IN THE SUPREME COURT OF THE STATE OF NEVADA

BARRY HARRIS,	) DOCKET NO. 86209
	) DIST. CASE NO. A-20-813935-W
Appellant,	)
	)
vs.	)
	)
THE STATE OF NEVADA,	)
	)
Respondent.	)
_____)	

APPEAL OF DENIAL OF WRIT OF HABEAS CORPUS
APPELLANT'S APPENDIX
(VOLUME 1 OF 2)

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DISTRICT COURT

CLARK COUNTY, NEVADA

BARRY HARRIS, Plaintiff, vs. WILLIAM GITTERE, Defendant.	CASE NO. A-20-813935-W DEPT NO. 32

NOTICE OF APPEAL

TO: THE STATE OF NEVADA

STEVE WOLFSON, DISTRICT ATTORNEY, CLARK COUNTY, NEVADA and DEPARTMNET 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

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.

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DISTRICT COURT
CLARK COUNTY, NEVADA

BARRY HARRIS,
#1946231

Petitioner,

-vs-

WILLIAM GITTERE, Warden,

Respondent.

CASE NO: A-20-813935-W

DEPT NO: XXXII

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

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

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

On August 14, 2019, Petitioner appeared for sentencing. Petitioner was adjudged guilty, consistent with the jury's verdict, and was sentenced, as follows: Count 2 – LIFE in the Nevada Department of Corrections ("NDC"), with the possibility of parole after fifteen (15) years; Count 3 – six (6) months in the Clark County Detention Center ("CCDC"), concurrent with Count 2; Count 4 – six (6) months in CCDC, concurrent with Count 3; Count 6 – twenty-four (24) to sixty (60) months in NDC, concurrent with Count 2. The Court credited Petitioner with

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

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

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

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

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

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

STATEMENT OF FACTS

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

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

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

Presentence Investigation Report at 5.

ANALYSIS

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

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

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

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

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

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

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

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

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

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

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

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

I. **Supplemental Claims**:

A. Petitioner Fails to Demonstrate Ineffective Assistance of Trial Counsel

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

B. Petitioner Fails to Demonstrate Ineffective Assistance of Appellate Counsel

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

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

II. **Pro Per Claims**:

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

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

1. Pretrial Representation (Ground One)

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

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

Likewise, Petitioner's mandamus claim amounts to a conclusory allegation, lacking any specificity or support. Therefore, as Petitioner does not identify any specific issue that could 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

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

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

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

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

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

for purposes of post-conviction review).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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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.

Dated this 3rd day of January, 2023

DISTRICT JUDGE

B89 DE3 0EFC 0921
Christy Craig
District Court Judge

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

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

JV/kf/DVU

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Barry Harris, Plaintiff(s)	CASE NO: A-20-813935-W
vs.	DEPT. NO. Department 32
William Gittere, Defendant(s)	

AUTOMATED CERTIFICATE OF SERVICE

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

Service Date: 1/3/2023

Allen Lichtenstein	allaw@lvcoxmail.com
District Attorney	motions@ClarkCountyDA.com
District Court 32	DC32inbox@clarkcountycourts.us

MOT

DUSTIN R. MARCELLO ,ESQ
Nevada State Bar No.: 10134
PITARO AND FUMO, CHTD.
601 Las Vegas Blvd. South
Las Vegas, Nevada 89101
Phone: (702) 474-7554
Fax: (702) 474-4210
Email: kristine.fumolaw@gmail.com
Alternative email: dustin@fumolaw.com
Attorney for Defendant

IN THE EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY,NEVADA
****

THE STATE OF NEVADA Plaintiff	Case No.: A-20-813935-W
vs.	
BARRY HARRIS Defendant	**MOTION FOR AMENDED ORDER OR TO PLACE ON CALENDER FOR FURTHER PROCEEDINGS**

COMES NOW, the Defendant, BARRY HARRIS by and through the attorney of record, DUSTIN R. MARCELLO, ESQ., and hereby files the following:

MOTION FOR AMENDED ORDER OR TO PLACE ON CALENDER FOR FURTHER PROCEEDINGS

This Motion is based on the attached Memorandum of Points and Authorities together with the pleadings and papers on file herein and any argument, testimony and evidence that be presented at hearing on the matter.

DATED: 10/28/2020

Respectfully submitted by:

PITARO AND FUMO, CHTD.

By: Dustin R. Marcello
DUSTIN R. MARCELLO, ESQ
Nevada Bar No.: 10134

MEMORANDUM OF POINTS AND AUTHORITIES

On April 21, 2020, Petitioner filed a pro per Petition for Writ of Habeas Corpus (Postconviction) and Ex Parte Motion for Appointment of Counsel and Request for Evidentiary Hearing. The State filed its Response on October 2, 2020.

On November 3, 2020, the Court granted Petitioner's Motion for Appointment of Counsel, and on November 24, 2020, Mr. Allen Lichtenstein, Esq. confirmed as counsel for Petitioner. (1 AA, 126).

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

Evidentiary Hearing

An evidentiary hearing was heard before the Honorable Christy Craig on August 26, 2021. Prior to that time, Harris filed a Pro Per motion to request to be transported to the hearing. However, Harris was not transported to the evidentiary hearing and no arrangements were made for him to appear by telephone. Judge Craig gave Petitioner Counsel, Mr. Lichtenstein, the option to bifurcate the hearing for Harris to testify, but Petition Counsel indicated he was prepared to go forward without Harris being present and did not believe a bifurcated hearing was needed. Following testimony of the witnesses and arguments by Petitioner Counsel, the Court denied the Petition. A written order was filed on September 30, 2021. (Attached hereto as Exhibit A).

Order Denying Petition

To deny Harris' claim that Trial Counsel(s) were ineffective, the District Court relied on the testimony of Mr. Sheets and Mr. Ramsey that Harris did not wish to appeal the denial of the writ of mandamus and instead chose to go to trial as a quickly as possible.

To deny Harris' claim that Appellate Counsel(s) were ineffective the District Court relied on the testimony Ms. Bernstein stating that it was a strategic decision to not appeal the denial of the writ of mandamus.

Appeal of Order Denying Petition and Dismissal

Harris filed an appeal of the district court order denying the Petition on September 16, 2021. ON October 22, 2021, current Counsel was appointed to pursue the appeal. (Dkt. 21-30481).

The opening brief was filed on April 18, 2022 (Dkt. 22-12176). On August 15, 2022, the case was transferred to the Court of Appeals from the Nevada Supreme Court. On August 29, 2022, the appeal was dismissed by the Court of Appeals. The remittitur was issued September 29, 2022. This Motion followed:

ARGUMENT

The Order dismissing the appeal states as follows:

> Our review of this appeal reveals a jurisdictional defect. The September 28, 2021, order purportedly denying Harris's petition and supplement did not resolve all of the claims raised below. Specifically, the order did not address all of the claims raised in Harris's pleadings below.
>
> The order was thus not a final order. *See Sandstrom v. Second Judicial Dist. Court*, 121 Nev. 657, 659, 119 P.3d 1250, 1252 (2005) ("[A] final order [is] one that disposes of all issues and leaves nothing for future consideration."). Accordingly, we lack jurisdiction to consider this appeal, see NRS 34.575(1); NRS 177.015(3), and we
>
> ORDER this appeal DISMISSED.
>
> (See Order Dismissing Appeal, attached hereto as Exhibit B).

The order dismissing the appeal is not particularly helpful or instructive of what issues were not addressed or what is exactly needed to fix the "jurisdictional defect". So now it is left to Counsel to try and figure out what exactly the Court of Appeals is looking for out of this Court's Order.

The best guess is that Mr. Harris raised a number of issues in his Pro Per Petition prior to Mr. Lichtenstein filling a supplemental brief. The order denying the Petition addressed the issues raised by Mr. Licenstein in his supplemental, but not the issues originally raised by Harris in his original pro per petition.

Counsel would read the record and this Court's actions as necessarily denying the pro per claims in certifying the specific claims addressed in the evidentiary hearing and then the final order denying those claims after evidentiary hearing, however; the Court of Appeals would apparently like something more comprehensive in the Order denying the Petition.

To this end, Counsel is requesting the matter be put on Calendar to address the matter or the Court to file an amended "final order disposing of all issues and leaving nothing for future consideration", so that Harris may refile and pursue his appeal.

CERTIFICATE OF SERVICE

I hereby certify that on this date: Friday, October 28, 2022 I did serve the forgoing motion through electronic service by filing the electronic filing system for the Clark County District Court to the following:

Motions@clarkcountyda.com

DATED: 10/28/2020

Respectfully submitted by:

PITARO AND FUMO, CHTD.

By: Dustin R. Marcello
DUSTIN R. MARCELLO, ESQ
Nevada Bar No.: 10134

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BARRY RASHAD HARRIS,
Appellant,
vs.
WILLIAM A. GITTERE, WARDEN,
Respondent.

No. 83516-COA

FILED

AUG 29 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER DISMISSING APPEAL

Barry Rashad Harris appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on April 21, 2020, and a supplemental petition filed on April 8, 2021. Eighth Judicial District Court, Clark County; Christy L. Craig, Judge.

Our review of this appeal reveals a jurisdictional defect. The September 28, 2021, order purportedly denying Harris's petition and supplement did not resolve all of the claims raised below. Specifically, the order did not address all of the claims raised in Harris's pleadings below. The order was thus not a final order. *See Sandstrom v. Second Judicial Dist. Court*, 121 Nev. 657, 659, 119 P.3d 1250, 1252 (2005) ("[A] final order [is] one that disposes of all issues and leaves nothing for future consideration."). Accordingly, we lack jurisdiction to consider this appeal, *see* NRS 34.575(1); NRS 177.015(3), and we

ORDER this appeal DISMISSED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

subpoena as she verified the phone number to which the subpoena was texted, and also verified the address where the subpoena was sent. The State's process server told the named victim of the date, and she specifically refused to promise to appear. The intentional and deliberate actions of the witness not to come to court coupled with the State's due diligence to procure her presence shows through the totality of the circumstances that good cause was presented to the court.

ORDER

THEREFORE, IT IS HEREBY ORDERED that the Petition for Mandamus/Prohibition shall be, and it is, hereby denied.

DATED this 27th day of November, 2017

D. E. Smith

Douglas E. Smith
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of November 2017, a copy of this Order was electronically served to all registered parties in the Eighth Judicial District Court Electronic Filing Program and/or placed in the attorney's folder maintained by the Clerk of the Court and/or transmitted via facsimile and/or mailed, postage prepaid, by United States mail to the proper parties or per the attached list as follows:

Genevieve Craggs, Genevieve.craggs@clarkcountyda.com
Scott Ramsey, Scott.ramsey@clarkcountynv.gov

Jill Jacoby

Jill Jacoby, Judicial Executive Assistant

cc: Hon. Christy L. Craig, District Judge
Pitaro & Fumo, Chtd.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

IN THE EIGHTH JUDICIAL DISTRICT COURT IN AND FOR THE COUNTY OF CLARK STATE OF NEVADA

BARRY HARRIS, PETITIONER

V.

THE STATE OF NEVADA, RESPONDENT

CASE NO: A-20-813935-W

DEPT. XXXII

MOTION "NOTICE OF APPEAL"

COME NOW, PETITIONE, BARRY HARRIS, I PRO SAY FILE THIS MOTION OF NOTICE OF APPEAL FOR CASE NO: A-20-813935-W TO THE SUPREME COURT OF THE STATE OF NEVADA. FOR HIS POSTCONVICTIONS ON 8/26/21 HEARING, "MAIL ON 9/6/21"

Barry Harris

P.O. BOX 1989
ELY, NEVADA 89301

LAS VEGAS NV 890
8 SEP 2021 PM 3 L

"LEGAL MAIL"

RECEIVED
SEP 13 2021
CLERK OF THE COURT

STEVEN D. GRIERSON
200 LEWIS AVENUE 3RD. FLOOR
LAS VEGAS, NEVADA 89155-1160

89101-630000

"LEGAL MAIL"

ELY STATE PRISON
SEP 17

Electronically Filed
9/30/2021 9:12 AM
Steven D. Grierson
CLERK OF THE COURT

NEFF

DISTRICT COURT
CLARK COUNTY, NEVADA

BARRY HARRIS,

Petitioner,

vs.

WILLIAM GITTERE,

Respondent,

Case No: A-20-813935-W

Dept No: XXXII

NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

PLEASE TAKE NOTICE that on September 28, 2021, the court entered a decision or order in this matter, a true and correct copy of which is attached to this notice.

You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is mailed to you. This notice was mailed on September 30, 2021.

STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Ingrid Ramos
Ingrid Ramos, Deputy Clerk

CERTIFICATE OF E-SERVICE / MAILING

I hereby certify that on this 30 day of September 2021, I served a copy of this Notice of Entry on the following:

☑ By e-mail:
Clark County District Attorney's Office
Attorney General's Office – Appellate Division-

☑ The United States mail addressed as follows:

Barry Harris # 95363
P.O. Box 1989
Ely, NV 89301

Allen Lichtenstein
3315 Russell Rd. No. 222
Las Vegas, NV 89120

/s/ Ingrid Ramos
Ingrid Ramos, Deputy Clerk

FCL
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
ALEXANDER CHEN
Chief Deputy District Attorney
Nevada Bar #10539
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

BARRY HARRIS,
#1946231

Petitioner,

-vs-

WILLIAM GITTERE, Warden,

Respondent.

CASE NO: A-20-813935-W

DEPT NO: XXXII

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

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

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

POINTS AND AUTHORITIES

PROCEDURAL HISTORY

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

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

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

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

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

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

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

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

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

STATEMENT OF FACTS

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

> On August 22, 2017, officers responded to a residence in reference to a call that came into 911 where they heard a female victim screaming. "Help me, 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.
>
> 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 with him on phone while she was at work. She went home and found the defendant lying on her bed. She reported that she gave him a key to the residence but was not living there. She sat next to him and they started arguing again. The victim told him to leave the residence and he replied, "I'm not going nowhere bitch". She told the defendant that if he continued to disrespect her that she would call the police. She reported that things escalated and the defendant grabbed her around her throat with both hands and began squeezing. He continued doing this until she could not breathe and felt as she was going to pass out. He then slammed her down on the bed and began punching her in the head. The defendant threw her on the floor and continued to punch her. The victim was able to get up and ran into the living room screaming for help. The victim stated that the defendant removed a firearm from his pants pocket and quickly

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

Presentence Investigation Report at 5.

ANALYSIS

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

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

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

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

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

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

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

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

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

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

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

1. Petitioner Fails to Demonstrate Ineffective Assistance of Trial Counsel

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

2. Petitioner Fails to Demonstrate Ineffective Assistance of Appellate Counsel

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

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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

Dated this 28th day of September, 2021

DISTRICT JUDGE

338 DC1 E429 573A
Christy Craig
District Court Judge

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

BY */s/ Alexander Chen*
ALEXANDER CHEN
Chief Deputy District Attorney
Nevada Bar #0010539

CERTIFICATE OF SERVICE

I hereby certify that service of Findings of Fact, was made this 22nd day of September, 2021, by Mail via United States Postal Service to:

BARRY HARRIS #95363
Ely State Prison, P.O. BOX 989
4569 North State Rd. 490
Ely, Nevada 89301

/s/ *Kristian Falcon*
KRISTIAN FALCON
Secretary for the District Attorney's Office

ac/kf/dvu

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Barry Harris, Plaintiff(s)	CASE NO: A-20-813935-W
vs.	DEPT. NO. Department 32
William Gittere, Defendant(s)	

AUTOMATED CERTIFICATE OF SERVICE

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

Service Date: 9/28/2021

Allen Lichtenstein	allaw@lvcoxmail.com
District Attorney	motions@ClarkCountyDA.com
District Court 32	DC32inbox@clarkcountycourts.us

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

BARRY HARRIS, Plaintiff, vs. WILLIAM GITTERE, Defendant.	)	CASE NO. A-20-813935-W DEPT. NO. 32

BEFORE THE HONORABLE CHRISTY CRAIG, DISTRICT JUDGE

THURSDAY, AUGUST 26, 2021 AT 1:03 P.M.

RECORDER'S TRANSCRIPT RE:
ARGUMENT: PETITION FOR WRIT OF HABEAS CORPUS
EVIDENTIARY HEARING

APPEARANCES:

FOR THE PLAINTIFF: ALLEN K. LICHTENSTEIN, ESQ.

FOR THE DEFENDANT: MELANIE H. MARLAND, ESQ.
Deputy District Attorney

Recorded by: KAIHLA BERNDT, COURT RECORDER

INDEX OF WITNESSES

PLAINTIFF'S WITNESSES	DIRECT	CROSS	REDIRECT	RECROSS
Nicole Dotson	8	14		
DEFENDANT'S WITNESSES				
Damian Sheets	31	38		
Kelsey Bernstein	41	44	50	50
Scott Ramsey	51	54		

(THURSDAY, AUGUST 26, 2021 AT 1:03 P.M.)

THE COURT: All right. I think that's everybody but Harris. So State of Nevada versus Barry Harris, A813935. I have Ms. Marland and Mr. Lichtenstein. Is it Stein or Stein?

MR. LICHTENSTEIN: Either way.

THE COURT: I got to have one.

MR. LICHTENSTEIN: I'm easy.

THE COURT: I'm going to say Stein.

MR. LICHTENSTEIN: Okay. I'll answer to that.

THE COURT: So we're still on the record. We're waiting for them to hopefully bring the Defendant up. There was an order to transport that was done and we're trying to track him down. So we're just going to take a five minute break, and I'm going to go back and see where we're at with regard to the jail and hopefully he'll be up here shortly.

THE CLERK: Judge, did you get the email from Erin about this? I don't know if you already responded or not.

THE COURT: I have not been looking at my emails. I'm going to go back in chambers and -- oh --

THE CLERK: The Defendant didn't get transported.

THE COURT: Oh, boy. So despite the transport order, it looks like it was never served on the prison or on the detention center which is weird because it's like automatically done. That makes absolutely --

THE CLERK: Your Honor, on the criminal cases, a lot of people are not registered as service recipients on the efiling system on criminal cases.

THE COURT: A lot of people like the prison --

THE CLERK: Yes.

THE COURT: -- and the AG's office?

THE CLERK: Yes. Because they have to manually add themselves as a party to be a registered recipient. Nobody else can add them because then they become responsible for that party.

THE COURT: Stand by. Let me just open up my Odyssey. I closed it and I didn't mean to.

MS. MARLAND: Could it be because it's the A case number or is it just -- they're just not added at all to --

THE COURT: I have no idea. Let me just take a look. So let's see --

THE CLERK: Okay. So I'm looking at the efiling queue, Your Honor. The only registered receipts on the A case are Mr. Lichtenstein -- Lichtenstein, I'm sorry, I didn't hear the correct way, the District Attorney's office and then our Law Clerk which I don't know why --

THE COURT: I mean it looks like that they were mailed -- oh, they were mailed to the party but not -- okay. Well, nuts.

THE CLERK: So, yeah, the efiling system only -- it doesn't really -- my understanding is it doesn't really coordinate with Odyssey like that. I don't know for sure though, but the only people who are registered on there are the people I mentioned.

THE COURT: All right. Allen, what do you want to do? Do you want to do it without your client or do you want to reset it for him?

MR. LICHTENSTEIN: Yes.

MS. MARLAND: Do we want to bifurcate it since I believe Mr. Lichtenstein currently has a witness?

THE COURT: What would you like to do, sir? I'm sorry to put you in this position.

MS. MARLAND: May I ask, this transport order, was it ordered by the Court? Was it -- I mean it would be ordered by the Court, but did the Court prepare it? We do it all the time, so --

THE COURT: I know. I know.

MR. LICHTENSTEIN: We'll just proceed today. My witness, Ms. Dodson, came in from Texas on her own dime, and --

THE COURT: I understand.

MR. LICHTENSTEIN: -- I didn't want to have to redo that.

MS. MARLAND: And I guess my question is do we want to bifurcate it so that we could perhaps get Mr. Harris here the next court date so if you want to call him you can call him?

THE COURT: If he decides he wants to call him, we'll definitely bifurcate it for that part of the hearing. It's up to him to decide that. He doesn't have to decide it now.

MS. MARLAND: Correct.

MR. LICHTENSTEIN: At this particular point I do not intend to call him, so we'll go from there.

THE COURT: Okay. All right, then. Then in light of the request, we will go ahead and go forward with the evidentiary hearing today. I'm going to take a two minute break to just get something to drink, and I'll come right back and we'll get started. Thank you, both.

(Whereupon, a brief recess was held from 1:07 p.m. to 1:10 p.m.)

THE COURT: So let's go back on the record, then, in State versus -- or Harris, A813935, and I'll note that there was an ex-parte motion for an order to transport, but I don't show that there was ever an actual order prepared and I don't think the State prepared one, at least I don't see one. And I'm not sure the State was ever even aware, so we probably should have talked about it prior to -- when we set the evidentiary hearing about making sure that got done, and I suspect we just didn't do it.

MS. MARLAND: And I believe that's what happened. I'm going through the notes. All I have is there's a note -- well, actually I have a note saying that Mr. Lichtenstein represented that there was no need for the Defendant to be present, I believe. I may be mistaken, but that's what I'm looking at, the 6-24 notes.

MR. LICHTENSTEIN: At the time of the previous hearing I may or may not have said that. Subsequently I contacted the Court -- I was a little bit new to the procedure -- the Court to see about how to get him back here and to call the DA's office, and I contacted the DA's office. Obviously they got the message because there was some kind of attempted communication with somebody to get him here.

THE COURT: Okay. Well, in the event that we decide to bifurcate and you want to continue the hearing in some way we'll address that, and we'll be very careful to make sure because the State does have a process by which it's usually fairly simple, it's straightforward, at least, from my end of getting him here. They fill it out and it goes off into the ether to the appropriate people, and typically it works out really well as long as we give the prison enough time.

It's a little bit more complicated, I think, for the prison when they're coming from Ely which is where I think he is but it still happens, so I apologize and I'm sorry that I didn't pay closer attention. All right. So this is the time set for an evidentiary hearing. State, are you prepared to go forward?

MS. MARLAND: Yes, Your Honor.

THE COURT: Mr. Lichtenstein, are you prepared to go forward?

MR. LICHTENSTEIN: Yes, Your Honor.

THE COURT: All right. This is your writ, sir, if you'd like to proceed.

MR. LICHTENSTEIN: Thank you, Your Honor.

THE COURT: Do you want to call your first witness or --

MR. LICHTENSTEIN: Yes. I'll call Nicole Dotson.

MS. MARLAND: And actually before -- I'm sorry, before we call the witness, I do have Mr. Ramsey and Mr. Sheets kind of on call. They told me they had not been subpoenaed, so they may be available this afternoon if the Court has any questions. I wasn't sure if Mr. Lichtenstein intended on subpoenaing them, apparently not, but they will make themselves available.

THE COURT: Yeah. I saw some subpoenas that were issued previously for both Mr. Sheets and Mr. Ramsey for previous hearings. Did you issue new subpoenas? Did you plan on calling them?

MR. LICHTENSTEIN: No, Your Honor.

THE COURT: No, you didn't plan on calling them?

MR. LICHTENSTEIN: I didn't plan on calling them and I had not subpoenaed them previously.

THE COURT: Well, I think it was Mr. Harris who had done the actual -- it was before you were appointed. Okay. All right. Thank you. Anything else, State?

MS. MARLAND: No, Your Honor.

THE COURT: All right. You may begin, sir.

MR. LICHTENSTEIN: I do have one question.

THE COURT: Yes, sir.

MR. LICHTENSTEIN: At the end of the testimony, will we have an opportunity to argue --

THE COURT: Absolutely.

MR. LICHTENSTEIN: -- because --

THE COURT: A hundred percent.

MR. LICHTENSTEIN: -- the writ is mostly about legal issues. I just want to set a factual predicate here.

THE COURT: Yes, sir. Oh, shoot. Andrea, can you -- she's -- this is weird.

THE CLERK: I'm here.

NICOLE DOTSON,

having been called as a witness, was duly sworn and testified as follows:

THE CLERK: Please state and spell -- oh, you can have a seat, and then please scoot up to the red microphone there in front of you and state and spell your first and last name for the record.

THE WITNESS: Can you hear me? Can you hear me?

THE CLERK: Yes.

THE WITNESS: Okay. My first name is Nicole, N-i-c-o-l-e. My last name is Dotson, D-o-t-s-o-n

THE COURT: All right. You may proceed.

MR. LICHTENSTEIN: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. LICHTENSTEIN:

Q Good afternoon, Ms. Dotson.

A Good afternoon.

Q Thank you for coming all this way. Where do you reside presently?

A I now currently reside in Texas, Houston.

Q Okay. How long have you been living there?

A I'm going on about four months.

Q Okay. Prior to your moving to Houston, where did you live?

A I've always resided in Las Vegas, Nevada.

Q Okay. I want to direct your attention specifically to the Fall of 2017. Where were you living then?

A I was living in Las Vegas, Nevada.

Q Do you remember your address from back then?

A I just remember it was on a street called Mountain Vista.

Q Okay. Had you been living there for a while?

A No. Actually we had just moved into that apartment currently about, I want to say, two months before the incident.

