raise this claim on direct appeal, and
18 cannot, as all of the facts and law necessary to raise it were available at the time Petitioner
19 filed his direct appeal. Evans, 117 Nev. at 646-47, 29 P.3d at 523. Nor does Petitioner claim
20 an impediment external to the defense prevented him from properly raising this claim on direct
21 appeal. Pellegrini, 117 Nev. at 886, 34 P.3d at 537. Likewise, Petitioner cannot demonstrate
22 prejudice sufficient to overcome his default, as his claim itself is without merit.

23 The Sixth Amendment to the United States Constitution guarantees that, "[i]n all
24 criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." In Barker
25 v. Wingo, the United States Supreme Court set out a four-part test to determine if a defendant's
26 speedy trial right has been violated: "[l]ength of the delay, the reason for the delay, the
27 defendant's assertion of his right, and prejudice to the defendant." 407 U.S. 514, 530, 92 S.Ct.
28 2182, 2192 (1972); see Prince v. State, 118 Nev. 634, 640, 55 P.3d 947, 951 (2002).

1 As to the first factor, in order to trigger a speedy trial analysis, “an accused must allege
2 that the interval between accusation and trial has crossed the threshold dividing ordinary from
3 ‘presumptively prejudicial’ delay.” Doggett v. United States, 505 U.S. 650, 651-52, 112 S.Ct.
4 2686, 2690 (1992). Courts have generally found post-accusation delays to be “presumptively
5 prejudicial” as they approach the one-year mark. Id. at 652 n.1, 112 S.Ct. at 2691 n.1.

6 As to the second factor, different reasons for trial delay should be attributed different
7 weights. Barker, 407 U.S. at 531, 92 S.Ct. at 2192. A deliberate delay in order to hamper the
8 defense is weighed heavily against the State, while negligence is weighed less heavily. Id. “[A]
9 valid reason, such as a missing witness, should serve to justify appropriate delay.” Id.
10 However, when a petitioner is responsible for most of the delay, he is not entitled to relief.
11 Middleton v. State, 114 Nev. 1089, 1110, 968 P.2d 296, 310-11 (1998).

12 Regarding the third factor, the Barker Court emphasized, “failure to assert the [speedy
13 trial] right will make it difficult for a [petitioner] to prove that he was denied a speedy trial.
14 407 U.S. at 531, 92 S.Ct. at 2192.

15 The fourth factor, prejudice, should be assessed by looking to “oppressive pretrial
16 incarceration, anxiety and concern of the accused, and the possibility that the [accused’s]
17 defense will be impaired by dimming memories and loss of exculpatory evidence.” Doggett,
18 505 U.S. at 654, 112 S.Ct. at 2692 (internal citations omitted).

19 Here, the Information against Petitioner was filed on January 17, 2018. Petitioner
20 proceeded to trial on April 9, 2018. Therefore, less than ninety (90) days passed between
21 Petitioner being formally charged and Petitioner proceeding to trial. As such, the delay does
22 not come close to approaching the one-year, “presumptively prejudicial” timeline as expressed
23 in Doggett. 505 U.S. at 652 n.1, 112 S.Ct. at 2691 n.1. Therefore, the first Barker factor does
24 not weigh in Petitioner’s favor.

25 Further, Petitioner recognizes that counsel requested more time to prepare for trial.
26 Petition at 9. Because at least some of the delay, which itself was minimal, was accounted to
27 Petitioner’s counsel needing to prepare for trial, Petitioner cannot demonstrate that the second
28 factor weighs in his favor.