Q Okay. What about after the incident?

A Where was I living?

Q Yeah. Did you move after that in Las Vegas?

A I've been in Las Vegas since I was six years old.

Q I'm just thinking about the address.

A I don't remember the address before that.

Q Okay. But -- let me try this again. After the incident, did you move within the next few months?

A Oh, no. I still was residing in Las Vegas a while after the incident.

Q Okay.

A I'm sorry, I misunderstood you.

Q Okay. So you didn't after the incident move to some other address or --

A No, sir.

Q -- whatever or anything?

A I just currently moved to Texas of this year.

Q Okay. Thank you. In terms of the incident, what are you referring to as the incident?

A Some of what happened in 2017, what he was essentially prosecuted for.

Q Okay. And he is --

A Barry Harris.

Q Okay. Did you appear as a witness in any of the court proceedings?

A I was actually the material witness.

Q Okay. Did you testify at a Preliminary Hearing?

A I did. I did.

Q Okay. Let's talk about that.

A I was incarcerated.

Q Well, let's go step-by-step with this. Okay? According to the records I saw, the Preliminary Hearing was initially scheduled for October 16th, 2017. Does that sound about right to you?

A Correct.

Q Okay. Did you receive a subpoena to appear on that date in this case?

A No.

Q You did not receive one at all?

A They never handed me one.

Q Okay. But you did get one; correct?

A Correct.

Q How did you get it?

A I believe it was mailed to me.

Q Okay. Let's go back to what you previously said. No one ever handed you one? No one ever --

A No, sir.

Q -- personally served you?

A No, sir.

Q Okay. Did anyone from the police or the District Attorney's office or someone in the State ever speak to you about this and ask you to show up in court?

A Yes, sir.

Q Okay. What did you say to them?

A I told them that I wasn't appearing in regards to me not feeling safe with his family attending the court.

Q Okay. So you never -- is it fair to say that you never told anybody from the DA's office or the police or anyone you spoke to that you would be appearing?

A I'm sorry, you said is it fair to say that?

Q Is it fair, correct, to say that, yeah.

A Yeah. Yeah.

Q Okay. And, in fact, did you appear on that date?

A Yeah. But it was against my --

Q On the first time or --

A Okay. I'm sorry. I'm confused.

Q Okay. Again, looking at the record, it shows that because you did not appear the State asked for a continuance and rescheduled it.

A I'm assuming that's correct.

Q Okay. But you weren't there that first time?

A No.

Q All right. Did you -- subsequent to that, after that did you ever receive a subpoena for Preliminary Hearing or was it just that one time?

A To my recollection, it was just that one time.

Q Okay. But you did appear as a witness later on in a Preliminary Hearing; is that correct?

A See, I'm confused because I don't know what is what now.

Q This is the hearing in Justice Court.

A Correct. But I'm still confused because I came to a trial. Before the trial, I guess that's what you're talking about --

Q Yes.

A -- I spoke with someone from the DA's office on the phone. They had all my contact, my work, everything in regards to the Preliminary Hearing. This is the time when I explained to them that I did not feel safe because his family was attending the court so I would not be attending, okay, because it was a domestic violence case. So I thought that there were going to be some type of special procedures to make me feel comfortable in regards to this. I didn't feel that the DA was accommodating that, however, I did not run from them and I was not being uncooperative which is why they knew exactly where to pick me up when they did decide to incarcerate me in regards to it. That's -- that's all I remember, so --

Q Okay. Well, let's break that down a little bit. All right. You say they picked you up and you were incarcerated?

A They came to my work, yes, sir.

Q Okay. Were these police?

A They had on regular clothes but I'm sure they were. They had the ability to arrest me.

Q Okay. So where did they pick you up?

A At the time I was working at a nursing home called Brookdale. I worked in memory care. They came to Brookdale I'm pretty sure close to the time for me to clock in because I got there and I clocked in. I proceeded to go to the back of the building where I worked at. My supervisor came to the back and said that they were waiting in her office for me. I said okay. So I headed towards the front of the building to greet them. When I stepped in, they told me that they were arresting me. When they said that my supervisor asked, what did she do.

And they said, she's in contempt of court and they arrested me, and that's what happened.

Q And were you taken to jail?

A Yes, sir.

Q Was this the Clark County Detention Center?

A Yes, sir.

Q How long were you there for?

A Four days.

Q Okay. Did you finally testify in Justice Court?

A Of course. I was in custody.

Q Okay. Well, I'm just -- this is for the record.

A Yeah. Yeah. Yeah.

Q Okay. Thank you. At any time, did you try to hide from them or --

A Absolutely not.

Q -- evade or whatever?

A Absolutely not.

Q And at any time, did anyone try to hand you a subpoena to appear?

A Not for that, no.

Q Okay. Thank you.

MR. LICHTENSTEIN: That's really all I have.

THE COURT: Ms. Marland, you may proceed.

MS. MARLAND: Yes, Your Honor.

CROSS-EXAMINATION

BY MS. MARLAND:

Q Good afternoon, Ms. Dotson. Sorry. Good afternoon, Ms. Dotson. So fair to say it sounds like -- and correct me if anything I tell you is wrong. Okay?

A Okay.

Q It sounds like on Direct you testified that you were mailed a subpoena; correct?

A Correct.

Q And that was before the October 14th -- October 16th Preliminary Hearing date? Does that sound right? October 16th Preliminary Hearing date or, I'm sorry, no, it's October 26th.

THE COURT: 26th.

Q (By Ms. Marland) Yep. Okay. This event took place in August of 2017, correct, the incident?

A Uh-huh. Correct.

Q All right. And then you received the subpoena in the mail sometime in October of 2017?

A Correct.

Q And that's the same time you spoke to the person from the DA's office and told them that you felt unsafe coming to court?

A Yes.

Q And you told them you wouldn't be coming in because of --

A Of that.

Q -- you were afraid; correct?

A Uh-huh.

Q Okay. So although the State didn't hand you a subpoena, you were made aware that -- you had one because you received one in the mail; is that right?

A Right.

Q And you were made aware of this court date based on a conversation you had with an employee of the DA's office; is that right?

A Yeah.

Q Okay. And then you did not come in based on everything you had told the process server; correct?

A Correct.

Q Okay.

MS. MARLAND: I have no further questions.

THE COURT: All right. Sir, do you have any Redirect based on that limited Cross?

MR. LICHTENSTEIN: None, Your Honor.

THE COURT: All right. Thank you, ma'am, for coming.

THE WITNESS: Okay.

THE COURT: Is it all right with both parties if she stays here and watches the rest since she flew all the way here from Texas? It's up to you, Ms. Marland.

MS. MARLAND: I would have no objection. I would just note that there, I believe, are multiple of these grounds that involve, you know, this victim's testimony or presence, so as long as Mr. Lichtenstein is not planning on calling Ms. Dotson back as a witness I would have no objection.

MR. LICHTENSTEIN: No, Your Honor.

THE COURT: All right. You can go back and have a seat in the galley and watch.

THE WITNESS: Thank you so much.

THE COURT: You're welcome. Thank you for coming all this way. Mr. Lichtenstein, do you have another witness to call?

MR. LICHTENSTEIN: No, Your Honor.

THE COURT: All right. Are you resting?

MR. LICHTENSTEIN: Yes.

THE COURT: All right. Ms. Marland?

MS. MARLAND: No witnesses, Your Honor.

THE COURT: All right. So I guess we'll move right into argument. All right, sir. You may proceed. I just want to ask a couple questions because I've read -- I've read and read and read and read and I've made a lot of notes, and I just want to make sure that I'm clarifying that I understand you're arguing that his lawyer was ineffective essentially in two ways, one, for not presenting the issue of what happened in Justice Court. He clearly went to District Court but he didn't take it to the Supreme Court pretrial. Is that one of the --

MR. LICHTENSTEIN: That is correct.

THE COURT: Okay. And then the second argument is that he didn't present that same issue on the direct appeal post-trial?

MR. LICHTENSTEIN: Correct.

THE COURT: All right. So I have those two things spread out. I'm ready to go. I'm ready to hear you.

MR. LICHTENSTEIN: The argument is pretty simple. Apparently you've had a long day, so I'll try to keep it short.

THE COURT: That's okay. I'm good to go.

MR. LICHTENSTEIN: The facts are not really in dispute. She was never properly served. The Court in the papers, the opposition said we were out of touch with her or we couldn't find her, no sworn statement at all, and if you look at the *Jasper* case, you look at the *Hernandez* case you can't go back to post-those and say, well, that's the rule because, you know, you don't have to have a sworn statement because the Nevada Supreme Court made it very clear that in order to get a continuance because of an unavailable witness at a Preliminary Hearing, to get that continuance you need either an affidavit, I guess a declaration would do, or sworn testimony.

This wasn't something new. This, you know, goes back to, what was it, I think *Jasper* was '72 and *Hernandez* was 2008. Clearly this was improper and prejudicial. What should have been done is in the absence of any sworn statement -- and you heard today under oath that Ms. Dotson made it very clear she did not make any oral representation that she'd be there that the State could rely on.

For inexplicable reasons they didn't follow up, they didn't have someone hand her a subpoena as is proper and then went and did not comply with Nevada Supreme Court precedent explaining good circumstances or due diligence in the proper way. Now, according to this testimony, there was no due diligence. Mailing a subpoena in a felony case is not proper service. This was not a misdemeanor.

THE COURT: So it's fair to say, however, that his attorney did file a writ pre-Prelim on this issue; isn't that right?

MR. LICHTENSTEIN: I believe it was pro se.

THE COURT: Okay.

MR. LICHTENSTEIN: But he did not follow up on it, and that is ineffective assistance because what should have occurred is that in Justice Court the case should have been dismissed in October. They could have refiled it, but then they would have to show by a preponderance of the evidence that there was good cause to not have her there, not serve her properly, and there wasn't. She didn't run from them. She didn't disappear. She didn't move to Texas then. They obviously were able to find her when they wanted to arrest her.

Now, I assume the State's going to say, well, what's the problem, no harm, no fowl kind of thing, but that's not what the law says. The law says that is a mandatory -- you know, mandatory requirements, and that wasn't done and that prejudiced Mr. Harris because, again, at the Preliminary Hearing stage that case should have been dismissed and then the burden would have shifted to the State. It's an issue that certainly should have been pursued by prior counsel and it wasn't.

And under *Strickland* that's ineffective assistance of counsel whether it's something that simply by following the law would have gotten the case dismissed, albeit with the possible opportunity to refile, but also the possibility that without the ability to show due diligence, which doesn't sound like they had, might not have been pursued and Mr. Harris would not be in prison right now.

THE COURT: Okay. And then the second issue about the direct appeal?

MR. LICHTENSTEIN: Well, I think it's the same issue in terms of not pursuing it fully.

THE COURT: So just to clarify based on the pleadings and the documents that had been filed, the direct appeal itself was filed by whom?

MR. LICHTENSTEIN: It was filed by Mr. Sheets --

THE COURT: Okay.

MR. LICHTENSTEIN: -- who was the same person who handled prior --

THE COURT: Okay. And so Mr. Sheets did not raise that issue of what happened in Justice Court during -- in the direct appeal?

MR. LICHTENSTEIN: Correct.

THE COURT: Okay.

MR. LICHTENSTEIN: And I looked through Odyssey, and I did not find any documents that address that at District Court.

THE COURT: Thank you. Anything else, sir?

MR. LICHTENSTEIN: Thank you.

THE COURT: Ms. Marland, you may proceed.

MS. MARLAND: Yes, Your Honor. Just a few things. First of all, just to correct the record the writ of mandamus, and I was just pulling it up on Odyssey, was indeed filed by Mr. Ramsey with the PD's office. In fact, he's the one who filed the stay of proceedings on the 3rd of November, so less than a week after this Preliminary Hearing. I would also note for the record Mr. Ramsey did object to the State's continuance. In terms of the specific continuance, the Court --

THE COURT: Okay. Can I just clarify for the record --

MS. MARLAND: Yes. Absolutely.

THE COURT: -- I'm just trying to make sure that we're talking about the same thing. So at that first Preliminary Hearing which was, I think, the 26th of --

MS. MARLAND: October.

THE COURT: -- October in 2017 where the witness failed to show, at that time Mr. Harris was represented by the Public Defender's office?

MS. MARLAND: That is correct.

THE COURT: Okay.

MS. MARLAND: And then I actually was noting what the sequence of events was, so --

THE COURT: And then can I just say, and that was Mr. Ramsey who represented him?

MS. MARLAND: Yes. Scott Ramsey, correct.

THE COURT: Okay.

MS. MARLAND: So there was an original Preliminary Hearing scheduled for September 15th. The Defendant got bound over for competency at that time. The second Preliminary Hearing upon his return from competency was October 26th, 2017. At that time the State did make the request to continue based on the -- well, based on the unavailability, so to speak, of Ms. Dotson. I'm calling it unavailability, and by that I mean uncooperative nature of the witness which in domestic violence cases is not uncommon.

I would note that many victims have the same concerns, and we only actually go out and get material witness warrants in very rare circumstances. I have the certificate of due diligence in the file, I was just going through it, so the way our subpoena system works is when we receive --

THE COURT: Hang on for a second.

MS. MARLAND: Sure.

THE COURT: Did you file that document with the court?

MS. MARLAND: The certificate of due diligence, no. It is work product. Now, what I do --

THE COURT: Okay. Because nobody's testified to it, so I don't think you can argue it here today because it's not a part to any of the documents, so I have not had a witness talk about it.

MS. MARLAND: And that's fine. And that's absolutely fine, Your Honor. I would just note that Ms. Craggs, I believe, or Ms. Sudano was at that Preliminary Hearing on October 26th.

THE COURT: As the District Attorney?

MS. MARLAND: As a District Attorney on this case and represented to the Court that their process server had mailed out the subpoena, which Ms. Dotson just testified she had received, had spoken to Ms. Dotson, and that is made generally closer to the Preliminary Hearing to ensure that the witness has received the subpoena and at that point had learned that Ms. Dotson was planning on not coming to court. When Ms. Dotson did, in fact, not come to court, the State made that request for a continuance.

Now, a request for a continuance based on -- it's NRS 171.196(2) which basically says, if the Defendant does not waive examination, the magistrate shall hear the evidence within 15 days unless for good cause shown the magistrate extends such time. Now, good cause shown, I agree *Bustos* and *Hill* are two avenues by which the State can prove good cause. In

this case the argument was we did our due diligence to find Ms. Dotson. We found Ms. Dotson and she told us she was not willing to come to court.

Now, that is the basis under which the Judge granted the State's motion to continue. That issue was then brought up on a writ of mandamus by Mr. Ramsey with the Public Defender's office. That issue was addressed and the Court found that the lower Court properly continued the hearing. That is in the -- and I have the actual case number, it's an A case number which is A-17-764110-W.

THE COURT: A dash what?

MS. MARLAND: Yes. A-17-764110-W. So there was a writ, there was a response, there was argument and there was an order from the Court denying the writ. It went back down to Justice Court. At that time a Preliminary Hearing had already been continued based on the fact that we had a stay in the proceedings. At the December 27th Preliminary Hearing date, defense said that they were going to hire private counsel. That Preliminary Hearing date got continued. We eventually finished the Preliminary Hearing on, I believe, the 16th or 18th of January.

So that was just the procedural basis. Now, Ms. Dotson just testified she had received the subpoena. She was not planning on coming to court. That was a representation she made to the process server, that was a representation the DA then made to the Court at the time of the request to continue, and that was the basis for the good cause found to then get a material witness warrant for Ms. Dotson and have her appear in court albeit in custody.

So just on that one issue, that was also pretrial, pre-Preliminary Hearing. Since then we have had a trial. I understand the allegation

here is that I guess there was ineffective assistance for not filing a writ. That issue was obviously -- a writ was filed by defense counsel at the time and followed through with.

THE COURT: Well, I mean what I think what he's arguing is that once it was denied, he should have filed an extraordinary writ with the Nevada Supreme Court, and the question is is that ineffectiveness.

MS. MARLAND: Well, and Your Honor, I don't believe the defense has been able to show the prejudice to the Defendant. Not only would that extraordinary writ have gone up to -- well, first of all, I don't believe we can show ineffectiveness, in this case it's also a strategic decision to get this moving, but also had the extraordinary writ been filed it would have prolonged the time in Justice Court, A. B, the fact that we can refile cases, we do that all the time. We can take a case to the Grand Jury.

In the instant case the Court found good cause. The issue was whether that two week continuance prejudiced the rights of the Defendant and whether defense counsel was ineffective. So we have to show both that the ineffective -- counsel's conduct --

THE COURT: Is it fair to say that he was held in custody on October the 26th when the State wasn't prepared to go forward?

MS. MARLAND: That is correct, yes. And the defense did make a motion for own recognizance release. The Court denied that motion.

THE COURT: So with regard to whether or not it's ineffective assistance for not taking the extraordinary writ up to the Nevada Supreme Court, that's argument number one, and it's your position --

MS. MARLAND: That it's not.

THE COURT: -- because why?

MS. MARLAND: Well, it's my position that -- so as to whether taking the denial of the writ up to the Supreme Court at the time was ineffective, I would submit that it's not because it didn't substantially prejudice the Defendant. I understand he was held in custody, but within -- there are other avenues to bind a Defendant up to District Court is what I would note as Your Honor well knows. The matter was continued for two weeks. The Defendant remained in custody for more time than that because the proceedings had been stayed for this writ. The State's position is there was no -- it does not rise to the level of ineffectiveness of counsel.

THE COURT: Okay. Now, with regard to the direct appeal.

MS. MARLAND: Yes, Your Honor. At that point the matter had already been bound over to District Court. We've gone through the trial. The Defendant was convicted beyond a reasonable doubt of the offenses charged. And I would submit on the writ in response from the State to the supplemental on the original petition for writ of habeas corpus on that issue. I believe it sets it out clearly. If Your Honor has specific questions, I would be happy to answer them.

THE COURT: Sure. So why is it okay for the attorney to not raise those issues in a post-trial appeal? Why isn't that ineffective?

MS. MARLAND: Well, Your Honor, I'm not sure that -- Court's brief indulgence.

I think -- and I may have misunderstood Mr. Lichtenstein's argument, but my understanding was the ineffective -- so why was this specific writ issue not brought up before the Nevada Supreme Court on direct appeal?

THE COURT: So the way I understood it, and I think the way I clarified at the beginning, is first the question was pretrial, pre-Preliminary really, should that writ -- it went to the District Court, but should he have appealed that decision by I think it was Judge Smith denying that writ, should there have been an appeal to the Nevada Supreme Court and is that ineffectiveness. That's number one.

Number two is post-trial after a conviction not raising that issue in the direct appeal, is that ineffectiveness for appellate purposes, and I have some really grave concerns about the fact that that was not raised in the direct appeal. I'm not as certain that an extraordinary writ pretrial -- you know, I mean I think tactical decisions by attorneys don't raise questions of ineffectiveness, and I think that's kind of where I'm at with that first issue. But that second issue about not raising it on direct appeal is more troubling especially because by this time the direct appeal is being filed by Mr. Sheets. Is that accurate?

MS. MARLAND: That's accurate, and --

THE COURT: Okay. So the original concern about ineffectiveness is against a prior attorney, so there's no reason why Mr. Sheets could not have raised it and should he have raised it. That's --

MS. MARLAND: Well, and on direct appeal. And Mr. Sheets did subpoena -- the subbing, substitute in on January 2nd which was two weeks prior to that next Preliminary Hearing date. At that point -- I mean appeals generally address the issues of what happened at the trial stage. I understand that prior legal issues, all legal issues can be brought on appeal.

THE COURT: Should they be brought on appeal? I mean if something goes wrong at the Preliminary Hearing and you're challenging the

decision a Justice Court Judge and frankly the District Court Judge made, isn't that something that should be in the direct appeal? I think that's the real crux of the question.

MS. MARLAND: The State's argument would be that, no, it should not be brought up on direct appeal at this time not only because there's already been the finding beyond reasonable doubt but moreover based on the fact that it would of -- I mean I understand --

THE COURT: So when would it be raised? If you --

MS. MARLAND: It could have been raised at the time the writ was denied.

THE COURT: And if he doesn't raise it, does he waive it? Is it waived at that point if it's not raised during the direct appeal? I mean how does Mr. Harris get that heard?

MS. MARLAND: The appeal of the denial of his rights -- I mean the writ of mandamus?

THE COURT: Or a question about the decision making of Judge Smith and Judge -- whoever the Justice Court Judge was, when does he raise that?

MR. LICHTENSTEIN: Excuse me, Your Honor. It's Tobiasson.

MS. MARLAND: I'm sorry?

THE COURT: Judge Tobiasson. Thank you.

MS. MARLAND: Well --

THE COURT: So when does he raise that if it's not in a direct appeal --

MS. MARLAND: Well, I think --

THE COURT: -- and does he waive it by not raising it?

MS. MARLAND: And I think part of the issue is also counsel shouldn't be -- shouldn't file -- the case law here supported the District Court's decision to deny the writ of mandamus. Now, the issue of whether or not we want to appeal that is whether that District Court abused its discretion. That is a decision for counsel to make. It appears as though it was a strategic decision to get this case moving as Mr. Harris --

THE COURT: How on earth do you know that? I mean Mr. Sheets has not testified.

MS. MARLAND: And Mr. Sheets --

THE COURT: Neither party chose to call him, so I have no idea what Mr. Sheets' opinion was or why he did or didn't do it which leaves me in sort of a problematic area.

MS. MARLAND: And in that case, Your Honor, I understand the defense has rested. If Your Honor would like me to call Mr. Sheets, he is available. He mentioned he would be available if Your Honor has those specific questions to pose to him.

THE COURT: Well --

MS. MARLAND: I understand.

THE COURT: -- it's not really my call to make how you guys present your case. What I'm saying is you're arguing it was a strategic decision, Mr. Lichtenstein hasn't raised it at all, I haven't heard from any witness, so I'm concerned about it.

MS. MARLAND: And I guess I would ask to call Mr. Sheets. If I could have five minutes, I can get him on BlueJeans.

MR. LICHTENSTEIN: I have no objection --

THE COURT: All right. Then you're --

MR. LICHTENSTEIN: -- but I'm not sure it's -- it's particularly --

THE COURT: -- agreeing to reopen the hearing because both parties have closed?

MR. LICHTENSTEIN: I'm not sure it's particularly relevant as it relates to the direct appeal.

THE COURT: I don't know what you're saying. Hang on.

MR. LICHTENSTEIN: Well, to say that it was a strategic decision not to appeal an issue where the District Court Judge has said different minds may come to different decisions but this is the way I'm going to decide, a strategic decision to ignore that would be on its face ineffective assistance.

THE COURT: Well, that's a slightly different argument. The State is arguing apparently that it was a strategic decision. Now, whether or not that rises to the level of ineffectiveness even if it's a strategic decision is a slightly different question. But I don't have any testimony at all, and right now the Court remains concerned about the fact that it was not raised on direct appeal because I don't know when else Mr. Harris would be able to raise it.

MS. MARLAND: Well, questions of ineffectiveness of counsel are to be raised post-conviction which is what Mr. Lichtenstein did. I understand. The question of whether or not the writ of mandamus should have been appealed, again, the State's position is that is not ineffective. I don't believe the defense has been able to prove --

THE COURT: I don't -- so for purposes of the second argument about whether or not it should have been included in the direct appeal, it would

not be to argue that Mr. Ramsey was ineffective for not doing that. It would be to argue that the underlying decision was wrong and ask the Supreme Court to rule on that, and I don't know how else you ever get to it. I mean frankly extraordinary writs are things that the Supreme Court can choose not to hear. They don't think it's appropriate and they tell you to come back after the trial is over. Well, now we're back here, Mr. Harris is at that point where the trial is over, and if it's not raised then I'm not sure he can ever raise it again.

So even if Mr. Sheets says it's a strategic decision, the question still remains was it an appropriate decision and should it have been done that way. And so I just don't know if it's not raised in the direct appeal how Mr. Harris would ever raise it because then all he's left with is saying in PCR that my attorney was ineffective, whereas the Supreme Court never had an opportunity to rule on that issue right during the direct appeal, which I think is when it should have happened.

MS. MARLAND: And I guess -- well, and, again, Mr. Sheets just texted that he is willing to log on if the Court would -- the State can still call him. I would just note I believe the issue is the prejudice prong of the *Strickland* analysis. I believe, first of all, we don't have ineffectiveness but also the prejudice to the Defendant with the additional two weeks the Defendant spent in custody, and I understand --

THE COURT: No, no, no, Ms. Marland, it's not. I mean the prejudice is if it doesn't get raised on direct appeal it never gets heard. He's never had an opportunity to have a higher Court rule on that underlying opinion. Additionally I note that he was found not guilty on a whole bunch of counts which indicates that some of that information might have been helpful perhaps at trial, I

don't know, but I just don't know how if it never gets raised on a direct appeal he never has the opportunity to challenge those decisions. It just doesn't happen, so I'm not sure how to get around that.

MS. MARLAND: And Mr. Sheets has logged on. I would ask to call Mr. Sheets --

THE COURT: Sure. All right. We're going to -- you're agreeing to reopen, then, the hearing?