1 Petitioner alleges that counsel requested additional time “over [Petitioner’s]
2 objections.” Petition at 9. However, a review of the Court Minutes demonstrated that, at the
3 calendar call, Petitioner’s counsel stated that they could not announce ready, but that they were
4 trying to be ready by the invoked trial date. See, Court Minutes dated February 27, 2018 (filed
5 on March 2, 2018) (“2/27 Minutes”). Thereafter, Petitioner’s counsel advised his intention to
6 file certain pretrial motions that would be beneficial to Petitioner, and requested a 30-day
7 continuance. 3/16 Minutes. Counsel recognized that Petitioner preferred to proceed to trial;
8 however, the Court informed Petitioner that there were no judges available to conduct
9 Petitioner’s trial, and granted the 30-day continuance. Id. Therefore, the third prong should
10 weigh against Petitioner due to his counsel’s request for a continuance. Even if the delay were
11 not due to Petitioner, the Court placed on the record that there were no available trial options;
12 therefore, in any event, the third prong could not weigh heavily in Petitioner’s favor.

13 Finally, Petitioner does not allege that the delay in trial was detrimental to Petitioner’s
14 defense at trial. Petition at 9. Therefore, Petitioner does not meet his burden for demonstrating
15 prejudice, and this prong cannot weigh in Petitioner’s favor. Likewise, Petitioner’s failure to
16 allege, much less demonstrate, precludes Petitioner’s ability to properly plead his derivative
17 ineffective assistance claim. Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

18 Because Petitioner’s claim was waived by his failure to raise it on direct appeal, and
19 because the claim itself is without merit, Petitioner is not entitled to relief on Ground Five of
20 his Petition.

21 **F. Petitioner Waived His Perjury Claim by Failing to Raise it on Direct Appeal**
22 **(Ground Nine)**

23 Petitioner also includes claim that his conviction was the result of perjury at trial.
24 Petition at 13. He does not specify which witness allegedly committed perjury, but alleges that
25 “the evidence at trial was totally contrary to police report and affidavit.” Id.

26 Petitioner’s claim is another claim that is suitable for direct appeal, but was not raised
27 therein. Therefore, this claim is waived. NRS 34.724(2)(a), 34.810(1)(b)(2); Evans, 117 Nev.
28 at 646-47, 29 P.3d at 523; Franklin, 110 Nev. at 752, 877 P.2d at 1059. Petitioner does not,

1 and could not successfully, allege good cause for his failure to raise this claim on direct appeal,
2 as all of the facts and law necessary to raise it were available at the time of Petitioner's direct
3 appeal. Evans, 117 Nev. at 646-47, 29 P.3d at 523. Petitioner similarly does not claim an
4 impediment external to the defense prevented him from properly raising this claim on direct
5 appeal. Pellegrini, 117 Nev. at 886, 34 P.3d at 537. Petitioner cannot demonstrate prejudice to
6 overcome his procedural default because his claim itself is without merit.

7 As stated *supra.*, Petitioner makes an allegation of perjury, but does not identify which
8 witness allegedly perjured themselves. Petition at 13. In the event Petitioner is referencing his
9 earlier claim against Dotson, Petitioner's claims against Dotson are belied by the record. See,
10 Section I(A)(2), *supra.*; see also, JT2 at 166, 187 (Petitioner's counsel confronting Dotson
11 about inconsistencies in her testimony). In the event Petitioner is referring to another witness,
12 Petitioner's failure to identify that witness, much less support his allegation of perjury with
13 specific references to evidence or the trial, results in Petitioner's claim being naked and
14 suitable only for summary denial under Hargrove. 100 Nev. at 502, 686 P.2d at 225. Finally,
15 Petitioner does nothing to show how the alleged perjury was detrimental to his case, other than
16 making the conclusory allegation that the perjury denied Petitioner due process and a fair trial.
17 Petition at 13; see, NRS 34.735(6) (making conclusory allegations without specific factual
18 support renders a claim suitable for dismissal).

19 Because Petitioner's claim was waived by his failure to raise it on direct appeal, and
20 because the claim itself is meritless, Ground Nine does not entitle Petitioner to relief.

21 **G. Cumulative Error does not Entitle Petitioner to Relief (Ground Ten)**

22 Petitioner finally asserts that he is entitled to relief due to the "accumulation of errors"
23 in his case. Petition at 13. Petitioner does not identify which errors should be cumulated;
24 instead, he simply references the other claims in his Petition. Id.