MR. LICHTENSTEIN: Yes. If the Court feels that will be --

THE COURT: It's not the Court. It's your guys' case, not mine. If you're okay with it.

No, ma'am. You may not speak. All right. Ms. Marland, you're going to call Mr. Sheets?

MS. MARLAND: The State calls Damian Sheets.

THE COURT: Mr. Sheets, can you hear me?

THE WITNESS: I can, Your Honor. Good afternoon. I wasn't aware of the hearing until a couple of hours ago.

THE COURT: Thank you. I appreciate it. Andrea, can you swear him in, please?

DAMIAN SHEETS,

having been called as a witness, was duly sworn and testified as follows:

THE CLERK: Please state and spell your first and last name for the record.

THE WITNESS: Damian R. Sheets, D-a-m-i-a-n, R as in Robert, Sheets, S-h-e-e-t-s.

THE COURT: All right. You may proceed, Ms. Marland.

DIRECT EXAMINATION

BY MS. MARLAND:

Q Good morning -- good afternoon, Mr. Sheets. You're a defense attorney; is that correct?

A That is correct.

Q And on or about January 2nd of 2018, were you appointed to represent an individual named Barry Harris?

A As far as the dates, again, I didn't have time to prepare for the hearing. At some point I was, I believe, appointed to represent Barry Harris with regards to a case where he was alleged to have committed kidnapping with a deadly weapon and domestic battery related crimes.

Q And did you, in fact -- were you, in fact, appointed in the middle of a bifurcated Preliminary Hearing?

A The best of my recollection I was.

Q And, in fact, did you only act as Mr. Harris's attorney -- well, were you Mr. Harris's attorney for that second part of the Preliminary Hearing that was heard mid-January of 2018?

A To the best of my recollection, I did act -- I came into the case mid-Prelim. I believe I objected to it but I was ordered to proceed.

Q Okay. And was one of the reasons you objected to it an issue with the continuance that had previously been granted to the State on October 26th of 2017?

Let me ask you this. What was your basis for the objection to proceed with the Preliminary Hearing in January?

A To be honest because I wasn't aware of the hearing, I didn't have an opportunity to review the record. I know that one of the reasons that I would have objected is I don't think it's reasonable or fair to come in to a Preliminary Hearing in the middle of a Preliminary Hearing as new counsel. I would have had a real issue with that. And if I felt that a continuance was improper, I would have objected to that as well. I've been notorious for aggravating people when I object to continuances of Preliminary Hearings.

Q And were you made aware that there had, in fact, been a request to continue made by the State based on the fact that the victim, Ms. Dotson, was uncooperative with the State for the October 26th hearing?

A My recollection, I recall something along those lines.

Q Okay. And were you aware that Mr. Harris through Mr. Ramsey had filed a writ of mandamus in the District Court challenging the Justice Court's decision to continue the Preliminary Hearing?

A Honestly off the top of my head, I can't recall if that was the case. I'm sorry. It was just so last minute I don't even have the file in front of me, I didn't have a chance to review it and it's an old case.

Q And just to kind of -- okay. And I'm just going to pop out a little bit to just the trial phase. You had multiple not guilty counts at the conclusion of trial; correct?

A Correct. I had asked the jury for several lesser included's and certain not guilty's, and I think with the exception of Count 1 I got almost everything I was asking for.

Q Okay. And were those all strategic decisions on your part based on the evidence that was presented at trial to make those arguments to the jury?

A Yes. After discussing the case with the client, what I thought could be proven beyond a reasonable doubt, the statements that were given and -- I'm sorry, if you could forgive me. I have the Metropolitan Police here. We were the victims of a crime this morning. They may need me in a minute. But so after the statements that were received in the case, the review of the video body cameras, we came up with a defense that we thought was going to be best suited and have the best opportunity for success with the jury especially given the presence of certain items and then the apartments -- the apartment injuries and then some of the officers' statements on the body camera footage.

Q Did you, in fact, get all the gun related counts basically not dismissed, but did you get a not guilty on all the gun related counts?

A Yes. To my recollection, all of the deadly weapon enhancements were not -- the jury did not find beyond a reasonable doubt that they existed, and as a result to the best of my knowledge I remember the bifurcated count, I think it was Count 9, in possession of a firearm by the ex-felon, it was dismissed as a result of the jury's findings on the first day if I remember correctly.

Q And you had discussed all these strategies with Mr. Harris at the time prior to trial?

A I did. And I even -- a lot of it was also during trial, but I'd say before and during trial because obviously trial is a very fluid process. So with regards to jury instructions or lesser included offenses, we did have a conversation about that during trial.

Q And fair to say this trial took place quite quickly after the Preliminary Hearing?

A I seem to remember that Barry wanted to move faster than I felt comfortable with. I seem to remember over his objection seeking a continuance of just a couple of weeks or so to fill in some blanks. I seem to remember I was dealing with medical records, but, yeah, I seem to remember this was a quick moving trial and it was at the insistence of the client.

Q Okay. And, Mr. Sheets, did you yourself write the direct appeal on this case or was that a colleague of yours?

A That was a colleague of mine, Ms. Bernstein. I had her sign on as well.

Q And Ms. Bernstein took care of the trial issue?

A She took care of the direct appeal.

Q I'm sorry, the direct appeal, yes.

THE COURT: Okay.

THE WITNESS: Yes.

THE COURT: Can you stop for a second? Ms. Bernstein, could you sign off, please? Thank you. For the record, Ms. Bernstein signed onto BlueJeans about halfway through Mr. Sheets' testimony. Given where this sounds like it's heading, I don't think it's appropriate that she participate or listen to the testimony.

MS. MARLAND: Yes, Your Honor.

THE COURT: Mr. Sheets, is she near you? Can she hear you?

THE WITNESS: I'm sorry, she's on the complete other side of the office. Our offices are at opposing corners.

THE COURT: Okay. Ms. Marland, you may proceed.

MS. MARLAND: Thank you. Brief indulgence.

THE WITNESS: And, Your Honor, I'm sorry, the detectives said they won't need me anymore, they've got everything they need, so I'm good to continue.

THE COURT: Thank you.

Q (By Ms. Marland) And so, Mr. Sheets, I'm sorry, you indicated that Mr. Harris wanted to move quite quickly, and he was objecting to the fact that you had requested a few weeks' continuance to be properly prepared for trial; is that right?

A And to the best of my recollection, I think he objected on the record and was escorted out of the courtroom after the debate between him and the Judge.

Q Okay. Was Ms. Dotson -- you cross-examined Ms. Dotson yourself; correct?

A Yes.

Q Okay. And were you able to comply with -- well, were you able to follow with the strategy you'd come up with with Mr. Harris in preparation for the trial when it came to Ms. Dotson's testimony?

A Yes. Based on kind of what Mr. Harris had explained to me happened by listening to the jail recordings that had been provided by the State, our -- I want to say at the time -- I can't remember for sure -- I want to say somebody spoke with Ms. Dotson, I can't remember if that was me or if I had KC Investigations do that, and based on how it was apparent she was going to testify, yes, the cross-examination was prepared but her testimony, if I'm remembering it correctly, was quite -- as it would be in the legal world, it was

quite minimized and if I remember right not -- it was much less hurtful to us than the statements she had given to police on the days of the event.

And so I was somewhat prepared for that and felt strategically it would be better not to call out the fact that when it was closer to the date of the offense and closer to the date of the crime, she made certain allegations regarding firearms and pouring of lemonade and being dragged through the apartment, I felt that if I were to emphasize that to a jury that might actually hurt Mr. Harris more than it would help him.

Q And when you say it was more minimized, did it appear to you as though compared to the police report Ms. Dotson was minimizing the events that took place in August of 2017?

A It seemed that her claims at trial were far less severe than her claims to the police department on the day of the alleged offense, and then I say it that way because obviously if I -- the way you phrase it would make it sound like I made a judgment as to guilt or innocence and I try not to do that.

Q Fair enough. In terms of discovery, did you provide all the discovery to Mr. Harris?

A We provided to Mr. Harris paper discovery with redactions made to personal -- or personal identifying information, and we will almost always leave personal identifying information out in order to comply with what we believe we're required to in that respect. As far as the events, the names of the parties involved, that was all produced, correct. The body cam footage was not obviously (audio distortion) to him within the Clark County Detention Center but was summarized to him.

Q And speaking about the body cam issue, did you, in fact, raise it in your opening and closing arguments at trial?

A I felt that it was a very -- yes. The short answer, yes, I felt it was very, very useful in conveying to the jury the possibility that the statements were coached or slanted by law enforcement, and I thought that by taking that approach we would be in a far better position to kind of get the jury prepared for the thought that Mr. Harris was not guilty of the crimes charged but may be of lesser included's, and had law enforcement come in an unbiased fashion it's perhaps -- the crimes would have been charged appropriately to start with.

Q Was it a strategic decision to argue that in your opening and closing argument?

A It was.

MS. MARLAND: I have no further questions for this witness.

THE COURT: Sir, you may cross.

CROSS-EXAMINATION

BY MR. LICHTENSTEIN:

Q Good afternoon, Mr. Sheets.

A Good afternoon.

Q Do you -- let's start with the direct appeal. You said someone else authored it; is that correct?

A That's correct. Ms. Bernstein authored the direct appeal.

Q Did you approve it?

A To the best of my recollection, I would have reviewed it and felt it was appropriate, correct.

Q Your name was on it; correct?

A To the best of my recollection, my name was probably on it, yes.

Q An issue was raised here about the direct appeal and something that was not in the direct appeal which was the issue of the continuance of the Preliminary Hearing in Justice Court and the writ that was denied by Judge Smith. Are you familiar with what I'm referring to?

A After the fact. I mean I understand that the issue was presented, correct.

Q It was not presented in the direct appeal as an issue, was it?

A To my understanding it was not, correct.

Q Okay. Is there a reason why it was not?

A The only way I'll be able to provide the answer, that I would be able to get into the statements of Ms. Bernstein, and I don't know if she brought to my attention reasons that she felt that it wasn't proper or fruitful. If you'd like me to go ahead and say those I will just knowing the rules of evidence or if you'd rather hear her testimony.

Q So as long as I understand you, you at this moment do not know why that was not added as an issue on direct appeal?

A I do but it's relying on what would be a hearsay statement. If you're okay with me indicating why, I'm willing to do so.

Q Well, since you were -- this was your brief, you put your name on it, I think we did ask that question --

MS. MARLAND: I'm not objecting.

THE WITNESS: Okay. So the reason that it was not left in the direct appeal is after conversation with Ms. Bernstein, she indicated that she believed that once you are convicted beyond a reasonable doubt, that the ability

to come up -- to raise that issue in direct appeal in her opinion was no longer valid or reasonable legally.

Q (By Mr. Lichtenstein) So as I understand it -- and you approved that particular reasoning?

MS. MARLAND: Objection.

THE WITNESS: If Ms. Bernstein brought me the research, I absolutely would support Ms. Bernstein's research. I think she's a very well thought out and well written attorney. I think she does an excellent job.

Q (By Mr. Lichtenstein) Are you aware of any legal -- or case law prohibition on raising issues such as that after a conviction on a direct appeal?

A I'm sorry, I don't think I understood the first part of the question.

Q Is there any case law or legal prohibition that you're aware of that would say it was improper to raise that issue on direct appeal?

A Off the top of my head, I am unaware as to whether case law exists. I think Ms. Bernstein had done some research on the issue to the best of my recollection.

Q Okay. Thank you.

THE COURT: Thank you. Anything else, Ms. Marland, based on that limited cross?

MS. MARLAND: No, Your Honor.

THE COURT: Thank you, Mr. Sheets. I appreciate you appearing at the last minute. Thank you very much.

THE WITNESS: Yes. Thank you, Your Honor. Should I go across the building and have Ms. Bernstein sign back on?

MS. MARLAND: Court's brief indulgence.

No. I don't believe we need Ms. Bernstein, Your Honor. I'm going to ask to call Mr. Ramsey.

THE COURT: Okay. I'm not sure what Mr. Ramsey can add to the direct appeal. The question is should it have been raised, and he didn't represent him at that time; right?

MS. MARLAND: I understand.

THE COURT: But you're welcome to call whoever you like.

MS. MARLAND: I believe there's two issues, but if Mr. -- okay. If Mr. Sheets can call Ms. Bernstein, I will put on Ms. Bernstein. Mr. Ramsey, could you log off for five minutes or ten minutes, please?

THE WITNESS: Very well. I will sign off. I've just texted her. I will sign off, I will cross the building and I will not be in her presence during the testimony, Your Honor.

THE COURT: Thank you, Mr. Sheets.

MS. MARLAND: Thank you.

THE WITNESS: Yes, Your Honor.

THE COURT: Ms. Bernstein, can you hear us?

MS. BERNSTEIN: Yes, I can. Thank you.

THE COURT: All right. If you'd go ahead and swear her in. I'm going to have the Clerk swear you in.

KELSEY BERNSTEIN,

having been called as a witness, was duly sworn and testified as follows:

THE CLERK: Please state and spell your first and last name for the record.

THE WITNESS: Kelsey Bernstein, K-e-l-s-e-y, B-e-r-n-s-t-e-i-n.

DIRECT EXAMINATION

BY MS. MARLAND:

Q Good afternoon, Ms. Bernstein. Were you tasked with working on an appeal in the case of the State of Nevada against Barry Harris back in 2018?

A Yes.

Q And did you, in fact, write the appeal yourself?

A I did.

Q Did you research the issues and review all the transcripts from trial and prior to that?

A Yes.

Q And, in fact, were you aware that there was a writ of mandamus filed after the State requested a continuance on October 26th, 2017 at Preliminary Hearing?

A Oh, are you asking if I'm aware now or was I aware then?

Q Were you aware then.

A If it was contained in the record, I would have read it because I did read everything.

Q Okay. And do you make determinations when filing an appeal as to what issues you believe are meritorious or not and whether they're strategically important to raise on appeal?

A Yes.

Q And did you do so in this case?

A Yes.

Q Did you, in fact, raise multiple issues in front of the Nevada Supreme Court?

A I did and I actually had a lot more issues than I would normally include. There were several.

Q And how do you make a determination as to what you include in your appeal?

A So whenever I'm reading through the transcripts, I read everything and I take a lot of time. I read everything from the initial arraignment in Justice Court, Preliminary Hearing, all of the pretrial litigation, every hearing whether it's a calendar call, status check and then obviously the trial itself. So when I'm deciding what issues, I don't go into the research phase with any preconceived notions of what issues I'm going to raise.

I mean that's why I prefer to do it that way and not be a part of the trial itself just so I can look at everything with a fresh pair of eyes. So as I'm going through and I see issues that I think are even at least potentially meritorious or (audio distortion), I'll include those.

Q And is that something you do in every case on which you work on an appeal?

A Yes.

Q Okay. And you would have done so in this case?

A Yes.

Q And did you, in fact, do so in this case?

A Yes.

Q And so any issues that would have been omitted, would that have been a strategic decision to bring to the Supreme Court only the issues you believed had a -- had merit in front of the Nevada Supreme Court on which you believed you could get a better result?

A Yes.

Q Did you, in fact -- did you, in fact, not bring an issue of whether the Defendant should have appealed his denial of the writ of mandamus from November 2017?

A Generally when it comes to discretionary be -- or discretionary relief, I do pay close attention to that to see if that issue is even relevant for purposes of a direct appeal because a lot of issues that may occur at Preliminary Hearing after a conviction has been found beyond a reasonable doubt, the Supreme Court will generally not address those because they're essentially superseded by the conviction itself.

Q And in this case you did not include an appeal from that denial. Would that likely have been because of your position on discretionary rulings?

A Yes.

MS. MARLAND: No further questions for this witness, Your Honor.

THE COURT: You may proceed.

CROSS-EXAMINATION

BY MR. LICHTENSTEIN:

Q Thank you. Good afternoon. Let's talk a bit more specifically about that writ concerning the Preliminary Hearing. I know it's been several years ago, but do you recall what the substance of that issue was?

A So if I had an independent recollection I would say as much, but truthfully I don't. I did read a copy of the petition that was filed in this case that did mention the writ, the substance, so my recollection of the writ is based on what was contained in the instant petition.

Q Okay. So you -- it sounded like you generally take a position in doing direct appeals that things that take place in Justice Court at a Preliminary Hearing would be superseded if there's a conviction and wouldn't be brought up on direct appeal -- and would not be worth bringing up on direct appeal, is that correct, or am I mis --

A Some issues. There's no real bright-line rule but some issues are.

Q Okay. So but at this moment you can't say why you put this issue in the basket of, no, we're not going to bother and other issues on Preliminary Hearing you might not? Is that fair to say?

A Can you repeat that question?

Q Well, let me (audio distortion). You said some -- some Preliminary Hearing related issues you do bring up in direct appeal and some you don't --

A That's correct.

Q -- and so obviously a superseding conviction isn't a basis for that because obviously any appeal would come if there's a conviction, there's no -- if there's an acquittal there's no appeal, so there are circumstances where an issue that takes place regarding Preliminary Hearing is brought up on direct appeal; correct?

A Yeah. It depends on the issue.

Q Okay. But you can't really speak to the issue with -- in this case because of the time and the recollection and the fact that you just found out about this hearing; is that correct?

A Again, are you asking why I didn't do something or why I don't remember?

Q Well, I understand why you don't -- why memory may be fuzzy. I'm asking why you didn't do something, and as I understand it your recollection is a bit unclear.

A It is. I can say that generally issues that are not related to the facts as presented at trial, if it happened in the Justice Court the Supreme Court will generally not consider those issues, so it really is specific to the issue that I'm raising. So, for example, if there was what I would consider to be a legitimate problem with probable cause that continued to exist at trial, I would raise that in direct appeal notwithstanding the fact that it did occur at Preliminary Hearing. But, for example, if you raise a sufficiency argument on a habeas petition and that has been denied and then he is convicted, then the Supreme Court has said in situations like that the argument for lack of probable cause is superseded by the establishment of those facts beyond a reasonable doubt.

Q Okay. But here we have an issue where the District Court has said differing minds can differ on this, and, again, that is in the record. Would that rise to an issue that should be addressed on direct appeal?

A When I -- differing minds can differ is a very interesting phrase to use in hindsight. Whenever I do a direct appeal and I do present certain issues, I'm also occasionally strategically electing to not include issues just by virtue of the fact that I don't want to dilute issues that I believe really do have merit.

So you can read the transcripts and find an instance where it's a leading question and no objection was made. I'm not necessarily going to raise that on direct appeal if I don't believe that it has a legitimate chance of changing the outcome, and I don't want to raise small issues or minute issues for fear of

diluting the heavier issues that are legally based and could actually achieve some relief.

Q If you can remember, what was the issue involved with the writ in Justice Court?

A From what I read of this writ, it was an improper continuance.

Q Okay. Do you know what was improper about the continuance or alleged to be improper about the continuance?

A Also drawing from my experience in domestic violence court, if there was no valid promise to appear and no personal service, then they would have likely moved for what's called a good cause continuance.

Q Okay. Are you aware that there was no subpoena served and no sworn statements for the continuance?

A Yes.

Q Okay. And you did not feel that was an important enough issue to raise?

A The denial of a motion to continue not necessarily of a significant nature enough to raise on appeal, it would qualify as what I would consider a fairly lesser issue given that it happened at the Preliminary Hearing, the issue was already addressed, so I think that the record was fairly clear on that.

Q I'm sorry, the issue was already addressed by whom?

A Sorry?

Q You said the issue was already addressed. I'm asking addressed by whom.

A No. It was addressed when the Preliminary Hearing went forward. The State got a material witness warrant. We did consider filing a petition for writ

of habeas corpus at that point, but my understanding is that Mr. Harris did not want to waive his right to a speedy trial, so we lost a lot of challenges that we could have raised based on that.

Q And in the absence of it being raised -- strike that. What would have been the prejudice to Mr. Harris by raising that issue on direct appeal since it was not raised earlier on?

A I don't understand what you mean by what is the prejudice to Mr. Harris.

Q On direct appeal you've chosen several issues and went with those. Here was something that was an issue that had not been addressed previously by the Nevada Supreme Court. What would have been the prejudice to Mr. Harris by raising that issue in direct appeal?

A My opinion, as I stated, it would have diluted what I considered to be more potentially meritorious issues that would offer him a greater deal of relief.

Q So it's your opinion that it would have affected the appeal on the other issues?

A Again, I'm not going to necessarily raise every single issue that I may see in the transcripts because what I do is I select what I consider to be the strongest issues. I'm not going to have a brief -- absent a murder case or a capital case, I'm not going to have a brief represent 25 different causes of action because I don't think that the Supreme Court would either appreciate that or take any one of them seriously. What I do is I narrow it down to what I believe at that time will be the causes of action or the grounds for relief that are going to most likely give him a chance of success.

Q At the time you made that decision, were you aware of Nevada Supreme Court cases that made continuances and sworn statements with continuances mandatory?

A You mean *Bustos* and *Hill*? Yes.

Q No. I'm talking post-*Bustos* and *Hill*.

A Not any off the top of my head.

THE COURT: I'm not sure I understood that question.

MR. LICHTENSTEIN: What?

THE COURT: I'm not sure I understood that question. Maybe you could try it -- ask it again.

MR. LICHTENSTEIN: Well, *Bustos* and *Hill* --

THE COURT: Don't tell me. You can ask the question.

Q (By Mr. Lichtenstein) Let me rephrase it. Are you familiar with the *Jasper* case?

A Off the top of my head right now I'm not.

Q Okay. And it's probably an unfair question, again, because you didn't have time to prepare for this, but would it surprise you at this point to learn that in at least two cases the Nevada Supreme Court made a sworn statement either orally or written in order to get a continuance to be mandatory?

A Yes. But it also can be waived.

Q Waived by whom?

A So, for example, again, drawing on my experience in domestic violence court, just given our relationship with the prosecutors it's fairly common for us on the defense side to waive the formal requirement of being sworn in and just have them make the representations on the record would consider that

essentially a waiver of the being sworn requirement, but they still have to make the same representations.

Q All right. Did that occur in this case?

A I don't recall.

Q Okay.

A I also wasn't there.

Q But you are aware that at Justice Court that issue was raised by defense as being improper?

A Yes.

Q Okay. Thank you.

THE COURT: Anything else, Ms. Marland?

MS. MARLAND: One question, Your Honor.

REDIRECT EXAMINATION

BY MS. MARLAND:

Q Ms. Bernstein, had you, in fact, raised the issue that the -- that the continuance was improperly granted and the Justice Court abused its discretion and granted that continuance on direct appeal, would the result of the trial been any different?

A No. And likely the results of the appeal would not have been any different even if I had raised that issue as well.

MS. MARLAND: I have no further questions.

THE COURT: Based on that limited question, do you have anything else, sir?

MR. LICHTENSTEIN: Yes, I do.

RECROSS-EXAMINATION

BY MR. LICHTENSTEIN:

Q Based on your knowledge, had that issue been raised could it have affected the appeal?

A I don't believe it would have changed the outcome.

Q Thank you.

THE COURT: Thank you, Ms. Bernstein. Anything else from either party?

MS. MARLAND: Not for Ms. Bernstein. I have Mr. Ramsey that's going to log on as well if I may call Scott Ramsey.

THE COURT: You may.

MS. BERNSTEIN: Your Honor, can I stay logged in or do I need to log back out?

THE COURT: You need to log out. Thank you.

MS. MARLAND: Mr. Ramsey is logging on.

THE COURT: Okay, Mr. Ramsey. Can you hear me?

MR. RAMSEY: I can hear you.

THE COURT: Great. I'm going to have my Clerk swear you in. Please raise your right hand.

SCOTT RAMSEY,

having been called as a witness, was duly sworn and testified as follows:

THE CLERK: Please state and spell your first and last name for the record.

THE WITNESS: My name is Scott Ramsey, first name S-c-o-t-t, last name Ramsey, R-a-m-s-e-y.

THE COURT: You may proceed.

MS. MARLAND: Thank you.

DIRECT EXAMINATION

BY MS. MARLAND:

Q Good afternoon, Mr. Ramsey. Do you work with the Public Defender's office?

A I do.

Q Were you working with the Public Defender's office in August of 2017?

A Yes.

Q And were you, in fact, appointed to represent an individual by the name of Barry Harris?

A Yes.

Q And was that at the Justice Court level?

A I picked up the case in Justice Court, yes.

Q Okay. And did you -- do you recall proceeding with the first part of a Preliminary Hearing?

A I do.

Q And at some point did you withdraw from representing Mr. Harris and did Mr. Sheets get appointed?

A Yes.

Q And would that have been in the middle of this bifurcated Preliminary Hearing?

A Yes.

Q Okay. And did you, in fact, refer Mr. Harris to competency in September?

A I don't believe so. I don't think that was me that referred him to competency court. In fact, I don't think I picked up the case until the Prelim was reset.

Q Okay. So were you aware that -- well, are you aware as to whether Mr. Harris did, in fact, go to competency before the October 26th Preliminary Hearing date?

A I believe he did but I don't recall specifically.

Q Okay. And you were ready to proceed on the October 26th Preliminary Hearing date?

A I don't remember specific dates, but I remember being ready to proceed in Mr. Harris's case at all points essentially.

Q Fair enough. Do you recall the State requesting a continuance due to the unavailability of the named victim, Nicole Dotson?

A I wouldn't recall -- I wouldn't refer to it as unavailability, but I recall them making a motion to continue that I objected to, yes.

Q And did you, in fact, take that issue up on a writ of mandamus?

A I did.

Q And was that writ granted or denied?

A Denied.

Q And did you appeal that writ?

A I did not.

Q Well, did you appeal the denial of the writ I should ask?

A I did not. Once the writ was denied, we just reset the Preliminary Hearing. We did not pursue it any further --

Q And do you recall --

A -- as far as appellate --

Q Do you recall why you elected to just pursue the Preliminary Hearing?

A I had a discussion with Mr. Harris once the writ was denied. He wasn't present for the hearing on the writ because it was placed on a civil calendar. I had a discussion with Mr. Harris about what he wanted to do. I had a discussion with the appeals team as far as what the process would be for appealing the denial of the writ. The appeals team essentially told me we can take it up on another writ of mandamus to the Supreme Court to get them to instruct the District Court to grant my initial writ of mandamus.

As far as the timeframe, which was a concern for Mr. Harris because he was very adamant that he wanted to go to trial quickly, in discussion with Mr. Harris about what we wanted to do with this he decided, and I let him have this decision, that he didn't want to delay his Preliminary Hearing any further, that we just needed to get the Preliminary Hearing to go forward, and were he convicted at trial we would take it up on direct appeal.

Q All right.

MS. MARLAND: I have no further questions for this witness.

THE COURT: Sir, you may proceed.

CROSS-EXAMINATION

BY MR. LICHTENSTEIN:

Q So, first of all, good afternoon.

A Good afternoon.

Q Concerning the decision not to proceed further with the writ, as I understand it it was because he was incarcerated and didn't want to stay in jail longer than he had to. Is that fair to say?

A That's -- yeah. That's a fair assessment of it. I remember he had either a no bail or a very high bail setting.

Q Okay. So had he -- you may or may not be able to answer this. Had he not been in jail, would the decision have been the same --

A I highly doubt it. I highly doubt it because Mr. Harris and I discussed the I call it a bad *Bustos*, the continuance of the Preliminary Hearing without the legal basis. We had very long discussions about that and he was interested in the case law and whatnot, and he wanted me to file the writ to try to get the case dismissed based on the writ in the first place. The only reason he didn't want to do the appeal's process or the other writ to the Supreme Court was because he wanted to go forward to trial because he thought he was going to win.

Q Do you think the -- do you think the writ raised meritorious issues?

A Absolutely.

Q Okay. Do you think that there was reasonable likelihood of prevailing if it went to the Supreme Court?

A I don't know. That's not something I deal with. We either win or the Supreme Court would set some pretty bad case law for my client. I don't know.

Q Okay. Thank you.

THE COURT: Anything else based on that?

MS. MARLAND: No further questions. Thank you, Mr. Ramsey.

THE COURT: Okay.

THE WITNESS: Thank you, Your Honor.

THE COURT: You bet. Appreciate it. You can log off. Anything else, Ms. Marland?

MS. MARLAND: No more witnesses, Your Honor.

THE COURT: All right. Is there any additional argument based on the testimony we've heard after the first argument?

MS. MARLAND: Yes, Your Honor. I would just note that on a petition for writ based on ineffective assistance of counsel we start with the presumption of effectiveness, then we look as to whether the conduct fell below the objective standard of reasonableness. I would submit that it has not. Ms. Bernstein and Mr. Sheets, Mr. Ramsey all testified that Mr. Harris was very adamant about proceeding with his Preliminary Hearing getting moving as quickly as possible.

Ms. Bernstein specifically testified that there were strategic -- they all testified -- well, Ms. Bernstein and Mr. Sheets all testified as to the strategic reasons behind other decisions including Ms. Bernstein's decision not to raise the denial of this writ of mandamus to the Supreme Court on direct appeal. I would submit that there would -- but even had that attorney conduct fallen below the objective standard of reasonableness, the result of the trial would not have been any different. And I will now submit it on our responses.

THE COURT: Sure. Would you like to respond?

MR. LICHTENSTEIN: Yes, Your Honor. The question that kind of faces this Court really is does failure to proceed to the Supreme Court on what is perceived of as a meritorious issue does seem -- because the client is antsy does seem to be a matter of ineffective assistance, and any defense attorney is going to know that the clients oftentimes want to do things procedurally that are

not in their best interest. That's why they have lawyers. That's why, in fact, lawyers are appointed.

Here the question of -- well, on direct appeal the suggestion that somehow or other a meritorious claim or arguably meritorious claim would somehow dilute other claims does seem to be ineffective assistance and actually prejudicial if the Supreme Court were to follow its own precedence. Same thing with Mr. Ramsey on the writ. Mr. Harris may have wanted to get to trial but it was not in his best interest to do so, and it really is up to the attorney to proceed with the trial in a manner -- or with the proceedings in a manner that is in the client's best interest.

So on that ground, again, no one is arguing that this issue was not meritorious. They chose not to pursue it for a variety of reasons that prejudiced Mr. Harris, and the fact that Mr. Harris may not have realized it at the time I don't think is the relevant concern. And I'll stand on that.

THE COURT: All right. So to prove ineffective assistance of counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness and resulting prejudice such that there is a reasonable probability that but for counsel's errors, the outcome of the proceedings would have been different. Both components of the inquiry must be shown, and the petitioner must be able to demonstrate the underlying facts by a preponderance of the evidence.

With regard to the first issue raised by the -- that is the pre-Preliminary Hearing writ that went to District Court, the Court notes that Mr. Ramsey testified that Mr. Harris did not want him to go to the Nevada Supreme Court because he thought he was going to win at trial. So Mr. Ramsey, after

having had contact and discussion with the appellate team at the Public Defender's office, was willing to go to the Nevada Supreme Court but did not based on Mr. Harris's decision making.

Based on that decision by Mr. Harris, I'm not finding that his counsel, either Mr. Ramsey at the time because Mr. Sheets was not his attorney at that point but then ultimately Mr. Sheets was -- came on, I'm not finding that they were ineffective. They followed the direction -- the only testimony I have frankly is that they followed the direction of Mr. Harris in making that decision about whether to appeal that -- I guess it was sort of in the middle of the Preliminary Hearing -- writ that was denied in District Court.

With regard to the second issue raised, the issue about the direct appeal and the non-inclusion of that decision on appeal -- I mean that decision of that writ, to prove ineffective assistance of an appellate counsel a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness and that the resulting prejudice was such that the omitted issue would have had a reasonable probability of success on appeal.

The omitted issue, that is the denial of his writ in District Court complaining about the 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. I'm finding that Ms. Bernstein's testimony was helpful in her decision making process. It's not that she ignored the issue but simply that she determined that it was not an appropriate issue to raise on appeal, that she had other more important issues.

And quite frankly I note that the Supreme Court has warned that appellate counsel is not required to raise every issue on appeal and that appellate counsel would be most effective when they are cautious and thoughtful and careful in the issues that they do raise. Ms. Bernstein testified that she thought about it and considered it and determined that there was no reasonable probability of success on the appeal, therefore, the Court is not finding that Ms. Bernstein and Mr. Sheets were ineffective on the direct appeal based on that second part of your argument. So I am denying the writ here, and I'm going to direct Ms. Marland to prepare the order. Is there anything else, Mr. Lichtenstein?

MR. LICHTENSTEIN: No, Your Honor.

THE COURT: Ms. Marland?

MS. MARLAND: No, Your Honor.

THE COURT: All right. Thank you, both. I appreciate it.

MR. LICHTENSTEIN: Thank you, Your Honor.

THE COURT: You betcha.

(Whereupon, the proceedings concluded.)

* * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/visual proceedings in the above-entitled case to the best of my ability.

LISA A. LIZOTTE
Court Recorder

Electronically Filed
08/11/2021
CLERK OF THE COURT

BARRY HARRIS
NDOC # 93363
ELY STATE PRISON
P.O. Box 1989
ELY, NEVADA, 89301
Proper Person

DISTRICT COURT

CLARK COUNTY, NEVADA

* * *

BARRY HARRIS, Petitioner/Defendant,

vs.

STATE OF NEVADA, WILLIAM GITTERE Respondent.

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

EX PARTE MOTION FOR ORDER TO TRANSPORT PRISONER

DATE: 8/26/21
TIME: 12:30PM

COMES NOW, Defendant BARRY HARRIS in proper person, and moves this Court for an Order directing the NDOC to transport the Petition/Defendant from Ely State Prison, Ely, Nevada, to Clark County in order to be present in time for the hearing set for 26 day of AUGUST, 2021, Department No. 32, Case No. A-20-813935-W.

This Motion is based on the papers on file herein and the Affidavit of Petitioner attached hereto.

Dated this 27 day of JULY, 2021.

Submitted by:
Barry Harris
Defendant

RECEIVED
AUG 02 2021
CLERK OF THE COURT

CERTIFICATE OF SERVICE BY MAIL

I, BARRY HARRIS, hereby certify pursuant to Rule 5(b) of the NRCP, that on this 27 day of JULY, 2021, I served a true and correct copy of the above-entitled MOTION TO TRANSPORT PRISONER postage prepaid and addressed as follows:

STEVEN D. GRIERSON
"CLERK OF THE COURT"
200 LEWIS AVENUE, 3RD. FLOOR
LAS VEGAS, NEVADA 89155

STEVEN B. WOLFSON
200 LEWIS AVE.
LAS VEGAS, NEVADA 89155

Signature Barry Harris

Print Name BARRY HARRIS

Ely State Prison
P.O. Box 1989
Ely, Nevada 89301-1989

AFFIDAVIT OF: Barry HARRIS

STATE OF NEVADA)
: ss
COUNTY OF CLARK)

I, BARRY HARRIS, do hereby affirm under penalty of perjury that the assertions of this affidavit are true:

1.That I am the Petitioner in the above-entitled action and that I make this affidavit in support of EX PARTE MOTION FOR ORDER TO TRANSPORT PRISONER, attached hereto.

2. That I am over eighteen (18) years of age; of sound mind; and have a personal knowledge of and, am capable to testify to the matter as stated herein.

4. That on 26 day of AUGUST, 2021, I have a hearing scheduled at 12 a.m. in Department No. 32 and request the court to order the NDOC to transport me for set hearing

I, BARRY HARRIS, do hereby state and declare under penalty of perjury and pursuant to NEVADA REVISED STATUTE 208.165 that the foregoing statements are true and correct, and to the best of my own personal knowledge and belief, as to any such matter that may be stated upon belief, I sincerely believe them to be true,

DATED THIS 27 day of JULY, 2021.

Affiant,

Barry Harris

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding _____

MOTION TO TRANSPORT PRISONER

(Title of Document)

filed in District Court Case No. A-20-813935-W

☑ Does not contain the social security number of any person.

-OR-

☐ Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

_____

(State specific law)

-OR-

B. For the administration of a public program or for an application for a federal or state grant.

_____

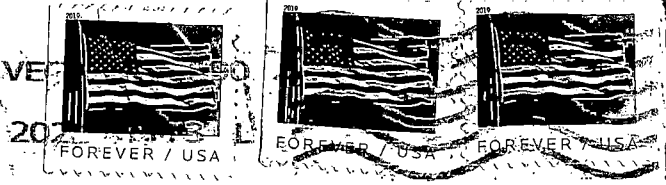
Barry Harris

(Signature)

7/27/21

(Date)

BARRY HARRIS #95363
P.O. BOX 1989
ELY, NEVADA 89301



RECEIVED
AUG - 2 2021
CLERK OF THE COURT

11
LEGAL
MAIL 11

STEVEN D. GRIERSON, CLERK OF THE COURT
200 LEWIS AVENUE, 3RD FLOOR
LAS VEGAS, NEVADA 89155-1160

89101-630000

ELY STATE PRISON
JUL 27 2021
US

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

June 24, 2021 11:00 AM ARGUMENT: PETITION FOR WRIT OF HABEAS CORPUS

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

COURT CLERK: Natali, Andrea

RECORDER: Berndt, Kaihla

REPORTER:

PARTIES PRESENT:

Allen Lichtenstein	**Attorney for Defendant, Plaintiff**
John T. Jones, Jr.	**Attorney for Defendant**

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

Allen Lichtenstein
Allen Lichtenstein, Attorney at Law, Ltd.
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IN THE EIGHTH JUDICIAL DISTRICT COURT
IN AND FOR THE COUNTY OF CLARK STATE OF NEVADA

BARRY HARRIS, Petitioner v. THE STATE OF NEVADA, Respondent	CASE NO: A-20-813935-W DEPT: XXXII PETITIONER'S REPLY TO STATE'S RESPONSE TO PETITIONER'S WRIT PETITION

Comes now, Petitioner, Barry Harris, by and through the undersigned counsel, and hereby files this Reply to the State's Response to the Petitioner's Petition for Habeas Corpus.

This Reply is made and supported by the attached Points and Authorities, and is further supported by all papers, pleadings and documents on file herein, and any future hearing.

Dated this 21st day of June 2021

Respectfully submitted by:

/s/Allen Lichtenstein
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POINTS AND AUTHORITIES

I. Introduction

The State's Response to Mr. Harris's Writ and subsequent Supplement was essentially non-responsive. While it argues that the issue concerning the granting of continuances in Justice Court because of the failure of an unsubpoenaed witness to appear contains no controversy, it fails to either address Petitioner's arguments, nor the applicable law. Mr. Harris's Petition claims that his prior counsels' failure to adequately establish the issue constituted ineffective assistance of counsel.

II. Argument

A. Ineffective assistance of counsel claims are evaluated under the Strickland standards.

The standards for establishing ineffective assistance of counsel are set forth in *Strickland v. Washington*, 466 U.S. 668, 687-689 (1984), *See also, Warden, Nev. State Prison v. Lyons*, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984)(" The United States Supreme Court has recently adopted the "reasonably effective assistance" standard [from Strickland] for ineffective counsel in criminal cases. This constitutional standard supplants Nevada's traditional "farce and sham" test.")

Under this two-part test, in order to show inadequacy of counsel's representation, a defendant must show two things. The first is that counsel's performance was deficient, which means falling below an objective standard of reasonableness. *Id.* Also, there must be a showing that the deficient performance prejudiced the defendant to the extent that it creates a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *See, McNelton v. State*, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999).

> Generally, this court will defer to the district court's factual findings concerning claims of ineffective assistance of counsel. Hill v. State, 114 Nev. 169, 175, 953 P.2d 1077, 1082, *cert. denied*, 525 U.S. 1042, 119 S. Ct. 594, 142 L. Ed. 2d 537 (1998). However, because these types of claims present a mixed question of law and fact, they are still subject to this court's independent review. *Kirksey v. State*,

> 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996) (citing State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993)).
>
> This court reviews claims of ineffective assistance of counsel under the "reasonably effective assistance" standard set out in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). *Warden v. Lyons*, 100 Nev. 430, 683 P.2d 504 (1984). Under *Strickland*, a defendant challenging the adequacy of his counsel's representation must show: (1) counsel's performance was deficient, i.e., counsel's representation fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defendant, i.e., "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 687-89, 694; *see Dawson v. State*, 108 Nev. 112, 115, 825 P.2d 593, 595 (1992). A court may consider the two prongs in any order and need not consider both if the defendant makes an insufficient showing on either one. *Strickland*, 466 U.S. at 697.

115 Nev. at 403, 900 P.2d at 1268. "A court may consider the two prongs in any order and need not consider both if the defendant makes an insufficient showing on either one." *Id*

B. Both prongs of the Strickland test have been met.

1. The continuance prejudiced Mr. Harris.

Here, the issue involves the inappropriate granting of a State requested continuance of the preliminary hearing due to the nonappearance of an unsubpoenaed prosecution witness, specifically the alleged victim. Mr. Harris filed a Writ of Mandamus challenging the Justice Court's decision granting the State the requested continuance. The failure of Mr. Harris's counsel's failure to address the Writ both pretrial, and on direct appeal to the Nevada Supreme Court constitutes ineffective assistance of counsel pursuant to *Strickland* and its progeny. *See, McNair v. Sheriff, Clark Cty.*, 89 Nev. 434, 514 P.2d 1175 (1973).

> To avoid delay by the defense, we have held that by failing to object promptly to an allegedly improper continuance an accused waives his right to complain. Stockton v. Sheriff, 87 Nev. 94, 95, 482 P.2d 285, 286, n. 1 (1971). The same is true if a defendant initiates a challenge by habeas, but does not pursue it. *George v. State*, 89 Nev. 47, 505 P.2d 1217 (1973).

89 Nev. at 439, 514 P.2d at 1178. Here we have inadequate assistance of counsel based on the failure to pursue the Writ.

The fact that the Justice Court's granting of a continuance to the prosecution prejudiced Mr. Harris is almost self-evident. The granting of said continuance was improper because the motion made by the prosecution for it was, in itself, improper. The appropriate remedy was for the Justice Court to dismiss the case. Moreover, even though had the Justice Court not issued the continuance, but rather had properly dismissed the case that would not have precluded the State from refiling. However, acceptance of such refiling is dependent upon the ability of the prosecution to justify its actions.

> [W]hen a justice court has dismissed a charge that subsequently is re-filed, our rulings contemplate that it is the district court which decides whether a prosecutor has been "willful" or "consciously indifferent" so as to be barred from instituting a second prosecution. *Stockton v. Sheriff*, 87 Nev. 94, 95, 482 P.2d 285, 286, n. 1 (1971). As noted, the prosecutor bears the burden of justifying delay when he moves for a continuance; thus, *a fortiori,* he must bear the burden of showing an excuse when he has occasioned a dismissal by failing to make a proper motion.

McNair, 89 Nev. at 438, 514 P.2d at 1177.

Thus, there is no guarantee that had the Justice Court not granted the continuance and dismissed the case because the State could not produce the alleged victim. Here the necessary *witness had not been subpoenaed* and the prosecutor offered no legal reason for his failure to arrange for the appearance of the necessary witness and to have been prepared to go forward with the preliminary examination. This is a similar situation to that in *Salas v. Sheriff, Clark Cty.*, 91 Nev. 802, 804, 543 P.2d 1343, 1344 (1975), where, the case was dismissed on appeal because "the necessary *witness had not been subpoenaed* and the prosecutor offered no legal reason for his failure to arrange for the appearance of the necessary witness and to have been prepared to go forward with the preliminary examination." *See also*,

> A prosecutor must be prepared to present his case at the time scheduled or show "good cause" for his inability to do so. *Bustos v. Sheriff*, 87 Nev. 622, 623, 491 P.2d 1279, 1279 (1971). A prosecutor seeking a continuance of a preliminary examination because of absent witnesses can demonstrate "good cause" by submitting an affidavit which states:

> the names of the absent witnesses and their present residences if known, the diligence used to procure their attendance, a brief summary of their expected testimony and whether the same facts can be proven by other witnesses, when it was first learned that the attendance of the witnesses could not be obtained, and that the continuance was sought in good faith and not for delay. *Bustos* at 623, 491 P.2d at 1279.

Terpstra, 111 Nev. at 861-62, 899 P.2d at 549.

The fact that the case would have been dismissed in Justice Court had the continuance not been granted, added to the fact of the very real possibility that once dismissed, the prosecution might very likely be precluded from refiling, clearly establishes the presence of the second prong of *Strickland.*

2. Defense counsel's representation was not reasonably effective in the circumstances.

As noted above *Strickland's* first prong addresses the question of whether defense counsel's representation was reasonably effective in the circumstances. Here, counsel's failure to pursue the issue of the Writ in Justice Court and on direct appeal, cannot be considered reasonably effective. The question of whether an attorney provided reasonably effective assistance of counsel is a mixed question of fact and law. *Kirksey v. State*, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996); *State v. Love*, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). The prosecution must show good cause for the requested delay. *State v. Nelson*, 118 Nev. 3994, 46 P.3d 1232 (2002).

> A pretrial writ of habeas corpus is not the proper avenue to challenge a discretionary ruling. The decision to grant a continuance is a discretionary ruling. However, the district court may review the legality of the detention on habeas corpus in circumstances where the continuance is alleged to have been granted in violation of the jurisdictional procedural requirements of *Hill* and *Bustos*. The district court therefore had authority to consider the pretrial petition for a writ of habeas corpus.
>
> A continuance may be granted upon a written affidavit demonstrating good cause as outlined in *Hill v. Sheriff of Clark Cty.*, 85 Nev. 234, 452 P.2d 918 (1969)*l*. We held in *Bustos* that a prosecutor also can "satisfy the purposes of the [*Hill*] doctrine and establish a record for review" by presenting sworn testimony of the same factual matters which are required in an affidavit. We have also reiterated that the

aim is "to apply the [*Bustos*] rules 'firmly, consistently, but realistically.'" "'**Good cause' is not amenable to a bright-line rule. The justices' court must review the totality of the circumstances to determine whether 'good cause' has been shown."**

118 Nev. at 403-04, 46 P.3d at 1234-35 (emphasis added).

1. Motions for a Continuance require sworn testimony providing information set forth in the Hill factors.

Pursuant to *Hill v. Sheriff of Clark Cty.*, 85 Nev. 234, 235-36, 452 P.2d 918, 919 (1969), the party seeking a continuance of a preliminary examination upon the ground of the absence of witnesses must prepare and submit to the magistrate an affidavit stating the following:

(a) the names of the absent witnesses and their present residences, if known;

(b) the diligence used to procure their attendance;

(c) A brief summary of the expected testimony of such witnesses and whether the same facts can be proven by other witnesses;

(d) when the affiant first learned that the attendance of such witnesses could not be obtained; and

(e) that the motion is made in good faith and not for delay.

In *Bustos,* The Nevada Supreme Court noted that, "[a] prosecutor should be prepared to present his case to the magistrate at the time scheduled or show good cause for his inability to do so." further stating that this requirement does not create an undue burden. 87 Nev. at 624, 491 P.2d at 1280. *See also, Maes v. Sheriff Clark Cty.*, 86 Nev. 317, 318 n.1, 468 P.2d 332, 332 (1970).

2. In granting the continuance, the Justice Court did not adhere to either *Hill* or *Bustos*.

As noted in the April 8, 2021 Supplemental Petition for Writ of Habeas Corpus, in granting the continuance, the Justice Court itself acknowledged that its action did not really fit the procedural framework set forth in *Hill* and *Bustos.*

> Although I understand it doesn't technically fit under *Hill* or *Bustos*, I've always kind of taken the position, and we've talked about this, where if a witness is advised of the date and is aware of the date and has received a subpoena, even if technically it's not service as defined by the statute, I don't think that it's – now, believe me, differing minds differ, but it's always been my position that if you have those representations a witness knows they have to come to court. And I think it's rarely the appropriate avenue to dismiss the charges as-a-result of that.

Justice Court Transcript 5:10-21, p.4, n.1 (October 26, 2017).

The "differing minds differ" comment should have, at the very least, informed Mr. Harris's counsel that the pro say Writ was not frivolous, and the decision to grant the continuance was not mandated by law. The statement that "witness knows they have to come to court" as the basis for granting the continuance indicates that the Justice Court essentially created its own standard, ignoring Nevada Supreme Court precedent.

C. The Motion for a Continuance needed to be accompanied by sworn testimony.

1. In *Jasper*, the Nevada Supreme Court ruled that future cases would require that motions of the type involved in the instant case must be accompanied by a sworn affidavit or sworn oral testimony by the prosecutor.

While it is possible that differing minds may differ as to whether , under the totality of circumstances, the State, in this case, can be said to have really met the level of due diligence, the need for the prosecutor to provide the Court with a sworn statement is clearly mandatory and not discretionary. *Jasper v. Sheriff, Clark Cty.*, 88 Nev. 16, 492 P.2d 1305 (1972)("Without the benefit of the affidavit as part of the record on appeal we are not able to determine whether or not it met the requirements of DCR 21."). Prior to the ruling in *Jasper*, in 1972, the Nevada Supreme Court had not addressed the question of whether a sworn statement made by the prosecutor, either by affidavit or sworn testimony was mandatory, thus ruling that the granting of a continuance by the Court based solely on unsworn testimony by the prosecutor was adequate to show due diligence.

> The magistrate denied the state's motion for a continuance upon his finding that the supporting affidavit failed to show due diligence. However, based upon the oral representations made by the prosecutor in response to the magistrate's inquiry, a continuance was ordered until May 17, 1971. The appellant petitioned for a writ of habeas corpus on the grounds that the magistrate was without power to order a continuance after a finding that there was not a showing of due diligence in the supporting affidavit. The district court denied the writ and the appellant appealed.
>
> Without the benefit of the affidavit as part of the record on appeal we are not able to determine whether or not it met the requirements of DCR 21. The magistrate ruled that it did not, in that it failed to show the exercise of due diligence to secure the attendance of the absent witness. However, the magistrate interrogated the prosecutor and ruled that, upon the oral representations made by him, the state had complied with the requirements of DCR 21.
>
> While the prosecutor was not sworn by the magistrate, the procedure used by the magistrate to ascertain facts in addition to those supplied by the affidavit was substantially as suggested by our opinion in *Bustos v. Sheriff*, 87 Nev. 622, 491 P.2d 1279 (1971). There we said ". . . [I]t is reasonably clear that the prosecutor could have shown good cause had the magistrate required his sworn testimony in lieu of affidavit, and since this method of showing cause has not heretofore been suggested we shall not fault the magistrate for granting a continuance in this instance. . . ."
>
> The thrust of the habeas petition below, and in these appellate proceedings, was not that the prosecutor's oral representations failed to show good cause, but simply that upon a failure of the affidavit to show good cause the magistrate was without power to grant a continuance. We reject that contention and we approve the procedure used by the magistrate to supplement the deficiencies of the affidavit. Consequently, upon the record before us we cannot fault either the magistrate's order for a short continuance, or the district court's denial of habeas.