25 The Nevada Supreme Court has not endorsed application of its direct appeal cumulative
26 error standard to the post-conviction habeas relief context. McConnell v. State, 125 Nev. 243,
27 259, 212 P.3d 307, 318 (2009). Nor should cumulative error apply on post-conviction review.
28 Middleton v. Roper, 455 F.3d 838, 851 (8th Cir. 2006), cert. denied, 549 U.S. 1134, 1275 S.Ct.

1 980 (2007) (“a habeas petitioner cannot build a showing of prejudice on series of errors, none
2 of which would by itself meet the prejudice test.”); see United States v. Rivera, 900 F.2d 1462,
3 1471 (10th Cir. 1990) (“[A] cumulative-error analysis should evaluate only the effect of
4 matters determined to be error, not the cumulative effect of non-errors.”). Because Petitioner
5 has not demonstrated any claim warrants relief individually, there is nothing to cumulative;
6 therefore, Petitioner’s cumulative error claim should be denied.

7 Defendant fails to provide the standard for cumulative error, much less demonstrate
8 cumulative error sufficient to warrant relief. In addressing a claim of cumulative error, the
9 relevant factors to consider include: “(1) whether the issue of guilt is close, (2) the quantity
10 and character of the error, and (3) the gravity of the crime charged.” Mulder v. State, 116 Nev.
11 1, 17, 992 P.2d 845, 855 (2000). However, the Nevada Supreme Court has explained that a
12 defendant “is not entitled to a perfect trial, but only a fair trial.” Ennis v. State, 91 Nev. 530,
13 533, 539 P.2d 114, 115 (1975).

14 Here, the issue of guilt at trial was not close, as the jury was able to hear testimony from
15 the victim, see body camera footage of the responding officers, and review medical records of
16 victim’s injuries. Further, as demonstrated *supra.*, Petitioner has failed to sufficiently
17 substantiate any claims of error – his conclusory allegations cannot be aggregated to form a
18 basis for relief. Even assuming *arguendo* that Petitioner had properly substantiated any one of
19 his claims, he has certainly not claimed or shown that he had a likelihood of a better outcome
20 at trial, or upon direct appeal, had that error not occurred. Therefore, while the charges against
21 Petitioner are indeed grave, Petitioner’s claim of cumulative error is without merit and does
22 not entitle Petitioner to relief.

23 //

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ORDER

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



DISTRICT JUDGE

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

B89 DE3 0EFC 0921
Christy Craig
District Court Judge

BY /s/ Jonathan Vanboskerck
JONATHAN VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #6528

JV/kf/DVU

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
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 Amended Order was served via the court's electronic eFile system to
13 all recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 1/3/2023

15 Allen Lichtenstein

allaw@lvcoxmail.com

16 District Attorney

motions@ClarkCountyDA.com

17 District Court 32

DC32inbox@clarkcountycourts.us

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Writ of Habeas Corpus

COURT MINUTES

November 03, 2020

A-20-813935-W Barry Harris, Plaintiff(s)
vs.
William Gittere, Defendant(s)

**November 03, 2020 12:00 AM Petition for Writ of Habeas
Corpus**

HEARD BY: Johnson, Eric

COURTROOM: RJC Courtroom 12A

COURT CLERK: Linda Skinner

RECORDER: Angie Calvillo

REPORTER:

PARTIES

PRESENT: Thomson, Megan Attorney

JOURNAL ENTRIES

- Court noted the Petition itself is largely insufficient but it was timely filed. The Court further noted Deft. asked for assistance of as he is looking at sentence of 15 years to life, non-successive. COURT ORDRED, petition GRANTED; Clerk to contact Drew Christensen for appointment of counsel and will set a status check for confirmation of counsel upon response.