88 Nev. at 18-19, 492 P.2d at 1306.

As noted above, at the time *Jasper* was decided, it had not issued any ruling that clearly required the prosecutor to provide sworn testimony to show that it had complied with the *Hill* factors. Thus, the *Jasper* Court ruled that the prosecutor's unsworn testimony would suffice in that case. However, that Court created a rule that clearly made sworn testimony by the prosecutor mandatory, stating clearly that, **"[h]ereafter, however, the magistrate must take from the prosecutor by means of sworn testimony.**" 88 Nev. at 19 n.4, 492 P.2d at 1306, (emphasis added). The use of the word "must" makes it clear and unequivocal that the requirement for sworn

testimony from the prosecutor seeking a continuance is mandatory. This requirement was reiterated in *Hernandez v. State*, 124 Nev. 639, 188 P.3d 1126 (2008).

> In *Bustos*, we addressed the necessity of affidavits to show good cause in the specific circumstance of a prosecutor seeking a continuance of a preliminary hearing due to the unavailability of witnesses. We had previously required a prosecutor who moved for such a continuance to submit an affidavit stating: (a) the names of the absent witnesses and their present residences, if known; (b) the diligence used to procure their attendance; (c) a brief summary of the expected testimony of such witnesses and whether the same facts can be proven by other witnesses; (d) when the affiant first learned that the attendance of such witnesses could not be obtained; and (e) that the motion is made in good faith and not for delay.
>
> We modified that rule in *Bustos* by allowing the State to present sworn testimony concerning the above requirements because we recognized that situations might arise preventing the State from submitting an affidavit. In *Jasper v. Sheriff*, we extended *Bustos* by allowing the State to supplement an otherwise deficient affidavit with oral testimony but **expressly required such testimony to be under oath.**

Hernandez v. State, 124 Nev. 639, 648, 188 P.3d 1126, 1132-33 (2008), *citing Hill* (85 Nev. at 235-36, 452 P2d at 919) (emphasis added).

2. The decision by the Justice Court to grant the continuance was in violation of Nevada Supreme Court rules.

This is clearly not a rule upon which differing minds may differ. The requirement that the prosecutor must provide sworn testimony supporting the claim of due diligence is clearly a bright line rule. Thus, in the instant case, the failure of the State to move for a continuance of the preliminary hearing due to the absence of an unsubpoenaed witness, required the prosecutor to present sworn testimony, either written or oral, in conjunction with such motion. Clearly that was not done here. The Justice Court did not require it, despite the clear instructions set forth by the Nevada Supreme Court.

III. Conclusion

Under these instructions, the motion for a continuance should have been denied on the grounds that: 1) the State did not show due diligence in its attempts to subpoena the witness, and

2) the requirement that the prosecutor's motion for a continuance be accompanied by sworn statements, either by affidavit or sworn testimony, was not followed. The impropriety of the granting of the motion for a continuance was the basis for Mr. Harris's original Writ. The failure of his counsel to pursue that Writ, particularly on direct appeal was both unreasonable, and clearly prejudicial to the Defendant, therefore meeting both prongs of the *Strickland* test for ineffective assistance of counsel.

Dated this 21st day of June, 2021

Respectfully submitted by:

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CERTIFICATE OF SERVICE

I hereby certify that on June 21st, 2021, I served a copy of the foregoing Supplemental Petition on all parties via electronic mail and the Court's EM/ECF system.

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DISTRICT COURT
CLARK COUNTY, NEVADA

BARRY HARRIS,
#1946231

Petitioner,

-vs-

WILLIAM GITTERE, Warden,

Respondent.

CASE NO: A-20-813935-W

DEPT NO: XX

STATE'S RESPONSE TO SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS (POSTCONVICTION)
and
REQUEST FOR EVIDENTIARY HEARING

DATE OF HEARING: JUNE 24. 2021
TIME OF HEARING: 11:00 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through JONATHAN VANBOSKERCK, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Response to Supplemental Petition for Writ of Habeas Corpus (Postconviction) and Request for Evidentiary Hearing.

This response is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On January 17, 2018, BARRY HARRIS (hereinafter, "Petitioner") was charged by way of Information, as follows: Count 1 – BURGLARY WHILE IN POSSESSION OF A FIREARM (Category B Felony – NRS 205.060); Count 2 – FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON RESULTING IN SUBSTANTIAL BODILY HARM (Category A Felony – NRS 200.310, 200.320, 193.165); Count 3 – ASSAULT WITH A DEADLY WEAPON (Category B Felony – NRS 200.471); Count 4 – BATTERY WITH USE OF A DEADLY WEAPON CONSTITUTING DOMESTIC VIOLENCE (Category B Felony – NRS 200.481, 200.485, 33.018); Count 5 – BATTERY CONSTITUTING DOMESTIC VIOLENCE – STRANGULATION (Category C Felony – NRS 200.481, 200.485, 33.018); Count 6 – BATTERY RESULTING IN SUBSTANTIAL BODILY HARM CONSTITUTING DOMESTIC VIOLENCE (Category C Felony – NRS 200.481, 200.485, 33.018); Count 7 – PREVENTING OR DISSUADING WITNESS OR VICTIM FROM REPORTING CRIME OR COMMENCING PROSECUTION (Category D Felony – NRS 199.305); Count 8 – CARRYING CONCEALED FIREARM OR OTHER DEADLY WEAPON (Category C Felony – NRS 202.350(1)(d)(3)); and Count 9 – OWNERSHIP OR POSSESSION OF FIREARM BY PROHIBITED PERSON (Category B Felony – NRS 202.360) for his action on or about August 22, 2017. On April 9, 2018, the State filed an Amended Information, removing Count 9.

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

On August 14, 2019, Petitioner appeared for sentencing. Petitioner was adjudged guilty, consistent with the jury's verdict, and was sentenced, as follows: Count 2 – LIFE in the Nevada

Department of Corrections ("NDC"), with the possibility of parole after fifteen (15) years; Count 3 – six (6) months in the Clark County Detention Center ("CCDC"), concurrent with Count 2; Count 4 – six (6) months in CCDC, concurrent with Count 3; Count 6 – twenty-four (24) to sixty (60) months in NDC, concurrent with Count 2. The Court credited Petitioner with 351 days time served. Petitioner's Judgment of Conviction was filed on August 16, 2018.

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

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

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

On April 8, 2021, Petitioner, through counsel, filed his Supplemental Petition for Writ of Habeas Corpus (Postconviction) (his "Supplement").

STATEMENT OF FACTS

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

> On August 22, 2017, officers responded to a residence in reference to a call that came into 911 where they heard a female victim screaming. "Help me, 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.
>
> 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 with him on phone while she was at work. She went home and found the defendant lying on her bed. She reported that she gave him a key to the residence but was not living there. She sat next to him and they started arguing again. The victim told him to leave the residence and he replied, "I'm not going nowhere bitch". She told the defendant that if he continued to disrespect her that she would call the police. She reported that things escalated and the defendant grabbed her around her throat with both hands and began squeezing. He continued doing this until she could not breathe and felt as she was going to pass

> out. He then slammed her down on the bed and began punching her in the head. The defendant threw her on the floor and continued to punch her. The victim was able to get up and ran into the living room screaming for help. The victim stated that the defendant removed a firearm from his pants pocket and quickly approached her. He shoved the firearm in her mouth telling her he would blow her brains out and if she made any noise, he would kill her. She stated that she continued to scream for help. The defendant began hitting her again on top of the head and the face as she fell to the ground where he continued to hit and kick her. Afterwards, he put the gun to her head and forced her to a bathroom telling her to be quiet and to stop yelling or he would pull the trigger. The victim stated that the defendant made her go into the restroom to keep her hostage so she wouldn't run or call the police. She stated that he continued to hit her during this and then poured a bottle of juice all over her while calling her names. The defendant told her that he hated her and that if she contacted the police that he would be back to kill her. He then gathered his belongings and left the residence. She stayed sitting on the bathroom floor and police arrived by the time she got up.

Presentence Investigation Report at 5.

ARGUMENT

I. PETITIONER'S SUPPLEMENT DOES NOT ENTITLE HIM TO RELIEF

A. Petitioner Fails to Demonstrate Ineffective Assistance of Trial or Appellate 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 counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. 466 U.S. at 687–88, 694, 104 S. Ct. at 2065, 2068; Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-part test).

"[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

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

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

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

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

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

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

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

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

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

1. Petitioner fails to demonstrate ineffective assistance of trial counsel

Petitioner supplements his claim that trial counsel was ineffective in his efforts regarding the continuance of Petitioner's preliminary hearing due to a witness's failure to appear. See, e.g., Supplement at 3. Specifically, Petitioner alleges that trial counsel "neglected to present to the Nevada Supreme Court the 11/3/2017 Writ of Mandamus pretrial…" Id. at 8. However, as a Writ of Mandamus is a form of "extraordinary relief," and as Petitioner's underlying complaint is without meritless, counsel cannot be deemed ineffective for failing to pursue futile arguments. Ennis, 122 Nev. at 706, 137 P.3d at 1103.

The Nevada Supreme Court has explained that "a writ of mandamus will only issue to control a court's arbitrary or capricious exercise of its discretion." Office of the Washoe County DA v. Second Judicial Dist. Court, 116 Nev. Nev. 629, 635, 5 P.3d 562, 566 (2000) (citing Marshall v. District Court, 108 Nev. 459, 466, 836 P.2d 47, 52 (1992)); City of Sparks v. Second Judicial Dist. Court, 112 Nev. 952, 954, 920 P.2d 1014, 1015-16 (1996); Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 637 P.2d 534 (1981). The Court later explained more fully the scope of that rule:

> An arbitrary or capricious exercise of discretion is one "*founded on prejudice or preference rather than on reason*." *Black's Law Dictionary* 119 (9th ed. 2009) (defining "arbitrary"), or "*contrary to the evidence or established rules of law*," *id.* at 239 (defining "capricious"). *See generally* City Counsel v. Irvine, 102 Nev. 277, 279, 721 P.2d 371, 372 (1986) (concluding that "[a] city board acts arbitrarily and capriciously when it denies a license without any reason for doing so"). A manifest abuse of discretion is "*[a] clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule*." Steward v. McDonald, 330 Ark. 837, 958 S.W.2d 297, 300 (1997); *see* Jones Rigging and Heavy Hauling v. Parker, 347 Ark. 628, 66 S.W.3d 599, 602 (2002) (stating that a manifest abuse of discretion "is one exercised improvidently or thoughtlessly and without due consideration"); Blair v. Zoning Hearing Bd. of Tp. of Pike, 676 A.2d 760, 761 (Pa.Commw.Ct 1996) ("[M]anifest abuse of discretion does not result from a mere error in judgment, but occurs when the law is overridden or misapplied, or when the judgment exercised is manifestly unreasonable or the result of partiality, prejudice, bias or ill will.").

State v. Eighth Judicial Dist. Court ("Armstrong"), 127 Nev. 927, 931-32, 267 P.3d 777, 780 (2011) (emphasis added).

The purpose of a writ of mandamus is to compel the performance of an act which the law *requires* as part of the duties arising from an office, trust, or station. State v. Eighth Judicial Dist. Court ("Riker"), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). Such a writ "does not lie to correct errors where action has been taken by the inferior tribunal…" State v. Eighth Judicial Dist. Court ("Hedland"), 116 Nev. 127, 133, 994 P.2d 692, 696 (2000); accord. State ex. rel Weber v. McFadden, 46 Nev. 1, 6, 250 P.2d 594, 595 (1922) (explaining that mandamus is not to be used to control judicial discretion or alter judicial action).

The Nevada Supreme Court has explained that a justice court's granting of a continuance is generally a discretionary ruling. Sheriff, Clark County v. Blackmore, 99 Nev. 827, 830, 673 P.2d 137, 138 (1983). Therefore, the district court did not err by denying Petitioner's pretrial Petition for Writ of Mandamus, and counsel cannot be deemed ineffective for declining to raise a meritless challenge to the district court's ruling. Ennis, 122 Nev. at 706, 137 P.3d at 1103.

The district court relied on NRS 171.196, which provides that a magistrate shall hear the evidence within 15 days, *unless for good cause shown*. See Findings of Fact, Conclusions of Law and Order, filed on November 27, 2017, in Case No. A-17-764110-W ("FCL") at 3-4. The district court thereafter determined that it was not necessary for the State to personally serve a witness, nor make a motion under Hill or Bustos, to show good cause for a continuance.

Id. at 4 (citing Sheriff, Clark County v. Terpstra, 111 Nev. 860, 863, 899 P.2d 548, 551 (1995)). Pursuant to that legal authority, the district court concluded that the justice court did not "manifestly" abuse its discretion in finding good cause and granting the State a continuance. Id. at 4-5.

Petitioner endeavors to undermine the district court's conclusion by attempting to distinguish the legal bases for the district court's FCL. Supplement at 9-10. Petitioner's efforts miss the mark, however, as Petitioner fails to find any case law limiting the scope of those cases. See id. Petitioner's failure to support his assertions with any relevant legal authority leaves his claim naked, and insufficient to challenge the district court's conclusions. Means, 120 Nev. at 1012, 103 P.3d at 33; see Randall v. Salvation Army, 100 Nev. 466, 470-71, 686 P.2d 241, 244 (1984) (court may decline consideration of issues lacking citation to relevant legal authority).

Furthermore, given the district court's legal analysis, and application of pertinent legal authority, counsel cannot be deemed ineffective for failing to persist in a meritless effort. See Donovan, 94 Nev. at 675, 584 P.2d at 711 (the role of a court in considering allegations of ineffective assistance of counsel is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance"); see also Strickland, 466 U.S. at 690, 104 S.Ct. at 2066 (the court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct.").

Petitioner also accuses the State of failing to meet its statutory burden regarding procuring an oral promise by the witness to appear and reproaches the district court for failing to hold the State to that burden. Supplement at 12-13. Petitioner's accusation is nothing more than a straw man – as the State was upfront with the district court that it *had not* obtained an oral promise to appear. See Reporter's Transcript, dated October 26, 2017, at 2:

> We are going to be requesting a warrant…Essentially what happened is we were in contact with her. She did, Nicole Dotson, the named victim, she did identify herself. She was informed of the date of court, we did text message her a copy of the subpoena and she verified the address that we mailed the subpoena to as well and then *she refused to promise to appear* and we lost contact with her…

(emphasis added). Therefore, Petitioner's citation to irrelevant legal authority is insufficient to undermine neither the justice court's decision, the district court's conclusions, nor counsel's determination that proceeding with the case was the proper course of action. Dawson, 108 Nev. at 117, 825 P.2d at 596 ("Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable.").

Counsel's arguments failed before the justice court, and counsel's writ arguments were denied by the district court, supported by relevant legal authority; therefore, it was not unreasonable for counsel to forego further action. Donovan, 94 Nev. at 675, 584 P.2d at 711 (clarifying that counsel does ***not*** bear the burden, "to protect himself against allegations of inadequacy, [to] make every conceivable motion no matter how remote the possibilities are of success." (Emphasis added)).

Petitioner intersperses an argument throughout his Supplement, apparently related to his Sixth Amendment rights, regarding the alleged "delay" in his preliminary hearing. See, e.g., Supplement at 15. Petitioner fails to provide this Court with the totality of the circumstances, rendering Petitioner's analysis disingenuous – especially as the record belies Petitioner's assertion of some violation. See generally id. Specifically, the Criminal Bindover contains the Justice Court minutes, which provide explanations for the multiple delays in Petitioner's preliminary proceedings:

- September 15, 2017 – Petitioner conditionally bound over to district court due to competency concerns;
- October 26, 2017 – State's Motion to Continue granted;
- November 7, 2017 – Defense Motion to Stay Proceedings granted;
- November 30, 2017 – Defense Motion for Further Proceedings granted;
- December 14, 2017 – Preliminary Hearing held (victim testified);
- December 27 and 28, 2017 – conflicting representations regarding Petitioner's retention of counsel;
- January 2, 2018 – Defense Motion to Withdraw as Counsel granted, new counsel appointed;

- January 16, 2018 – Preliminary Hearing concluded, case bound over to district court. See Criminal Bindover, filed on January 16, 2018. Indeed, the Bindover reveals that over two (2) months of the delay were due to Defense continuances and/or Petitioner's own conflicts with counsel. Id. Therefore, because Petitioner's complaints of delay in the preliminary proceedings were due, at least in part, to Petitioner's own actions, Petitioner cannot successfully argue that his delay was unconstitutional. As such, counsel cannot be deemed ineffective for failing to challenge the timeliness of Petitioner's preliminary hearing, as any such challenge would have been futile. Ennis, 122 Nev. at 706, 137 P.3d at 1103.

Petitioner finally references the Victim Impact Statement, filed on May 17, 2018, in an apparent attempt to bolster his arguments against counsel's effectiveness. See Supplement at 17-18. It is unclear how this post-trial statement affected the delay in Petitioner's preliminary proceedings or counsel's efforts regarding the pretrial Petition for Writ of Mandamus. Instead, it appears to be merely an additional vehicle with which Petitioner seeks to drive his complaint against the judicial process. See id. at 19 (complaining, "The [Victim Impact] Statement and 4/26/2019 Opening Brief showcase so very well all of the inconsistencies and cracks in dispute in the entire tax and time-wasting proceeding commencing in Justice Court up onto [sic] the point we find ourselves now."). As such, the State declines to substantively address any potential connection or merit, as Petitioner has failed to cogently argue, and the State cannot reasonably be expected to argue against itself. Means, 120 Nev. at 1012, 103 P.3d at 33; see Randall, 100 Nev. at 470-71, 686 P.2d at 244.

In sum, Petitioner's arguments lack cogent argument or relevant legal support, are expressly belied by the record, and/or otherwise fail to overcome the presumption of counsel's effectiveness. As such, Petitioner's claim should be rejected.

2. Petitioner fails to demonstrate ineffective assistance of appellate counsel

Petitioner also includes a claim that appellate counsel was ineffective for failing to raise the issue of the unsuccessful Writ of Mandamus upon direct appeal. See Supplement at 3, 19.

However, while railing against the nature of the State's Response to his Petition,[1] Petitioner fails to remedy the defects which the State highlighted in that Response.

Petitioner makes two (2) references to appellate counsel's ineffectiveness for failing to present his Writ of Mandamus concerns on direct appeal. See Supplement at 3, 19. However, Petitioner only deems necessary to elaborate on his claim of ineffective assistance of *trial* counsel. See id. at 3-19. Therefore, to the extent that Petitioner is content with making a simply derivative claim of ineffective assistance of appellate counsel based on his fleshed-out claim, Petitioner's derivative claim must fail for the reasons set forth at length in Section I(A)(1), *supra*. See Kirksey, 112 Nev. at 998, 923 P.2d at 1114 (in order to meet Strickland's burden, a petitioner must demonstrate that the omitted issue had a reasonable probability of success on appeal).

To the extent that Petitioner believes he has sufficiently stated a claim for ineffective assistance of appellate counsel, Petitioner is mistaken. Petitioner acknowledges the quality of the Opening Brief prepared by appellate counsel. Supplement at 19. However, Petitioner merely suggests that his Writ of Mandamus issue should have been included – he does not argue that this issue bore any more merit than the issues that *were* presented, much less support such an argument with cogent argument and relevant legal authority. See Jones, 463 U.S. at 751-52, 103 S.Ct. at 3313 (explaining appellate counsels' duty to "winnow[] out weaker arguments…and focus[] on one central issue if possible, or at most on a few key issues."). To the contrary, the relief Petitioner now requests is specifically the type of result frowned upon by the Jones Court. See id. at 754, 103 S.Ct. at 3314 (discouraging reviewing courts from "second-guess[ing] reasonable professional judgment and impos[ing] on appointed counsel a duty to raise every 'colorable' claim," as such practice "would disserve the very goal of vigorous and effective advocacy").

Because Petitioner's claim against appellate counsel fails to meet Petitioner's burden under Strickland, Petitioner is not entitled to relief.

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[1] See Supplement at 3-4 (characterizing the State's Response as "misrepresenting" and/or "wrongly claiming" that Petitioner's claims are conclusory and lacking specificity).

B. Any Allusion to a Brady Claim, or an Insufficient-Evidence Claim, is Meritless

To the extent that Petitioner's reference to the Victim Impact Statement is instead an allusion to a potential claim under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963), or a claim of insufficient evidence, his allusion is vague and naked. Further, such a claim would be belied by the record.

As stated *supra*, Petitioner is extremely unclear as to the nature of his complaint regarding the Victim Impact Statement. See Supplement at 17-18. He does not provide any cogent argument in support of any theory that would entitle him to relief, nor does he provide any reference to any legal authority that would provide a legal basis, and context, for his complaint. See id. Therefore, Petitioner's complaint does not warrant substantive review. Randall, 100 Nev. at 470-71, 686 P.2d at 244. Instead, Petitioner's complaint is naked and suitable only for summary denial under Hargrove, 100 Nev. at 502, 686 P.2d at 225.

In either event, Petitioner's claim is belied by the record. In the event that Petitioner is alluding to a Brady claim, the Victim Impact Statement was filed as part of the record on May 17, 2018. Therefore, Petitioner cannot succeed under a theory that the Victim Impact Statement was improperly withheld from him.

In the event that Petitioner alludes to the sufficiency of the evidence, his claim is precluded under the law of the case doctrine. Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975). Under the law of the case doctrine, issues previously decided on direct appeal may not be reargued in a habeas petition. Pellegrini v. State 177 Nev. 860, 879, 34 P.3d 519, 532 (2001) (abrogated on other grounds by Rippo v. State, 134 Nev. 411, 423 n.12, 423 P.3d 1084, 1097 n.12 (2018)) (citing McNelton v. State, 115 Nev. 396, 414-15, 990 P.2d 1263, 1275 (1999)). In affirming Petitioner's conviction, the Nevada Supreme Court expressly explained, "sufficient evidence in the record supports [Petitioner's] convictions." See Order of Affirmance, filed on December 19, 2019, in Nevada Supreme Court Case No. 76774, at 2. Because the Nevada Supreme Court has already determined that Petitioner's convictions are supported by sufficient evidence, Petitioner cannot now succeed on a claim of insufficient evidence. Pellegrini, 177 Nev. at 879, 34 P.3d at 532.

Because Petitioner's reference to the Victim Impact Statement is incoherent, and because under either potential theory, Petitioner's reference is belied by the record and/or subject to the law of the case doctrine, Petitioner is not entitled to relief.

II. PETITIONER FAILS TO DEMONSTRATE THE NECESSITY FOR AN EVIDENTIARY HEARING

The Nevada Supreme Court has held that if a petition can be resolved without expanding the record, then no evidentiary hearing is necessary. Marshall v. State, 110 Nev. 1328, 885 P.2d 603 (1994); Mann, 118 Nev. at 356, 46 P.3d at 1231. A defendant is entitled to an evidentiary hearing if her petition is supported by specific factual allegations, which, if true, would entitle her to relief unless the factual allegations are repelled by the record. Marshall, 110 Nev. at 1331, 885 P.2d at 605; see also Hargrove, 100 Nev. at 503, 686 P.2d at 225 (holding that "[a] defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record"). It is improper to hold an evidentiary hearing simply to make a complete record. See Riker, 121 Nev. at 234, 112 P.3d at 1076 ("The district court considered itself the 'equivalent of . . . the trial judge' and consequently wanted 'to make as complete a record as possible.' This is an incorrect basis for an evidentiary hearing.").

Petitioner has failed to demonstrate the need for an evidentiary hearing. Instead, Petitioner simply asserts – contrary to relevant precedent – that he is constitutionally entitled to an evidentiary hearing. See Supplement at 19. Petitioner does not set forth any theory that would need to be explored at an evidentiary hearing. See id. On the contrary, the claims raised in Petitioner's Supplement can be resolved without expanding the record; as such, no evidentiary hearing is necessary. Marshall, 110 Nev. 1328, 885 P.2d 603. Petitioner's claim against trial counsel can be easily denied, as the proposed actions would have been futile. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Petitioner's claim against appellate counsel can likewise be rejected, as the claim itself is derivative of Petitioner's trial counsel claim, and because Petitioner fails to meet his burden under Strickland. Kirksey, 112 Nev. at 998, 923 P.2d at 1114. Finally, Petitioner's unclear reference to the Victim Impact Statement lacks any

cogent argument or relevant legal authority; as such, it does not warrant review, much less merit an evidentiary hearing. Randall, 100 Nev. at 470-71, 686 P.2d at 244; Hargrove, 100 Nev. at 502, 686 P.2d at 225.

Because each of Petitioner's Supplement claims can be resolved without expanding the record, no evidentiary hearing is necessary in this case.

CONCLUSION

For the forgoing reasons, the State respectfully requests that Petitioner Barry Harris's Supplemental Petition for Writ of Habeas Corpus, and the included request for an evidentiary hearing, be DENIED.

DATED this 10th day of June, 2021.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #1565

BY /s/ *Jonathan Vanboskerck*
JONATHAN VANBOSKERCK
Chief Deputy District Attorney
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CERTIFICATE OF ELECTRONIC FILING

I hereby certify that service of Document Name, was made this 10th day of June, 2021, by Electronic Filing to:

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IN THE EIGHTH JUDICIAL DISTRICT COURT
IN AND FOR THE COUNTY OF CLARK STATE OF NEVADA

BARRY HARRIS,	
	CASE NO: A-20-813935-W
Petitioner	DEPT: XX
v.	
THE STATE OF NEVADA,	SUPPLEMENTAL PETITION FOR A WRIT OF HABEAS CORPUS
Respondent	
	Date of Hearing:

Comes now, Petitioner, Barry Harris, by and through the undersigned counsel, and hereby files Supplemental Brief to the Petitioner's Petition for Habeas Corpus pursuant to NRS 34.280, as set forth in this Court's Minute Order.

This motion is made and supported by the attached Points and Authorities, and is further supported by all papers, pleadings and documents on file herein, and any future hearing.

Dated this 8th day of April, 2021

Respectfully submitted by:

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POINTS AND AUTHORITIES

I. INTRODUCTION

On April 21, 2020, Petitioner filed a pro se Petition for Writ of Habeas Corpus and subsequently filed a pro se Supplemental Claim on October 26, 2020. Supplemental Claim to Ground One specifically draws attention to ineffectiveness of counsel imputation through memorandum with accompanying exhibits as follow: 1.) 11/3/2017 copy of filed Writ of Mandamus; 2.) 11/27/2017 District Court Findings of Fact, Conclusions of Law and Order Denying Defendant's Petition for Writ of Mandamus/Prohibition by Judge Douglas E. Smith; and 3.) 10/26/2017 Reporter's Transcript of State's Motion to Continue Preliminary Hearing (JC Case No. 17F15265X).

In his supplemental memorandum, Petitioner in pertinent part asserts that his defense "counsel, Damian Sheets, Esq., is ineffective for not presenting this (said Writ of Mandamus) issue pre-trial and not listing same on Direct Appeal to Nevada Supreme Court (*see* 10/26/20 Supplemental Claim, pgs. 2 & 3) resulting in:

"Ground One: Petitioner is in custody in violation of his right to due process fair trial, & Sixth Admendment [sic] as guaranteed by the 5th, 6th, and 14th to The United States Constitution." (*Id*., pg. 2).

"The extraordinary remedy of habeas corpus is appropriate to test the legality of a conviction which is challenged on constitutional grounds." *Shum v. Fogliani*, 82 Nev. 156, 158, 413 P.2d 495, 496 (1966), *citing Dean v. Fogliani*, 81 Nev. 541, 407 P.2d 580 (1965) and *Garnick v. Miller*, 81 Nev. 372, 403 P.2d 850 (1965).

Petitioner is being held in violation of his constitutional rights based upon the following grounds:

1. Trial counsel was ineffective:

A. For failure to present 11/3/2017 Writ of Mandamus (Justice Court issues) in both pretrial and in the 4/26/2019 Direct Appeal to Nevada Supreme Court.

State misrepresents in great part via its 10/2/2020 Response to Writ of Habeas Corpus, et seq. (hereinafter "State's 11/2/20 Response") that:

Petitioner alleges his trial counsel was ineffective in pre-trial representation (Ground One) by failing to pursue a writ of mandamus with the Nevada Supreme Court. (State's Response 10/2/20).

State further wrongly claims:

> Likewise, Petitioner's mandamus claim amounts to a conclusory allegation, lacking any specificity or support. Therefore, as Petitioner does not identify any specific issue that could 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. (State's 11/2/20 Response, pg. 7)

We refute State's contention that said Writ is conclusory in nature lacking specificity. Petitioner's Writ

is a legitimate remedy based upon facts as evidenced in the record - through court transcripts and pleadings and therefore defense counsel should have presented said Writ pre-trial and included it as part of Direct Appeal to Nevada Supreme Court, (*infra* at Paragraph V).

III. NATURE OF THE ILLEGAL DETENTION

Petitioner is being held in violation of his 5th, 6th, and 14th Amendment Rights, based upon the following grounds:

1. Trial counsel was ineffective:

a. For not proffering the Writ of Mandamus issue as grounds for case dismissal in Direct Appeal relief to Nevada Supreme Court.

IV. FACTS IN SUPPORT OF SUPPLEMENT

The case as presented by Petitioner at trial was established on the following version of events:

Petitioner, Barry Harris first appeared in Justice Court 10 in Las Vegas on August 31, 2017 for his initial arraignment. Appellant was charged with a total of nine counts:

1. Burglary with Use of a Deadly Weapon;
2. Kidnapping (First Degree) with Use of a Deadly Weapon Resulting in Substantial Bodily Harm;
3. Assault with a Deadly Weapon;
4. Battery with Use of a Deadly Weapon;
5. Domestic Battery by Strangulation;
6. Domestic Battery Resulting in Substantial Bodily Harm;
7. Preventing or Dissuading a Witness;
8. Carrying a Concealed Weapon; and
9. Ownership of a Gun by Prohibited Person.

Jury trial took place over five days commencing on April 9, 2018 and concluding on April 16, 2018. Ultimately, Mr. Harris was only convicted on *one* of the original charges as alleged, with the remainder resulting in findings of Not Guilty or Guilty of lesser included offenses:

1. Burglary with Use of a Deadly Weapon – **Not Guilty**;
2. Kidnapping (First Degree) with Use of a Deadly Weapon Resulting in Substantial Bodily Harm – **Guilty of lesser included** offense, Kidnapping Resulting in Substantial Bodily Harm;
3. Assault with a Deadly Weapon – **Guilty of lesser included** offense, misdemeanor assault;
4. Battery with Use of a Deadly Weapon – **Guilty of lesser included** offense, misdemeanor battery constituting domestic violence;
5. Domestic Battery by Strangulation – **Not Guilty;**
6. Domestic Battery Resulting in Substantial Bodily Harm – **Guilty;**
7. Preventing or Dissuading a Witness – **Not Guilty;**
8. Carrying a Concealed Weapon – **Not Guilty;** and
9. Ownership of a Gun by Prohibited Person – **Dismissed** by State.

Justice Court (hereinafter "Court") set a preliminary hearing for **September 15, 2017**. The day prior to Mr. Harris' preliminary hearing he was referred to Competency Court in case 17F15787X. After a finding of competency, Mr. Harris again appeared in Court on October 13, 2017. The Court set a preliminary hearing

date for **October 26, 2017**. On that date, Mr. Harris was present and ready to proceed with his preliminary hearing but witness and alleged victim, Nicole Dotson, failed to appear. Unable to proceed with the hearing, the State moved to continue the case (further delaying preliminary hearing date) and requested a material witness warrant for the named victim. (*See* 10/26/2017 Reporter's Transcript of State's Motion to Continue Preliminary Hearing (hereinafter "Transcript"), 2:6-7). In support of the Motion, State made the following equivocal representations:

> Essentially what happened is we were in contact with her. She did, Nicole Dotson, the named victim, she did identify herself. She was informed of the court date, we did text her a copy of the subpoena and she verified the address that we mailed the subpoena to as well and then **she refused to promise to appear and we lost contact with her and we weren't able to get a hold of her again.** *Id.,* 2:10-18. (*emphasis added*)

At no point was the prosecutor under oath. (*See generally, Id.*). Additionally, the prosecutor neither previously submitted an affidavit pursuant to *Hill v. Sheriff of Clark County*, 452 P 2nd 918 (1969) nor did the Defendant stipulate to an oral motion for a continuance pursuant to *Bustos v. Sheriff, Clark County*, 491 P.2d 1279 (1971). *See generally*, *Id.* Defense properly objected and moved to dismiss the case. In support of the Motion to dismiss, defense counsel argued that "[t]he State hasn't met their due diligence to serve her with a subpoena. There is no personal service." (*Id.*, 3:2-6). Defense counsel also argued that Nevada law does not support serving a subpoena via text message and while there is some language in support of oral

promises to appear, the **alleged victim specifically told the State she would not appear**. (*emphasis added*)(*Id.*, 3:6-13). Despite failing to submit a written affidavit pursuant to *Hill* or being sworn under oath pursuant to *Bustos* and over Mr. Harris' objection, the Court granted the continuance, set an Order to Show Cause hearing for November 2, 2017 and reset the preliminary hearing for **November 9, 2017**, which was vacated when Petitioner filed an Emergency Motion for Stay of Justice Court Proceedings and Writ of Mandamus. (Transcript, 6:2-9; 11/27/2017 District Court's Findings of Fact, Conclusions of Law and Order Denying Defendant's Petition for Writ of Mandamus/Prohibition, 2:19-23 (hereinafter, "11/27/17 Court Denial")). The Court acknowledged that State's motion did not comply with *Hill* or *Bustos*, nor did the State's attempts to serve the alleged victim constitute service as defined by statute. Based on the Court's denial of Mr. Harris' Motion to dismiss, despite the State's failure to comply with Nevada Supreme Court precedent, on 11/3/2017, Mr. Harris submitted said Writ of Mandamus/Prohibition requesting District Court to order Justice Court to dismiss the charges against Mr. Harris. (Writ of Mandamus, pgs. 3&4).

On 11/17/2017, State responded to Petitioner's Writ of Mandamus and on 11/27/2017 District Court denied Petitioner's Writ of Mandamus citing non-conformance to "totality of the circumstances" rationale under *Hill* and *Bustos.* The Court then wrongly validated State's good cause showing for a continuance of preliminary hearing. Preliminary Hearing finally occurred on **12/14/2017**.

V. THE DEFICIENT PERFORMANCE WARRANTS THE GRANTING OF HABEAS CORPUS RELIEF.

To prevail on an ineffective counsel claim, the defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland v. Washington*, 104 S. Ct. 2052, 2068, 466 U.S. 668, 694 (U.S.,1984). A reasonable probability is a probability sufficient to undermine confidence in the outcome, "*but it does not require that a defendant demonstrate that he would have been acquitted*." (*emphasis added), State v. Rogers,* 2001 MT 165, ¶ 14, 306 Mont. 130, ¶ 14, 32 P.3d 724, ¶ 14 (quoting *Strickland,* 466 U.S. at 694, 104 S. Ct. at 2068, 80 L.Ed.2d at 698). *State v. Kougl*, 323 Mont. 6, 13, 97 P.3d 1095, 1100 (Mont.,2004).

Ineffective assistance cases turn on their individual facts. *Langston v. Wyrick,* 698 F.2d 926, 931 (8th Cir.1982) *Sanders v. Trickey*, 875 F.2d 205, 209 (C.A.8 (Mo.),1989).

Turning on the facts as evidenced in Petitioner's 4/21/2020 Pro Se Petition and 10/26/2021 Supplemental Claim to Ground One, in relevant part, Petitioner's attorney, Damian Sheets, Esq., neglected to present to the Nevada Supreme Court the 11/3/2017 Writ of Mandamus pre-trial and in 4/26/2019 Direct Appeal, failed to list said Writ as an issue. Same Writ is centered on procedural error in Justice Court. Several continuances (beyond the statutory (NRS 171.196) fifteen (15) day

limit) for scheduling preliminary hearing date from the 8/31/2017 initial appearance), as well as the State's glaring failure to properly subpoena and procure the presence at the **10/26/2017** scheduled hearing of the prosecution's chief witness – alleged victim, Nicole Dotson. Petitioner appropriately contends that State failed to show good cause for continuance. Justice Court nonetheless rescheduled preliminary hearing to **11/9/2017** (subsequently vacated).[1] (*see,* Statement of the Issues, 11/3/17 Writ of Mandamus, pg. 3 & 4). Preliminary Hearing finally occurred on **12/14/2017**, approximately one hundred five (105) days after Petitioner's initial arraignment (8/31/2017).

November 27, 2017 District Court Denial cites among other case law, *Sheriff, Clark County. v. Terpstra*, 111 Nev. 860, 863, 899 P.2d 548, 551(1995)(*cf.)*, "It is not necessary for a witness to be personally served in order for the State to show good cause for a continuance". (11/27/17 Court Denial 4:14-15). The witness in *Terpstra* was out-of-state, whereas chief witness in the instant case resided at Apartment # 267, 3850 Mountain Vista Street, Las Vegas, Clark County, Nevada at the time of the incident and thereafter. (8/23/2017 Declaration of Warrant/Summons; 12/14/2017 Reporter's Transcript of Preliminary Hearing, 8:9-20).

[1] The court stated, "Although I understand it doesn't technically fit under Hill or Bustos, I've always kind of taken the position, and we've talked about this, where if a witness is advised of the date and is aware of the date and has received a subpoena, even if technically it's not service as defined by the statute, I don't think that it's – now, believe me, differing minds differ, but it's always been my position that if you have those representations a witness knows they have to come to court. And I think it's rarely the appropriate avenue to dismiss the charges as-a-result of that." Writ of Mandamus, pg. 4 footnote 1 from 10/26/2017 JC Transcript 5:10-21

One can understand the challenge in locating an out-of-state witness and thus the Court's indulgent stance as cited in *Terpstra, supra*. The challenge here is in understanding the Court's leniency and the low bar adjustment and accommodation concerning State's pretexts of so called "due diligence" of the management and supervision of main witness extant in Clark County Nevada.

Moreover, the State's attempts to procure chief witness, Nicole Dotson' court appearance hardly qualify under "reasonableness of the efforts" standard proffered in District Court's 11/27/2017 Denial (4:9-13) citing *Hernandez v. State,* 188 P.3d 1126 (2008) showcasing that reasonable diligence was used to acquire the presence of the witness. ("[A] witness is not `unavailable' ... unless the prosecutorial authorities have made a good-faith effort to obtain his [or her] presence at trial."); accord Drummond, 86 Nev. at 7, 462 P.2d at 1014. (*Hernandez*). We have interpreted the requirement that the State "exercise[ ] reasonable diligence" to mean that the State must make reasonable efforts to procure a witness's attendance at trial before that witness may be declared unavailable. (*Id.* at 1131).

> In this case, we first consider whether such assignments of error should be reviewed as mixed questions of law and fact. Then, we determine whether untimely motions for the admission of preliminary hearing testimony must be supported by affidavits or sworn testimony demonstrating good cause and whether the State's efforts to procure Grijalva's attendance in this case were reasonable. (*Id.)*

Standard of review:

> Of the several cases in which we have considered whether a district court properly admitted preliminary hearing testimony in a criminal case, none state a standard of review. We generally review a district court's decision to admit evidence for an abuse of discretion; however, we review various issues regarding the admissibility of evidence that implicate constitutional rights as mixed questions of law and fact subject to de novo review. We have noted that review of a district court's decision as a mixed question of law and fact is appropriate where the determination, although based on factual conclusions, requires distinctively legal analysis… Furthermore, the determination that the State exercised reasonable diligence to procure the witness's attendance is based on factual findings, but a distinctly legal analysis is required to determine whether the efforts satisfy constitutional standards of reasonableness. Therefore, applying a mixed question of law and fact standard of review may be more appropriate. (*Id.*, at 1131, 1132)
>
> We have typically reviewed a district court's factual findings, without questioning the validity of those findings, and then independently reviewed whether those facts constituted reasonable diligence in procuring a witness. We now expressly adopt that standard for reviewing a district court's determination that the prosecution exercised constitutionally reasonable diligence to procure a witness's attendance. As a mixed question of law and fact, we will give deference to the district court's findings of fact but will independently review whether those facts satisfy the legal standard of reasonable diligence. (*Id.* at 1132)

Good faith effort and reasonable diligence are predicated by common sense but not in the instant case. State was certainly aware prior to 10/27/2017 scheduled preliminary hearing that chief witness-alleged victim, Nicole Dotson, was recalcitrant as evidenced by her statement to process server that she "**refused to**

promise to appear." and then attempted justification of its laissez faire conduct thusly: "we lost contact with her and we weren't able to get ahold of her again." (10/27/2017 Reporter's Transcript of State's Motion to Continue Preliminary Hearing, 2:15-18)(*emphasis added*).

According to NRS 174.315(3) - in part: "Witnesses, whether within …the State, may accept delivery of a subpoena in lieu of service, by a written or oral promise to appear given by the witness". Moreover, *Id.* at (3)(a), (b) and (c) promulgates the necessity that:

> Any person who accepts an oral promise to appear shall:
> (a) Identify himself or herself to the witness by name and occupation;
> (b) Make a written notation of the date when the oral promise to appear was given and the information given by the person making the oral promise to appear identifying the person as the witness subpoenaed; and
> (c) Execute a certificate of service containing the information set forth in paragraphs (a) and (b).

State did not provide said "identifiers" as required and evaded this obligation, which infraction the court ignored. (*infra*).

Witness, Nicole Dotson's response to the State (per Transcript) of refusing to promise to appear (at preliminary hearing) hardly comports with the statutory directive "by oral promise to appear". (Transcript 2:10-18). It is outrageous to think such and utterly unacceptable to endorse an alter ego as the same.

Regrettably, the Court flouted the statute by accepting a contra-response cloaked in vagaries proffered by an ill-prepared prosecutor. (*See* Transcript at 2:10-

18). State does not volunteer an iota of evidence as to the particulars of the "conversation/contact" (which we can only presume occurred) with Nicole Dotson, i.e., time, date, method of communication – whether by actual telephone conversation or via unverified text. (*supra*, *Id.*). Prosecution, moreover, neither provided evidence of voice verification of Nicole Dotson under NRS 52.065 nor under NRS 52.075(2). Nor did Judge Tobiasson inquire as to authenticity of these vital yet omitted details. After all, State did not produce an affidavit to the Court as to the supposed completed service of subpoena to Ms. Dotson. We do not know how far in advance of the 10/27/2017 preliminary court date the State contacted Ms. Dotson being knowledgeable of her recalcitrance as to the court attendance requirement. Was it a month, a week or an hour before the actual hearing on 10/27/2017? Why did the State not notify the defense of a probability that said witness would refuse to cooperate with said subpoena? Perhaps it was a strategy to feign a *Bustos* "surprise" in order to garner favor with the Court. Such information is paramount as it goes to State's obligation to notify defense (in compliance with the *Hill* standard). The State demonstrated negligence at best in showing any prescribed due diligence but that is overindulgent.

> The intendment of Hill, supra, has since been applied to related situations wherein there was a **willful failure of the prosecution to comply with important procedural rules,** Maes v. Sheriff, 86 Nev. 317, 468 P.2d 332 (1970), **and where the prosecutor had exhibited a conscious indifference to rules of procedure affecting the**

defendant's rights, State v. Austin, 87 Nev. 81, 482 P.2d 284 (1971). (*Bustos* at 1280)(*emphasis added*).

Therefore, as seasoned litigators, State's attorneys should have anticipated witness' defiance of the served and texted subpoena. State failed to exercise sufficient and necessary good faith effort and proper due diligence in light of Nicole Dotson's demonstrated contrarian conduct in order to ensure her cooperation and necessary appearance in Court on 10/26/2017. The prosecution was neither caught off guard nor surprised that Nicole Dotson did not appear in Court, therefore under *Bustos*, they did not qualify under a due diligence standard and should not have been awarded yet another continuance. The Judge unfortunately indulged the prosecution by defying statutory authority governing the procedural rules and was therefore ultra vires and void ab initio.

Justice of the Peace Melanie Andress-Tobiasson was put in an unenviable position on October 26, 2017. Even though the Court reasoned that State demonstrated due diligence in procuring said witness' appearance, her assessment and subsequent decision (*supra*, footnote 1) to allow yet another continuance (four (4) in all) and delay in proceedings, regrettably subverted Petitioner's 5th, 6th and 14th Amendment rights. Defendant/Petitioner's case was prejudiced and his Constitutional rights usurped. State v. Austin, 87 Nev. 81, 482 P.2d 284 (1971) resonates with the instant case in that the "the prosecutor had exhibited a conscious indifference to rules of procedure affecting the defendant's rights. (*Bustos).* Further,

> The prophylactic effect of the doctrine of Hill is worthwhile. A prosecutor should be prepared to present his case to the magistrate at the time scheduled or show good cause for his inability to do so. This is not an unfair burden. The business of processing criminal cases will be frustrated if continuances are granted without good cause. (*Id.*)

By comparison and contrast; Justice Court in *State v. Austin*, 87 Nev. 81, 482 P.2d 284 (1971), saw fit to grant a motion to dismiss proceedings after generously granting three (3) continuances:

> In the 129 days intervening between the time of the alleged offense and the return of the indictment [approximately105 days in the instant case], a magistrate in a justice court had indulged the State with three continuances when the State's legal representatives were unprepared to proceed. Finally, the magistrate granted a motion to dismiss the proceedings. The court found that the dismissal of the previous justice court proceedings was fully justified.
>
> The applicable rule was that a new proceeding for the same offense, whether by complaint, indictment, or information, was not allowable when the original proceeding was dismissed due to the **willful failure of the prosecution to comply with important procedural rules.** The rule applied equally to situations where there was a **conscious indifference to rules of procedure affecting a defendant's rights** as it did to willful failures to comply with rules of procedure. (*emphasis added*).

Cascading historical events and nomothetic preamble (*supra*) conflate to bolster the cogency of the instant Writ and to give the Court clear and defined context. Granted that the courts enjoy discretionary latitude and rule via fiat guided by statute, precedent and individual facts - how does one justify a 105 day delay without incurring a 6th amendment constitutional abridgment? Both defendant,

Curtis Austin (*supra*) and Barry Harris were arrested on criminal charges. Austin was arrested for heroin possession (in 1971 under NRS 453.030 carrying serious criminal implications). Petitioner, Barry Harris, is charged criminally, as well. These cases share degrees of moral turpitude, both in Justice Court limbo for over 100 days - each accommodating State's requests for various reasons/excuses, well beyond statutory limit, yet both have disparate outcomes. For our purposes, the criminal charges do not seem to play a particularly important part in either result. It is simple luxury of discretionary whim by the court. It does not suggest either is right or wrong –what is is. But in the instant case, is there conscious indifference to rules of procedure affecting a defendant's rights? (*see, Austin*). This does not appear to have been explored.

In a habeas corpus proceeding, claims must consist of more than "bare" allegations. An evidentiary hearing is mandated only when a post-conviction petitioner asserts specific factual allegations that are not belied or repelled by the record and that, if true, would entitle him to relief. *Nika v. State*, 198 P.3d 839, 858, 124 Nev. 1272, 1300–01 (Nev., 2008). As is the circumstance in the instant case. State contends that Petitioner's Writ of Mandamus is conclusory in its claims. (10/2/2020 State's Response, pg. 7)

Black's Law Dictionary defines conclusory as "[e]xpressing a factual inference without stating the underlying facts on which the inference is based." For example:

> [T]o allege a soldier is a "traitor" and "deserter" is a more [*sic*] conclusion; to allege that on a specified day at a specified place a member of the armed forces lawfully committed to combat by his superior officer during a declared war willfully and unjustifiably threw down his weapon in the course of battle and fled from the enemy in defiance of a direct, simultaneous, and lawful order and accosted his fellow soldiers in an attempt to injure or kill them and to materially assist the enemy-that alleges treason and desertion, a claim to which the word "traitor" or "deserter" is unnecessary. Black's Law Dictionary 351 (10th ed. 2014). (https://www.lawinsider.com/dictionary/conclusory)

However, simply stated, the record, through transcripts and court documents, does not belie the facts. Facts are stubborn things that confirm themselves, therefore (*supra*, Points and Authorities, IV. Facts of the Case), Petitioner's Writ of Mandamus is anything but conclusory, contrary to State's allegations.

Petitioner additionally asserted concerns as to a pre-sentence report-Victim Impact Statement, written and signed by Nicole Dotson (attached as **Exhibit**) (hereinafter Statement (sans date but reference in section VII of 5/14/2018 PSI)) (verified in Court Minutes under post-conviction dates of 6/7/2018 and 7/24/2018). Although Mr. Harris had requested it, he apparently had not reviewed or obtained a copy of said report containing an 8/22/2017 "voluntary" statement by Nicole Dotson to a police officer as recorded on a body cam. This statement is obviously exculpatory, but was inexplicably kept from him. Pursuant to Appellant/Petitioner's Opening Brief dated 4/26/2019 (hereinafter "Opening Brief") and citing many inconsistencies in Ms. Dotson's testimony and issues re: hearsay rules and

exceptions throughout said brief, Petitioner calls attention to a major detail/concern which is noted but overlooked at *Id.*, Page 17:

> The fourth witness was Officer Nicholas Bianco, another patrol officer with the Las Vegas Metropolitan Police Department that arrived to the apartment complex after Officer Ferron. Officer Bianco conceded that prior to giving Ms. Dotson a blank voluntary statement, **he specifically told her what to say and emphasize in her report, even telling her that emphasizing certain aspects of the incident was "icing on the cake**" (AA, 760: 8). (*emphasis added*).