CUSTODY (NDC)

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Writ of Habeas Corpus

COURT MINUTES

November 24, 2020

A-20-813935-W Barry Harris, Plaintiff(s)
vs.
William Gittere, Defendant(s)

November 24, 2020 1:45 PM Confirmation of Counsel

HEARD BY: Johnson, Eric **COURTROOM:** RJC Courtroom 12A

COURT CLERK: Kristen Brown

RECORDER: Angie Calvillo

REPORTER:

PARTIES

PRESENT: Lichtenstein, Allen Attorney
Merback, William J. Attorney

JOURNAL ENTRIES

- Mr. Lichtenstein CONFIRMED AS COUNSEL and stated that he just received the case and is not that familiar with it at this time. COURT ORDERED, matter SET for a status check to set a briefing schedule.

12/08/20 12:00 PM STATUS CHECK: SET BRIEFING SCHEDULE

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Writ of Habeas Corpus

COURT MINUTES

December 08, 2020

A-20-813935-W Barry Harris, Plaintiff(s)
vs.
William Gittere, Defendant(s)

December 08, 2020 12:00 AM Status Check

HEARD BY: Johnson, Eric **COURTROOM:** RJC Courtroom 12A

COURT CLERK: Ro'Shell Hurtado

RECORDER: Angie Calvillo

REPORTER:

PARTIES

PRESENT: Lichtenstein, Allen Attorney

JOURNAL ENTRIES

- Allen Lichtenstein, Esq. and Morgan Thomas, Esq. present via Bluejeans video conference. Deft. not present.

Colloquy regarding briefing schedule. Following colloquy, COURT ORDERED the following Briefing Schedule: Supplemental Brief due by April 8, 2021, Answer/Response due by May 6, 2021, Reply due by June 10, 2020, and matter SET for Argument.

NDC

06/24/2021 8:30 AM ARGUMENT

DISTRICT COURT
CLARK COUNTY, NEVADA

Writ of Habeas Corpus

COURT MINUTES

June 24, 2021

A-20-813935-W Barry Harris, Plaintiff(s)
vs.
William Gittere, Defendant(s)

June 24, 2021	11:00 AM	Argument
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HEARD BY: Craig, Christy

COURTROOM: RJC Courtroom 16D

COURT CLERK: Andrea Natali

RECORDER: Kaihla Berndt

REPORTER:

PARTIES

PRESENT:	Jones, Jr., John T.	Attorney
	Lichtenstein, Allen	Attorney

JOURNAL ENTRIES

- Petitioner not present, incarcerated in the Nevada Dept. of Corrections.

COURT ADVISED, it had read all of the pleadings and it was inclined to set this matter for an evidentiary hearing. Mr. Jones stated he was not served with the Supplemental Brief; therefore, requested the opportunity to file a response. Mr. Lichenstein agreed that service had not originally been effectuated; however, it was served and Mr. Vanboskerck had filed a response, and he filed a reply. Upon Court's inquiry, Mr. Lichenstein stated he did not believe that the Petitioner needed to be present for the continuance setting and requested it be set out sixty days. COURT ORDERED, matter SET for evidentiary hearing on a special setting.

8/26/21 - 12:30 PM - EVIDENTIARY HEARING ... ARGUMENT: PETITION FOR WRIT OF HABEAS CORPUS

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Writ of Habeas Corpus

COURT MINUTES

August 26, 2021

A-20-813935-W	Barry Harris, Plaintiff(s)
	vs.
	William Gittere, Defendant(s)

August 26, 2021 12:30 AM All Pending Motions

HEARD BY: Craig, Christy **COURTROOM:** RJC Courtroom 16D

COURT CLERK: Andrea Natali

RECORDER: Kaihla Berndt

REPORTER:

PARTIES

PRESENT:	Lichtenstein, Allen	Attorney
	Marland, Melanie H.	Attorney

JOURNAL ENTRIES

- EVIDENTIARY HEARING ... ARGUMENT: PETITION FOR WRIT OF HABEAS CORPUS

Colloquy regarding the Deft. not being present due to the order to transport not being served. Ms. Marland inquired if the matters could be bifurcated. Mr. Lichtenstein agreed to bifurcate the matters. Ms. Marland stated she had Mr. Sheets and Mr. Ramsey on call but they were not subpoenaed for this matter. Mr. Lichtenstein stated he did not plan on calling them. Sworn testimony (see worksheet). Argument by Mr. Lichtenstein that there was not proper service, it was by mail, which was not proper for a criminal case. Further argument by Mr. Lichtenstein regarding ineffectiveness of counsel, the case should have been dismissed in Justice Court, and that good cause should have been shown, that the witness couldn't have been served. Argument by Ms. Marland noting there was due diligent efforts and there was good cause for a material witness warrant, this did not rise to the level of ineffectiveness of counsel. COURT NOTED, the first question was whether there should there have been an appeal, of Judge Smith's denial of the writ, to the Nevada Supreme Court and was that ineffectiveness, and not raising that the issue post-trial on direct appeal and it had grave concerns about that. Colloquy regarding whether this should have been raised on the direct appeal, and if it

wasn't in the direct appeal, whether that should be considered a waiver. Ms. Marland argued that it appeared to be a strategic decision not to include that in the direct appeal; additionally, she could call Mr. Sheets to testify in this matter. Upon Court's inquiry, Mr. Lichtenstein agreed to reopen this matter. Sworn witness testimony continued. Arguments by counsel regarding whether there was ineffectiveness of counsel. COURT summarized how to prove ineffectiveness of counsel under the laws. COURT stated its FINDINGS, as to the first issue of the preliminary hearing, and it was not finding Mr. Ramsey was ineffective, or that Mr. Sheets was ineffective. As to the second issue about direct appeal and the non-inclusion of that decision on the writ on the appeal, COURT summarized the requirements of proof of ineffectiveness of appellate counsel under the laws. COURT NOTES as to the denial of the writ in District Court, complaining about Justice Court's decision to grant a continuance, and whether or not that decision was appropriate, was not likely to have had a reasonable probability of success on appeal. COURT FINDS, Ms. Bernstein's testimony was helpful in her decision making process, it was not that she ignored the issue but had determined it was not appropriate issue to raise on appeal, and she had other more important issues, and she thought there was not a reasonable probability of success on appeal; therefore, it WAS NOT FINDING Ms. Bernstein and Mr. Sheets were ineffective on the direct appeal; therefore, ORDERED, the writ DENIED and DIRECTED, Ms. Marland to prepare the order.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Writ of Habeas Corpus

COURT MINUTES

October 21, 2021

A-20-813935-W Barry Harris, Plaintiff(s)
vs.
William Gittere, Defendant(s)

October 21, 2021 8:30 AM At Request of Court

HEARD BY: Jones, Tierra **COURTROOM:** RJC Courtroom 16D

COURT CLERK: Andrea Natali

RECORDER: Kaihla Berndt

REPORTER:

PARTIES

PRESENT: Goodman, Laura Attorney
Marcello, Dustin R. Attorney

JOURNAL ENTRIES

- COURT NOTED, Mr. Marcello was confirming as counsel; therefore, ORDERED, Mr. Marcello APPOINTED as counsel, for the limited purpose of the appeal, and ADVISED, Mr. Marcello to follow the dates set in the Supreme Court.

DISTRICT COURT
CLARK COUNTY, NEVADA

Writ of Habeas Corpus

COURT MINUTES

December 15, 2022

A-20-813935-W Barry Harris, Plaintiff(s)
vs.
William Gittere, Defendant(s)

December 15, 2022 8:30 AM Motion

HEARD BY: Craig, Christy

COURTROOM: RJC Courtroom 05D

COURT CLERK: Andrea Natali

RECORDER: Kaihla Berndt

REPORTER:

PARTIES

PRESENT:	Hallquist, Corey John	Attorney
	Marcello, Dustin R.	Attorney

JOURNAL ENTRIES

- Mr. Marcello stated he was not sure if the higher court needed a blanket statement indicating that all of the other claims had been denied. COURT ADVISED, they needed to go through the appeal and the original documents to ensure everything was there; ADDITIONALLY ADVISED, Mr. Marcello to go through all of the original claims, what was addressed at the evidentiary hearing, wherein nothing needed to be filed, however, DIRECTED, that information to be provided to its law clerk and JEA, and the State is DIRECTED to do the same thing; ORDERED, matter CONTINUED.