This account (*supra*) draws attention to the many holes in accounts of the incident as proffered by witness/victim, Dotson and egregious breaches in legal protocols insulting basic due process protections.

However, "the [real] icing on the cake" expressed in Nicole's Victim Impact Statement is that: "…and no one deserves time for what **they didn't do**!" (*Statement*)(*emphasis added*). Ms. Dotson states that nothing happened and that (the police): "you guys try and convict him on a charge that didn't happen[.] I was not kidnap[.] We know something happen but only I know[.]" "I ask for a fair [trail] instead from the very beginning I've been pressure what to say or not to say [doe'snt] seem the [court's] care about me at all…" (*Id.*) "…it's just all about just [prosecuting] [S]omeone you guys don't like however he's someone I love me and my daughter…" (*Id.*). If the chief witness asserted in her own writing that nothing happened warranting the extent of the resulting prosecution and conviction, why did this case go as far as it has? Is there any wonder why Ms. Dotson refused to appear in court. She didn't say she wasn't a victim of something but the system has made

her a victim twice: "…so if you care about the emotional distress I'm suffering from [Reavaulate] this Sentence otherwise I'll always be impacted from this." (*Id.*)

The Statement and 4/26/2019 Opening Brief showcase so very well all of the inconsistencies and cracks in dispute in the entire tax and time- wasting proceeding commencing in Justice Court up onto the point we find ourselves now.

Although Petitioner's attorney filed the Writ on 11/3/2017 and then filed post-conviction Direct Appeal on April 26, 2019, he undeniably erred in failing to petition Nevada Supreme Court pre-trial on the Justice Court's actions on which Writ of Mandamus is based, as well as inexplicably omitting same in post-conviction 4/26/2019 Direct Appeal in Appellant's Brief (under Supreme Court docket # 76774) (*see*, 4/26/2019 Appellant's Brief, Memorandum of Points and Authorities; I. Statement of the Issues). The Writ of Mandamus is conspicuously absent.

Underwritten by the foregoing, Petitioner files this Supplemental Brief for Petition of Habeas Corpus (post-conviction) relief claiming ineffective assistance of counsel. An evidentiary hearing is again requested,

WHEREFORE, the Petitioner prays for the following:

1. That his Habeas Corpus proceeding go forward, and

2. That consistent with his 5th, 6th, and 14th Amendment rights that this Court order an evidentiary hearing in this matter,

Dated this 9th day of April, 2021

Respectfully submitted by:

/s/Allen Lichtenstein
Allen Lichtenstein
Nevada Bar No.: 3992
Allen Lichtenstein, Attorney at Law, Ltd.
3315 Russell Road, No. 222
Las Vegas, NV 89120
(702) 433-2666 – phone; (702) 433-9591 – fax
allaw@lvcoxmail.com
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on April 8th , 2021, I served a copy of the foregoing Supplemental Petition on all parties via electronic mail and the Court's EM/ECF system.

/s/ Allen Lichtenstein

SERVICE LIST

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

steven.wolfson@clarkcountyda.com

JONATHAN VANBOSKERCK
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Nevada Bar #006528
200 Lewis Avenue
Las Vegas, Nevada 89155-2212

jonathan vanboskerck@clarkcountyda.com

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

November 24, 2020 01:45 PM Confirmaiton of Counsel: Allen Lichtenstein, Esq.

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

COURT CLERK: Brown, Kristen

RECORDER: Calvillo, Angie

REPORTER:

PARTIES PRESENT:

Allen Lichtenstein	**Attorney for Plaintiff**
William J. Merback	**Attorney for Defendant**

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

BARRY HARRIS #95363
P.O. BOX 650
INDIAN SPRINGS

FILED
OCT 26 2020
CLERK OF COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

NAME, BARRY HARRIS
Plaintiff(s),

-vs-

NAME,
WILLIAM GITTERE / CALVIN JOHNSON
Defendant(s).

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

COMES NOW, BARRY HARRIS, in PRO PER and herein above respectfully Moves this Honorable Court for a SUPPLEMENTAL CLAIM TO GROUND ONE OF HIS HABEAS CORPUS THROUGH "MEMORANDUM" ATTACHED HERE TO IS "WRIT of MANDAMUS" "FINDING FACTS" "PRELIMINARY TRANSCRIPTS"

The above is made and based on the following Memorandum of Points and Authorities.

RECEIVED
OCT 19 2020
CLERK OF THE COURT

MEMORANDUM OF POINTS AND AUTHORITIES

MR. HARRIS PRESENT HERE A PRO-SE SUPPLEMENTAL CLAIM TO GROUND ONE OF HIS MOTION HABEAS CORPUR CASE NO. A-20-813935-W IN DEPT. #20 MR. HARRIS ASK THIS COURT TO ALLOW HIM TO SUBMIT THE ATTACHED DOCUMENTS AS A SUPPLEMENTAL CLAIM TO GROUND ONE HE IS REPRESENTING HIS SELF PRO-SE AND HIS HABEAS-CORPUS HAS NOT BEEN RULED ON YET THAT DATE IS SET FOR 11/3/20.

"SUPPLEMANTAL GROUND 1: ONE"

GROUND ONE: PETITIONER IS IN CUSTODY IN VIOLATION OF HIS RIGHT TO DUE PROCESS FAIRTRIAL, & SIXTH AMENDMENT AS GUARANTEED BY THE 5TH, 6TH, AND 14TH TO THE UNITED STATES CONSTITUTION.

COUNSEL DAMIAN R SHEETS #10755 WAS INEFFECTIVE FOR NOT RAISING MR. HARRIS WRIT OF MANDAMUS #A-17-764110-W TO THE SUPREME COURT OF NEVADA ON DIRECT APPEAL "SEE-ATTACHED EXHIBITS AND EVIDENCE WHERE THE EVIDENCE WILL SHOW MR. SHEETS NEGLECTED "SIGNIFICANT AND OBVIOUS" ISSUE THAT IS PRESERVE FOR APPEAL REVIEW "SEE ATTACHED TRANSCRIPTS" 10/26/17, THE OUTCOME OF THE APPEAL WOULD HAVE ALTERED BECAUSE THE APPEAL COURTS WOULD HAVE KNOWN BY READING THE PETITIONER "WRIT OF--MANDAMUS" THAT THE LOWER COURTS VIOLATED MR. HARRIS 5TH DUE-PROCESS, 14TH EQUAL PROTECTION OF LAW RIGHTS TO THE CONSTITUTION OF THE UNITED STATES AND NEVADA CONSTITUTION AS WELL AS NEVADA LAW N.R.S 171.196, "HILL V. SHERIFF OF CLARK COUNTY, 85 NEV. 234 (1969)" AND "BUSTOS 87. NEV. 622, 624, 491 P.2d 1279, 1280 (1971), HILL & BUSTOS IS STANDARD NEVADA LAW THAT IS NEEDED TO BE FOLLOWED WHEN ASKING TO CONTINUE A DEFENDANT PRELIMINARY HEARING. HERE IN MR. HARRIS CASE THAT DOES NOT HAPPEN AND AGAIN COUNSEL DAMIAN SHEETS #10755 IS INEFFECTIVE FOR NOT PRESENTING THIS ISSUE PRIOR TO TRIAL AND ON DIRECT APPEAL TO NEVADA SUPREME COURT

Dated this 8 day of OCTOBER, 2020.

By: Barry Harris

CERTIFICATE OF SERVICE BY MAIL

Pursuant to NRCP Rule 5 (b), I hereby certify that I am the Petitioner/Defendant named herein and that on this 8 day of OCTOBER, 2020, I mailed a true and correct copy of this foregoing "SUPPLEMENTAL CLAIM TO GROUND ONE" to the following:

STEVEN D. GRIERSON
200 LEWIS AVE. 3RD. FLOOR
LAS VEGAS, NEVADA 89155

STEVEN B. WOLFSON
200 LEWIS AVENUE
LAS VEGAS, NV 89155

BY: BARRY HARRIS

AFFIRMATION

Pursuant to NRS 239b.030

The undersigned does hereby affirm that the preceding document, "MEMORANDUM TO THE COURT" "SUPPLEMENTAL CLAIM TO GROUND ONE"

(Title of Document)

Filed in case number: A-20-813935-W

☑ Document does not contain the social security number of any person

Or

☐ Document contains the social security number of a person as required by:

☐ A Specific state or federal law, to wit

_____

Or

☐ For the administration of a public program

Or

☐ For an application for a federal or state grant

Or

☐ Confidential Family Court Information Sheet
(NRS 125.130, NRS 125.230, and NRS 125b.055)

DATE: 10/8/20

Barry Harris
(Signature)

BARRY HARRIS
(Print Name)

_____
(Attorney for)

#7

EXHIBIT

"WRIT OF MANDAMUS"

PHILIP J. KOHN, PUBLIC DEFENDER
NEVADA BAR NO. 0556
SCOTT A. RAMSEY, DEPUTY PUBLIC DEFENDER
NEVADA BAR NO. 13941
PUBLIC DEFENDERS OFFICE
309 South Third Street, Suite 226
Las Vegas, Nevada 89155
Telephone: (702) 455-4685
Facsimile: (702) 455-5112
Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

BARRY HARRIS, Plaintiff, v. THE STATE OF NEVADA, Defendant.	CASE NO. A-17-764110-W DEPT. NO. Department 8 DATE: TIME:

WRIT OF MANDAMUS/PROHIBITION

COMES NOW, the Defendant, BARRY HARRIS, by and through SCOTT A. RAMSEY, Deputy Public Defender and respectfully petitions this Honorable Court for a Writ of Mandamus ordering the Justice Court to dismiss the case against Mr. Harris.

This Motion is made and based upon the following declaration, Memorandum of Points and Authorities, and the transcript of Justice Court 10 proceedings on October 26, 2017, which are attached.

DATED this 3rd day of November, 2017.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By: */s/Scott A. Ramsey*
SCOTT A. RAMSEY, #13941
Deputy Public Defender

DECLARATION

SCOTT A. RAMSEY makes the following declaration:

1. I am an attorney duly licensed to practice law in the State of Nevada; I am a Deputy Public Defender for the Clark County Public Defender's Office appointed to represent Defendant Barry Harris in the present matter.
2. That I am the attorney of record for Defendant in the above matter; that I have read the foregoing Petition, know the contents thereof, and that the same is true of my own knowledge, except for those matters therein stated on information and belief, and as to those matters, I believe them to be true; that Defendant, BARRY HARRIS (hereinafter "Mr. Harris"), personally authorizes me to commence this Writ of Mandamus action.
3. That the instant petition springs from the Justice Court granting the State's motion for a continuance of Mr. Harris's preliminary hearing. On October 26, 2017, the Defendant was set for a preliminary hearing. The State failed to procure the presence of the alleged victim and moved the Court to continue the hearing. The Court granted the Motion over Mr. Harris's objection despite the State's failure to demonstrate good cause for the continuance as required by statute.
4. I am more than 18 years of age and am competent to testify as to the matters stated herein. I am familiar with the procedural history of the case and the substantive allegations made by The State of Nevada. I also have personal knowledge of the facts stated herein or I have been informed of these facts and believe them to be true.
5. I declare under penalty of perjury that the foregoing is true and correct. (NRS 53.045).

EXECUTED this 3rd day of November, 2017.

/s/Scott A. Ramsey
SCOTT A. RAMSEY

IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS/PROHIBITION

COMES NOW the Defendant, BARRY HARRIS, by and through his counsel, SCOTT RAMSEY, the Clark County Public Defender's Office, and submits the following Points and Authorities in Support of Defendant's Petition for a Writ of Mandamus.

POINTS AND AUTHORITIES

STATEMENT OF THE ISSUES

Did the Justice Court violate Mr. Harris' Due Process rights when it granted the State's motion for a continuance despite the State's failure to establish good cause or meet the legal standards established in Hill and Bustos?

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Mr. Harris first appeared in Justice Court 10 on August 31, 2017 for his initial arraignment. The Court set a preliminary hearing for September 15, 2017. The day prior to Mr. Harris's preliminary hearing he was referred to Competency Court in case 17F15787X, so the Court referred the instant case to Competency Court. After a finding of competency, Mr. Harris again appeared in Justice Court on October 13, 2017. The Court set a preliminary hearing date for October 26, 2017.

On that date, Mr. Harris was present and ready to proceed with his preliminary hearing, but the alleged victim failed to appear. Unable to proceed with the hearing, the State moved to continue the case and requested a material witness warrant for the named victim. *See* attached Reporter's Transcript of State's Motion to Continue Preliminary Hearing (hereinafter "Transcript"), 2:6-7. In support of the Motion, the State made the following representations:

> "Essentially what happened is we were in contact with her. She did, Nicole Dotson, the named victim, she did identify herself. She was informed of the court date, we did text her a copy of the subpoena and she verified the address that we mailed the subpoena to as well and then she refused to promise to appear and we lost contact with her and we weren't able to get a hold of her again."
> Transcript, 2:10-18.

At no point was the prosecutor under oath. *See generally* Transcript. Additionally, the prosecutor neither previously submitted an affidavit pursuant to Hill nor did the Defendant stipulate to an oral motion for a continuance pursuant to Bustos. *See generally* Transcript.

The defense objected and moved to dismiss the case. In support of the Motion to dismiss, defense counsel argued that "[t]he State hasn't met their due diligence to serve her with a subpoena. There is no personal service." Transcript, 3:2-6. Defense counsel also argued that Nevada law does not support serving a subpoena via text message, and while there is some language in support of oral promises to appear, the alleged victim specifically told the State she would not appear. Transcript, 3:6-13. Despite failing to submit a written affidavit pursuant to Hill, or being sworn under oath pursuant to Bustos, and over Mr. Harris's objection, the Court granted the continuance, set an Order to Show Cause hearing for November 2, and reset the preliminary hearing for November 9, 2017. Transcript, 6:2-9. The Court acknowledged that the State's motion did not comply with Hill nor Bustos, nor did the State's attempts to serve the alleged victim constitute service as defined by statute.[1] Based on the Court's denial of Mr. Harris's Motion to dismiss despite the State's failure to comply with Nevada Supreme Court precedent, Mr. Harris submits the instant Writ requesting this Court order the Justice Court dismiss the charges against Mr. Harris.

LEGAL ARGUMENT

I. A Writ of Mandamus/Prohibition is the Proper Remedy

Pursuant to N.R.S. 33.170, "a writ of mandamus shall issue in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law." A writ of mandamus is available to compel the performance of an act which the law requires as a duty resulting from an office, trust or station[2] or to control an arbitrary or capricious exercise of discretion.[3] A

[1] The court stated, "Although I understand it doesn't technically fit under Hill or Bustos, I've always kind of taken the position, and we've talked about this, where if a witness is advised of the date and is aware of the date and has received a subpoena, even if technically it's not service as defined by the statute, I don't think that it's – now, believe me, differing minds differ, but it's always been my position that if you have those representations a witness knows they have to come to court. And I think it's rarely the appropriate avenue to dismiss the charges as a result of that." Transcript, 5:10-21.

[2] *See* N.R.S. 34.160

[3] *See* Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 637 P.2d 534 (1981).

defendant must raise issues regarding improper Hill or Bustos motions before the new preliminary hearing date. *See* Stockton v. Sheriff, 87 Nev. 94 (1971). This Honorable Court's intervention is necessary because the Justice Court exceeded its jurisdiction and acted arbitrarily and capriciously by granting the State's continuance over defense objection. As the new preliminary hearing is set for November 9, 2017, Mr. Harris respectfully asks this Court to order the Justice Court to dismiss his case as the State failed to show good cause for its continuance.

II. The State failed to demonstrate good cause for a continuance.

The State has the burden of procuring its necessary witnesses for preliminary hearing. If the State fails to do so, it must show good cause to continue the hearing or the case must be dismissed. *See* N.R.S. 171.196. According to the Nevada Supreme Court:

> "A prosecutor should be prepared to present his case to the magistrate at the time scheduled or show good cause for his inability to do so. This is not an unfair burden. The business of processing criminal cases will be frustrated if continuances are granted without good cause." Bustos v. Sheriff, Clark Cty., 87 Nev. 622, 624, 491 P.2d 1279, 1280 (1971).

A court must look at the totality of the circumstances when determining if "good cause" exists to grant a continuance. *See* Sheriff, Clark County v. Terpstra, 111 Nev. 860, 863 (1995). Granting a continuance without good cause gives the State leave to "frustrate the judicial system." *See* Bustos, 87 Nev. at 624. There is no presumption that good cause exists when requesting a continuance. Ex Parte Morris, 78 Nev. 123, 125 (1962). "[O]ur criminal justice system can ill afford to bestow on prosecutors, or on defense counsel, largesse through continuances for which no cause is shown." *See* McNair v. Sheriff, Clark County, 89 Nev. 434, 436-37, 514 P.2d 1175, 1176 (1973). No legal principle requires a judge to "grant a continuance on the hope that a recalcitrant witness will later agree to testify." *See* McCabe v. State, 98 Nev. 604, 606-07 (1982); *see also* Zessman v. State, 94 Nev. 28, 31 (1978).

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a. The State was not entitled to a continuance as it did not have good cause for its failure to meet the criteria set forth in Hill and Bustos.

The State has the burden of proving good cause if its witnesses are missing at the time set for the preliminary hearing. *See generally* Bustos, 87 Nev. 622; *see also* Hill v. Sheriff of Clark County, 85 Nev. 234 (1969). "Good cause" is shown through filing a written Hill motion or orally requesting a Bustos motion be granted. *See generally* Bustos, 87 Nev. 622; *see also* Hill v. Sheriff of Clark County, 85 Nev. 234 (1969). In Hill, the Nevada Supreme Court held the State acts in good faith when it asks for a continuance based on a missing essential witness as long as the State timely files an affidavit outlining:

1. the identity of the missing witness,
2. the diligence used to procure the witness' presence,
3. a summary of the expected testimony of the witness and whether there are other witnesses who could testify to the same information,
4. when the State learned the witness would not be present, and
5. the motion was made in good faith and not for purposes of delay.

Hill, 85 Nev. at 235-36.

The Court warned prosecutors that "they must either proceed to a preliminary hearing at the appointed time, or show good cause for a continuance by affidavit." *See* McNair v. Sheriff, Clark County, 89 Nev. 434, 437, 514 P.2d 1175, 1176 (1973). In Bustos, the Supreme Court held there are circumstances in which there is no time for the State to file a written affidavit, and therefore, would be permitted to make the motion orally while sworn under oath. *See* Bustos, 87 Nev. at 623.[4] The Supreme Court explained there are two exceptions to the Hill rule that the good cause must be established through a written affidavit: 1. defense counsel stipulates to an oral argument or 2. the State was "surprised" by the witness' nonappearance. Id. In that case, the Court held there was "surprise" as the State had valid subpoena returns and did not know the witness would be absent until the time of the hearing. Id. at 624.

Condoning the State's willful failure to comply with the directives of Hill would effectively make the Supreme Court's precedent meaningless. *See* Maes v. Sheriff, Clark County, 86 Nev. 317, 318-19 (1970). "Willful" is not only intentional derelictions but also a

[4] The State would still be required to outline all of the factors as delineated in Hill. Id.

conscious indifference on behalf of the State toward important procedural rules that affect a defendant's rights. *See* State v. Austin, 87 Nev. 81, 82-83 (1971). In cases where the State neither submitted a written affidavit nor provided sworn testimony in support of its motion to continue, the Supreme Court held the appropriate response was to deny the State's motion and dismiss the case against the defendant. *See* Clark v. Sheriff, Clark County, 94 Nev. 364 (1978) (reversing the denial of the defendant's habeas petition for failure to submit an affidavit or be sworn under oath); *see also* Reason v. Sheriff, Clark County, 94 Nev. 300 (1978) (reversing the denial of the defendant's habeas petition based on the State's failure to submit an affidavit or be sworn under oath); *compare with* State v. Nelson, 118 Nev. 399 (2002) (holding there was sufficient evidence based on the prosecutor's sworn testimony that the State was surprised by the witness' nonappearance); *compare with* Terpstra, 111 Nev. at 860 (holding the written affidavit outlining all of the Hill factors supported the trial court's finding of good cause).

While the State did identify the named witness, and there is no dispute that said witness would be necessary as she is the named victim, the State failed to meet the other four requirements outlined in Hill. *See* Transcript, 2:10-23. At no point during the State's motion was it indicated the expected testimony of the missing witness. *See* Transcript. At the time of the motion, the State argued it had previously had contact with the missing witness and knew of her current address but had since lost contact. Transcript, 2:10-17. Despite knowing the witness' address, the State never attempted to personally serve the missing witness. *See* Transcript. Additionally, the State never informed defense counsel nor the court of the date in which it last had contact with the missing witness or when the State learned the missing witness would be absent from the preliminary hearing. S*ee* Transcript. Finally, the State never argued that the motion for a continuance was made in good faith and not for the purpose of delay. *See* Transcript.

The State also failed to meet the standard required for "good cause" under Bustos. The State would have needed to show it was "surprised" by the missing witness' nonappearance; however, the State did not and could not argue it was surprised as the missing victim had

previously informed the State she "refused to promise to appear." *See* Transcript, 2:16. Unlike Bustos where the prosecutor had valid subpoena returns, the State made no representations indicating it received any confirmation that the missing witness ever received the subpoena sent via the mail. *See generally* Transcript. Most importantly, the Court stated it was not granting the State's motion under Hill or Bustos. *See* Transcript, 5:4-11 ("it wasn't technically a Bustos or a Hill … Although I understand it doesn't technically fit under Hill or Bustos…"). As the State's request failed to meet the standards outlined in Hill and Bustos, the State should not have received a continuance and the case against Mr. Harris should have been dismissed.

b. The State's failure to either submit a written affidavit or give sworn testimony prohibits the State from receiving a continuance and requires a dismissal of the charges against Mr. Harris.

While the evidence is clear that the State's motion in this case was insufficient under Hill and Bustos and its progeny, Nevada law requires that either an affidavit or sworn testimony support the State's motion for a continuance. *See* Clark, 94 Nev. at 364; *see also* Reason, 94 Nev. at 300. In both of those cases, the Nevada Supreme Court held that the State's failure to submit an affidavit or provide sworn testimony required a denial of the State's motion for a continuance. *See* Clark, 94 Nev. at 364; *see also* Reason, 94 Nev. at 300. While the State did make representations on the record, at no point during this motion was the prosecutor under oath. *See* Transcript. In any of the above cited cases where "good cause" was found, the prosecutors had at least submitted an affidavit or swore under oath as to the requisite "surprise."[5] In this case, as the State failed to comply with either of these requirements, they were not entitled to a continuance and the case against Mr. Harris should be dismissed.

c. The State did not otherwise demonstrate "good cause" to continue the preliminary hearing.

The State did not comply with the requirements of Hill and Bustos, so it must demonstrate good cause through other means for the Court to grant a continuance. "What constitutes 'good cause' is not amenable to a bright-line rule. The justice's court must review the

[5] *See* Nelson, 118 Nev. at 399; *see also* Terpstra, 111 Nev. at 863.

totality of the circumstances to determine whether 'good cause' has been shown." Terpstra, 111 Nev. at 863, 899 P.2d at 550. Under the totality of the circumstances, the State did not demonstrate good cause to continue Mr. Harris's preliminary hearing.

In Ormound v. Sherriff, Clark County the Nevada Supreme Court reversed a district court's denial of a petition for a writ of habeas corpus based on the improper continuance of a preliminary hearing. 95 Nev. 173, 591 P.2d 258 (1979). In that case, the prosecutor mailed a subpoena to an out-of-state witness, but did not utilize the Uniform Act to Secure the Attendance of Witnesses From Without a State in Criminal Proceeding. Id. The Court found the failure to use the Uniform Act was a willful disregard of procedural rules, and ordered the case to be dismissed. Id.

The Court reconsidered this issue in Terpstra, and overruled the finding in Ormound that a prosecutor must utilize the Uniform Act "before a justice's court can find 'good cause' for a continuance based on the absence of an out-of-state witness." Terpstra, 111 Nev. at 863, 899 P.2d at 550-551. Instead, the use of a legal means to compel the attendance of a witness is a significant factor to consider when determining if good cause exists to continue the hearing. "It is not, however, a dispositive factor; it merely goes to 'the diligence used by the prosecutor to procure the witness' attendance.'" Id. at 863, 550 (1995) (quoting Bustos, 87 Nev. at 622, 491 P.2d at 1279).

In this case, the State had a legal means available to compel the attendance of the witness, and failed to use it. NRS 174.315(2) permits a prosecutor to issue a subpoena to compel the attendance of a witness at a preliminary hearing. NRS 174.345 mandates that "service of a subpoena *must* be made by delivering a copy thereof to the person named" (emphasis added) unless an exception applies. The only exception applicable to the witness in this case is NRS 174.315(3), which states that a "witness may accept delivery of a subpoena in lieu of service, by a written or oral promise to appear given by the witness."

In this case, there is no indication that the State even attempted to make personal service upon the witness. *See* Transcript. Furthermore, the witness actually "refused to promise to

appear." *See* Transcript, 2:16-17. As the witness did not accept the mailed subpoena by oral promise to appear, the exception to personal service in NRS 174.315(3) does not apply in this case. The State argued at the date of preliminary hearing that it sent the witness a subpoena via text, but no statute permits service by text message; to the contrary, the statute specifies that personal service is required.