CONTINUED TO: 2/21/23 - 10:00 AM



EIGHTH JUDICIAL DISTRICT COURT CLERK'S OFFICE
NOTICE OF DEFICIENCY
ON APPEAL TO NEVADA SUPREME COURT

DUSTIN R. MARCELLO, ESQ.
601 LAS VEGAS BLVD., SOUTH
LAS VEGAS, NV 89101

DATE: January 26, 2023
CASE: A-20-813935-W

RE CASE: BARRY HARRIS vs. WILLIAM GITTERE, ESP, WARDEN

NOTICE OF APPEAL FILED: January 25, 2023

YOUR APPEAL HAS BEEN SENT TO THE SUPREME COURT.

PLEASE NOTE: DOCUMENTS **NOT** TRANSMITTED HAVE BEEN MARKED:

- ☐ \$250 – Supreme Court Filing Fee (Make Check Payable to the Supreme Court)**
 - If the \$250 Supreme Court Filing Fee was not submitted along with the original Notice of Appeal, it must be mailed directly to the Supreme Court. The Supreme Court Filing Fee will not be forwarded by this office if submitted after the Notice of Appeal has been filed.
- ☐ \$24 – District Court Filing Fee (Make Check Payable to the District Court)**
- ☐ \$500 – Cost Bond on Appeal (Make Check Payable to the District Court)**
 - NRAP 7: Bond For Costs On Appeal in Civil Cases
 - *Previously paid Bonds are not transferable between appeals without an order of the District Court.*
- ☒ Case Appeal Statement
 - NRAP 3 (a)(1), Form 2
- ☐ Order
- ☐ Notice of Entry of Order

NEVADA RULES OF APPELLATE PROCEDURE 3 (a) (3) states:

"The district court clerk must file appellant's notice of appeal despite perceived deficiencies in the notice, including the failure to pay the district court or Supreme Court filing fee. **The district court clerk shall apprise appellant of the deficiencies in writing**, and shall transmit the notice of appeal to the Supreme Court in accordance with subdivision (g) of this Rule with a notation to the clerk of the Supreme Court setting forth the deficiencies. Despite any deficiencies in the notice of appeal, the clerk of the Supreme Court shall docket the appeal in accordance with Rule 12."

Please refer to Rule 3 for an explanation of any possible deficiencies.

*****Per District Court Administrative Order 2012-01, in regards to civil litigants, "...all Orders to Appear in Forma Pauperis expire one year from the date of issuance." You must reapply for in Forma Pauperis status.***

Certification of Copy

State of Nevada }
County of Clark } SS:

I, Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, does hereby certify that the foregoing is a true, full and correct copy of the hereinafter stated original document(s):

NOTICE OF APPEAL; DISTRICT COURT DOCKET ENTRIES; CIVIL COVER SHEET; AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER; NOTICE OF ENTRY OF AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER; DISTRICT COURT MINUTES; NOTICE OF DEFICIENCY

BARRY HARRIS ,

Plaintiff(s),

vs.

WILLIAM GITTERE, ESP, WARDEN,

Defendant(s),

Case No: A-20-813935-W

Dept No: XXXII

now on file and of record in this office.

IN WITNESS THEREOF, I have hereunto
Set my hand and Affixed the seal of the
Court at my office, Las Vegas, Nevada
This 26 day of January 2023.

Steven D. Grierson, Clerk of the Court



Amanda Hampton, Deputy Clerk