Under the holding in Terpsta, the State's failure to even attempt to properly serve the witness requires dismissal of the case. Although not dispositive, the State's failure to personally serve the missing witness, *despite knowing where she lived*, is significant and shows a willful disregard for important procedures. In Bustos, the prosecutor had properly subpoenaed the missing witness and was truly surprised the witness' nonappearance;[6] in comparison, in Salas v. State, the prosecutor had not even issued a subpoena.[7] In that case, the court held that failing to issue a subpoena was not good cause for a continuance. *See* Salas, 91 Nev. at 802. In this case, the State did not eve attempt proper service. While the State did mail a subpoena to the witness, without an oral promise to appear, simply mailing a subpoena is not proper service. The State had various opportunities and methods in which it could have attempted to guarantee the missing witness's presence, yet failed to do so. As such, the State did not have good cause to request a continuance and Mr. Harris's case should be dismissed with prejudice.

d. The State's conscious indifference to important procedures requires Mr. Harris' case to be dismissed with prejudice.

"A new proceeding for the same offense (whether by complaint, indictment or information) is not allowable when the original proceeding has been dismissed due to the willful failure of the prosecutor to comply with important procedural rules." *See* Maes, 86 Nev. at 319, 468 P.2d at 333. The Nevada Supreme Court continues to strictly adhere to the important procedural rules regarding continuances. The State had a duty to prepare for the preliminary hearing, and had a legal means to compel the presence of the witness, but failed to do so. The State failed to follow the statutory requirements in serving a subpoena, and failed to follow the

[6] Bustos, 87 Nev. at 623.
[7] 91 Nev. 802 (1975).

basic procedural precepts by submitting a written affidavit or sworn testimony supporting its request for the continuance. As such, Mr. Harris is requesting that this Honorable Court dismiss the instant case against him with prejudice, based upon the State's willful disregard of his constitutional right to Due Process under the 5th and 14th Amendments to the United States Constitution.

CONCLUSION

Hill, Bustos, and their progeny are not mere suggestions; they are legal requirements. Good cause must not be set aside for a missing witness who had no contact with the State. This Honorable Court must not condone the State's abject failure to comply with basic rules governing requests to continue trials. In order to allow the State's continuance to stand, this Honorable Court must not only set aside Mr. Harris' Constitutional rights, but also those of Ms. Dotson, a person who has never been accused of wrongdoing in this matter. Therefore, and based on the foregoing, Petitioner respectfully requests that this Honorable Court issue the writ of mandamus/prohibition ordering the Justice Court to dismiss the charges against Mr. Harris in this matter with extreme prejudice.

DATED this 3rd of November, 2017.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By: */s/ Scott Ramsey*
SCOTT A. RAMSEY, #13941
Deputy Public Defender

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that service of the above and foregoing Writ of Mandamus was served via electronic e-filing to the Clark County District Attorney's Office at motions@clarkcountyda.com on this 3rd day of November, 2017.

By: */s/ Egda Ramirez*
Employee of the Public Defender's Office

#2

EXHIBIT

"FINDING FACTS"

FCL
Judge Douglas E. Smith
Eighth Judicial District Court
Department VIII
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89155
(702)671-4338

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

BARRY HARRIS,
#1946231

Defendant.

CASE NO: A-17-764110-W
DEPT NO: VIII

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DENYING DEFENDANT'S PETITION FOR WRIT OF MANDAMUS/PROHIBITION

DATE OF HEARING: SEPTEMBER 21, 2017
TIME OF HEARING: 8:00 AM

THIS CAUSE having come on for hearing before the Honorable DOUGLAS E. SMITH, District Judge, on the 21st day of September 2017, the Petitioner not being present, begin represented by PHILLIP KOHN, Clark County Public Defender, by and through SCOTT RAMSEY, Deputy Public Defender, the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through GENEVIEVE CRAGGS, Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT, CONCLUSIONS OF LAW

On August 21, 2017, Barry Harris (hereinafter "Defendant") was charged by way of criminal complaint with the following: BURGLARY (Category B Felony - NRS 205.060 - NOC 50424); FIRST DEGREE KIDNAPPING (Category A Felony -

NRS 200.310, 200.320 - NOC 50051); BATTERY WITH USE OF A DEADLY WEAPON CONSTITUTING DOMESTIC VIOLENCE (Category B Felony - NRS 200.481; 200.485; 33.018 - NOC 57935); BATTERY CONSTITUTING DOMESTIC VIOLENCE - STRANGULATION (Category C Felony - NRS 200.481; 200.485; 33.018 - NOC 54740); OWNERSHIP OR POSSESSION OF FIREARM BY PROHIBITED PERSON (Category B Felony - NRS 202.360 - NOC 51460); and CARRYING CONCEALED FIREARM OR OTHER DEADLY WEAPON (Category C Felony - NRS 202.350 (1)(d)(3) - NOC 51459). On August 31, 2017, Defendant was arraigned on the aforementioned charges and pleaded not guilty.

On September 15, 2017, Defendant was sent for a competency evaluation. On October 13, 2017, Defendant was scheduled to return for competency proceedings. However, he was combative with officers so was not present. His preliminary hearing was set for October 26, 2017.

On October 26, 2017, the State requested a continuance based on the due diligence of the State and the evidence presented that the victim in the case knew of the court date but chose not to appear. The Honorable Judge Tobiasson granted the States' continuance over the Defendant's objection. An Order to Show Cause Hearing for the victim was scheduled for November 2, 2017, and a preliminary hearing was scheduled for November 9, 2017.

On November 3, 2017, Defendant filed an Emergency Motion for Stay of Justice Court Proceedings and the instant Writ was filed. The preliminary hearing date of November 9, 2017 was vacated. The State filed its Response on November 21, 2017.

The writ of mandamus is an extraordinary writ. State v. Dist. Ct. (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). The purpose of such a writ is to compel the performance of an act which the law requires as part of the duties arising from an office, trust, or station. Id. The purpose is not to act as an assignment of error, and it may not be used to correct errors by inferior tribunals, though it may be used to rectify

a manifest abuse of discretion. Id.; State v. Dist. Ct. (Hedland), 116 Nev. 127, 133, 994 P.2d 692, 696 (2000) ("[A] writ of mandamus does not lie to correct errors where action has been taken by the inferior tribunal . . . ."); State ex rel. Weber v. McFadden, 46 Nev. 1, 6, 250 P.2d 594, 595 (1922) (holding that mandamus is not to be used to control judicial discretion or alter judicial action). A writ of mandamus will not issue where the "petitioner has a plain, speedy and adequate remedy in the ordinary course of law." Hedland, 116 Nev. at 133, 994 P.2d at 696; See NRS 34.170. A justice court's granting of a continuance is generally a discretionary ruling... Sheriff, Clark County. v. Blackmore, 99 Nev. 827, 830, 673 P.2d 137, 138 (1983).

NRS 171.196 provides that the magistrate shall hear the evidence within 15 days, unless for good cause shown. NRS 171.196(2). Indeed, a magistrate may set a preliminary hearing beyond the statutory 15 day period when necessary. See Stevenson v. Sheriff, 92 Nev. 525 (1975). Factors constituting good cause include: the condition of the calendar, the pendency of other cases, public expense, the health of the judge, and even the convenience of the court. See Shelton v. Lamb, 85 Nev. 618 (1969).

This Court must be cautious in reviewing the lower court's rulings. This Court must truly look to see if the lower court judge abused their discretion and must not decide the factual issues of the case. This Court's decision must look to the totality of the circumstances to determine whether or not the decision of the Justice of the Peace was an abuse of discretion.

The State must demonstrate good cause for securing a continuance of a preliminary examination. See Sheriff, Nye County v. Davis, 106 Nev. 145, 787 P.2d 1241 (1990); see also McNair v. Sheriff, Clark County, 89 Nev. 434, 514 P.2d 1175 (1973). The requirements outlined in Bustos v. Sheriff, Clark County, 87 Nev. 622, 624 (1971) and Hill v. Sheriff of Clark County, 85 Nev. 234 (1969), are avenues in which the State may demonstrate good cause in order to receive a continuance. However, these avenues are sufficient to demonstrate good cause, but not necessary.

The basis for the continuance and the basis for the State's request come from NRS 171.196(2). NRS 171.196(2) states in pertinent part, "[i]f the defendant does not waive examination, the magistrate shall hear the evidence within 15 days, ***unless for good cause shown*** the magistrate extends such time."

A motion to continue a preliminary hearing is not limited solely to the narrow factual confines of either Hill or Bustos; the justice's court must review the totality of the circumstances to determine whether 'good cause' has been shown." Sheriff, Clark Cty. v. Terpstra, 111 Nev. 860, 863, 899 P.2d 548, 551 (1995). "Good cause is not amenable to a bright-line rule." *Id.* at 862. In Hernandez v. State, the Nevada Supreme Court found that, "[i]n determining whether the proponent of preliminary hearing testimony has met its burden of proving that a witness is constitutionally unavailable, the touchstone of the analysis is the reasonableness of the efforts." 124 Nev. 639, 651, 188 P.3d 1126, 1134 (2008).

It is not necessary for a witness to be personally served in order for the State to show good cause for a continuance. Terpstra, 111 Nev. at 863.

In State v. Nelson, 118 Nev. 399, 401, 46 P.3d 1232, 1233 (2002), the Nevada Supreme Court made clear that the granting of a continuance was a totality of the circumstances review. The defendant in Nelson filed a Writ arguing that the State's continuance did not conform to the specific requirements of Hill or Bustos and thus the Writ should be granted. Id. at 403. The District Court dismissed the case based on the rationale that the continuance did not conform to either Hill or Bustos. Under a totality of circumstances analysis, the District Court's decision was reversed by the Nevada Supreme Court. Id. at 404-05.

The Justice Court did not manifestly abuse its discretion by finding that the State showed good cause through due diligence to procure the named victim in the instant case. The State clearly laid out for the court that the witness was in fact the named victim in the case. Additionally, the State explained that the witness knew of the court date, and yet purposefully did not show up. The State knew she received the

subpoena as she verified the phone number to which the subpoena was texted, and also verified the address where the subpoena was sent. The State's process server told the named victim of the date, and she specifically refused to promise to appear. The intentional and deliberate actions of the witness not to come to court coupled with the State's due diligence to procure her presence shows through the totality of the circumstances that good cause was presented to the court.

ORDER

THEREFORE, IT IS HEREBY ORDERED that the Petition for Mandamus/Prohibition shall be, and it is, hereby denied.

DATED this 27th day of November, 2017

D. E. Smith

Douglas E. Smith
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of November 2017, a copy of this Order was electronically served to all registered parties in the Eighth Judicial District Court Electronic Filing Program and/or placed in the attorney's folder maintained by the Clerk of the Court and/or transmitted via facsimile and/or mailed, postage prepaid, by United States mail to the proper parties or per the attached list as follows:

Genevieve Craggs, Genevieve.craggs@clarkcountyda.com
Scott Ramsey, Scott.ramsey@clarkcountynv.gov

Jill Jacoby

Jill Jacoby, Judicial Executive Assistant

EXHIBIT

3

TRANSCRIPTS

10/26/17

TRAN

IN THE JUSTICE'S COURT OF LAS VEGAS TOWNSHIP

COUNTY OF CLARK, STATE OF NEVADA

STATE OF NEVADA, Plaintiff, vs. BARRY HARRIS, Defendant.	)	JC CASE NO. 17F15265X

REPORTER'S TRANSCRIPT

OF

STATE'S MOTION TO CONTINUE PRELIMINARY HEARING

BEFORE THE HONORABLE MELANIE ANDRESS-TOBIASSON
JUSTICE OF THE PEACE

THURSDAY, OCTOBER 26, 2017

APPEARANCES:

For the State: GENEVIEVE CRAGGS
Deputy District Attorney

For the Defendant: SCOTT RAMSEY
Deputy Public Defender

Reported by: Donna J. McCord, CCR #337

TRAN

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COUNTY OF CLARK, STATE OF NEVADA

STATE OF NEVADA,
Plaintiff,
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BARRY HARRIS,
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ORIGINAL

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FILED
2017 OCT 31 A 7:45
JUSTICE COURT
LAS VEGAS NEVADA
BY
DEPUTY

LAS VEGAS, NEVADA, OCTOBER 26, 2017, 12:04 P.M.

* * * * *

THE COURT: Barry Harris.

MS. CRAGGS: I'm making a motion, your Honor, to continue. We're going to be requesting a material witness warrant for your Honor if you're so inclined after I speak with my team chief.

Essentially what happened is we were in contact with her. She did, Nicole Dotson, the named victim, she did identify herself. She was informed of the date of court, we did text message her a copy of the subpoena and she verified the address that we mailed the subpoena to as well and then she refused to promise to appear and we lost contact with her and we weren't able to get ahold of her again. So we were able to verify that we know where she lives, we did mail her a subpoena, we did text her a subpoena, we did speak with her. And part of the reason obviously we're requesting this is that it is a very serious case and we do know where she is.

THE COURT: I'm just waiting for the file.

Well, I know where you're going so

I'll let you make your record.

MR. RAMSEY: And, your Honor, we would object to any continuance at this point and move to dismiss. The State hasn't met their due diligence to serve her with a subpoena. There is no personal service. I'm not aware of anything in the Nevada Revised Statutes that allows the State to serve a subpoena via text message. There is, you know, some language about an oral promise to appear, but if she's saying she's not showing up to court or she's not promising to appear, that does not meet the statutory requirements, your Honor. There is no basis for a continuance here and we would be moving to dismiss.

MS. CRAGGS: And, your Honor, obviously our request is that the basis for the continuance is our own due diligence. We do know where she is. We do know that we're sending it to the right address. We do know that we texted a subpoena to the correct phone number and now she's simply refusing to appear.

THE COURT: Let me address this after we take a break. I have a bunch of motions in my file that your client sent to me.

MR. RAMSEY: I'm aware.

MS. CRAGGS: Oh, I just saw that, yes.

THE COURT: And I haven't really reviewed them in detail because he is represented by counsel, but I will look at them. So let me look at these and I'll make a ruling when I come back.

MR. RAMSEY: All right. Thank you.

MS. CRAGGS: Thank you.

(Recess.)

THE COURT: Barry Harris. All right. So let's address first, I have a bunch of motions. I'm not going to address those motions. If your client feels the need to file motions he can talk to you about that.

With regard to the State's request for a continuance, the representations were made that they made contact with her, she verified that the address was correct where they sent the subpoena, they texted her another copy of the subpoena and spoke to her, she indicated she was aware of the date, yes?

MS. CRAGGS: Yes.

THE COURT: Okay.

MS. CRAGGS: I believe she was told the date over the phone by the process server.

THE COURT: Okay.

LAS VEGAS, NEVADA, OCTOBER 26, 2017, 12:04 P.M.

* * * * *

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With regard to the State's request for a continuance, the representations were made that they made contact with her, she verified that the address was correct where they sent the subpoena, they texted her another copy of the subpoena and spoke to her, she indicated she was aware of the date, yes?

MS. CRAGGS: Yes.

THE COURT: Okay.

MS. CRAGGS: I believe she was told the date over the phone by the process server.

THE COURT: Okay.

MR. RAMSEY: And I would just want to — I mean, it's not an oral promise to appear as required by the statute.

THE COURT: It's not and I don't think she was basing it — it wasn't technically a Bustos or a Hill. The representations are that they made contact with her, she indicated she was aware of the court date, she indicated that the address was correct where they sent the subpoena, they texted her a copy of the subpoena. Although I understand it doesn't technically fit under Hill or Bustos, I've always kind of taken the position, and we've talked about this, where if a witness is advised of the date and is aware of the date and has received a subpoena, even if technically it's not service as defined by the statute I don't think that it's — now, believe me, differing minds differ, but it's always been my position that if you have those representations a witness knows they have to come to court. And I think that it's rarely the appropriate avenue to dismiss the charges as a result of that. If they had not made any contact with her or if they could not verify any of this or if they had contact with her and she said I'm not coming to court without receiving a subpoena, that would be a

different situation.

Under these circumstances I am going to grant the State's motion for a continuance. I'm going to reset in 15 days, November 9th at 10:00 a.m.

State, I know you were requesting a warrant. What I'm going to do first is I'm going to set an order to show cause hearing for November 2nd at 8:30. If we have the same situation on that date then I will address the request for a warrant, okay?

MR. RAMSEY: What was the preliminary hearing date?

THE COURT: The 9th at 10:00 a.m.

MR. RAMSEY: And I would like to —

THE COURT: November 9th. Order to show cause November 2nd.

MR. RAMSEY: And I would like to request my client's release based on the State's failure to procure their witness for the preliminary hearing. He's prejudiced because he's still in custody on this case based on the State's —

THE COURT: Based on the representations that were made, the serious nature of the charges, the fact he does have another felony case in the system, he's got a prior for battery with deadly

weapon with substantial bodily harm, I'm going to deny that motion at this time. Of course at the November 9th hearing we can readdress that if we're in the same situation.

THE DEFENDANT: Please, your Honor, I've been incarcerated for 60 days. It's been an ongoing thing.

THE COURT: I understand.

THE DEFENDANT: Please, your Honor. I got family out there. These are serious charges. If they was against me I would show up in court —

THE COURT: No.

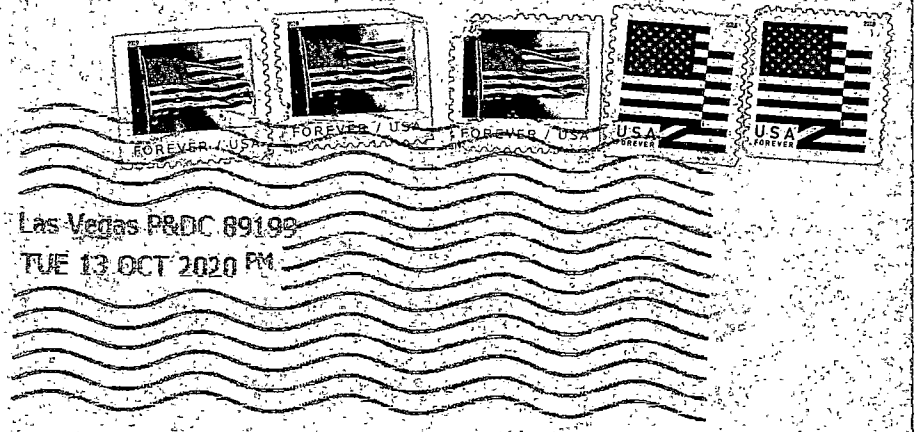
THE DEFENDANT: — and testify against somebody if it was their case.

* * * * *

Attest: Full, true, accurate transcript of proceedings.

/S/Donna J. McCord
DONNA J. McCORD CCR #337

BARRY HARRIS #95363
P.O. BOX 650
INDIANSPRINGS, NEVADA 89070



"CONFIDENTIAL"
LEGAL MAIL

STEVEN D. GRIERSON
200 LEWIS AVE. 3RD. FLOOR
LAS VEGAS, NEVADA 89155-1160

HIGH DESERT STATE PRISON
OCT 12 2020
UNIT 3 MB

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 PM Petition for Writ of Habeas Corpus

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

COURT CLERK: Carina Bracamontez-Munguia/cb

RECORDER: Angie Calvillo

PARTIES PRESENT: Thomson, Megan Attorney for Defendant

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)

Clerk's Note: A copy of this minute order has been distributed to Barry Harris, ID #95363, High Desert State Prison, P.O. Box 630, Indian Springs, Nevada 89070. //cbm 11/11/2020

RSPN
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
JONATHAN VANBOSKERCK
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200 Lewis Avenue
Las Vegas, Nevada 89155-2212
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Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

BARRY HARRIS,
#1946231
Petitioner,

-vs-

WILLIAM GITTERE, Warden,

Respondent.

CASE NO: A-20-813935-W

DEPT NO: XX

STATE'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS (POSTCONVICTION)
and
EX PARTE MOTION FOR APPOINTMENT OF COUNSEL AND REQUEST FOR EVIDENTIARY HEARING

DATE OF HEARING: NOVEMBER 3, 2020
TIME OF HEARING: 8:30 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through JONATHAN VANBOSKERCK, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Response to Petition for Writ of Habeas Corpus (Postconviction) and Ex Parte Motion for Appointment of Counsel and Request for Evidentiary Hearing.

This response is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

/ / /

POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On January 17, 2018, BARRY HARRIS (hereinafter, "Petitioner") was charged by way of Information, as follows: Count 1 – BURGLARY WHILE IN POSSESSION OF A FIREARM (Category B Felony – NRS 205.060); Count 2 – FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON RESULTING IN SUBSTANTIAL BODILY HARM (Category A Felony – NRS 200.310, 200.320, 193.165); Count 3 – ASSAULT WITH A DEADLY WEAPON (Category B Felony – NRS 200.471); Count 4 – BATTERY WITH USE OF A DEADLY WEAPON CONSTITUTING DOMESTIC VIOLENCE (Category B Felony – NRS 200.481, 200.485, 33.018); Count 5 – BATTERY CONSTITUTING DOMESTIC VIOLENCE – STRANGULATION (Category C Felony – NRS 200.481, 200.485, 33.018); Count 6 – BATTERY RESULTING IN SUBSTANTIAL BODILY HARM CONSTITUTING DOMESTIC VIOLENCE (Category C Felony – NRS 200.481, 200.485, 33.018); Count 7 – PREVENTING OR DISSUADING WITNESS OR VICTIM FROM REPORTING CRIME OR COMMENCING PROSECUTION (Category D Felony – NRS 199.305); Count 8 – CARRYING CONCEALED FIREARM OR OTHER DEADLY WEAPON (Category C Felony – NRS 202.350(1)(d)(3)); and Count 9 – OWNERSHIP OR POSSESSION OF FIREARM BY PROHIBITED PERSON (Category B Felony – NRS 202.360) for his action on or about August 22, 2017. On April 9, 2018, the State filed an Amended Information, removing Count 9.

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

On August 14, 2019, Petitioner appeared for sentencing. Petitioner was adjudged guilty, consistent with the jury's verdict, and was sentenced, as follows: Count 2 – LIFE in the Nevada

Department of Corrections ("NDC"), with the possibility of parole after fifteen (15) years; Count 3 – six (6) months in the Clark County Detention Center ("CCDC"), concurrent with Count 2; Count 4 – six (6) months in CCDC, concurrent with Count 3; Count 6 – twenty-four (24) to sixty (60) months in NDC, concurrent with Count 2. The Court credited Petitioner with 351 days time served. Petitioner's Judgment of Conviction was filed on August 16, 2018.

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

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

On April 21, 2020, Petitioner filed the instant Petition for Writ of Habeas Corpus (Postconviction) (his "Petition") and Ex Parte Motion for Appointment of Counsel and Request for Evidentiary Hearing (his instant "Motion").

<u>STATEMENT OF FACTS</u>

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

> On August 22, 2017, officers responded to a residence in reference to a call that came into 911 where they heard a female victim screaming. "Help me, 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.
>
> 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 with him on phone while she was at work. She went home and found the defendant lying on her bed. She reported that she gave him a key to the residence but was not living there. She sat next to him and they started arguing again. The victim told him to leave the residence and he replied, "I'm not going nowhere bitch". She told the defendant that if he continued to disrespect her that she would call the police. She reported that things escalated and the defendant grabbed her around her throat with both hands and began squeezing. He continued doing this until she could not breathe and felt as she was going to pass out. He then slammed her down on the bed and began punching her in the head. The defendant threw her on the floor and continued to punch her. The victim was able to get up and ran into the living room screaming for help. The victim

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

Presentence Investigation Report at 5.

ARGUMENT

I. PETITIONER'S PETITION FOR WRIT OF HABEAS CORPUS DOES NOT ENTITLE HIM TO RELIEF

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

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 counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. 466 U.S. at 687–88, 694, 104 S. Ct. at 2065, 2068; Warden, Nevada State Prison

v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-part test). "[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

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

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

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

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

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

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

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

1. Pretrial Representation (Ground One)

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

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

Likewise, Petitioner's mandamus claim amounts to a conclusory allegation, lacking any specificity or support. Therefore, as Petitioner does not identify any specific issue that could 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.

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

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

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

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

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

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

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

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

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

Petitioner's claim does not challenge the validity of a guilty plea, nor does it allege ineffective assistance of counsel; therefore, this claim should have been raised on direct appeal. Franklin, 110 Nev. at 752, 877 P.2d at 1059. Petitioner's failure to raise the claim in that effort results in a waiver thereof. Id. Petitioner does not allege that good cause exists to overcome this default, and cannot, as his allegation revolves around an occurrence at his trial; therefore,

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

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

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

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

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

When examining the effectiveness of appellate counsel under the Strickland analysis, there is a strong presumption that appellate counsel's performance was reasonable and fell within "the wide range of reasonable professional assistance." See United States v. Aguirre, 912 F.2d 555, 560 (2nd Cir. 1990) (citing Strickland, 466 U.S. at 689, 104 S.Ct. at 2065). A

claim of ineffective assistance of appellate counsel must satisfy the two-prong test set forth by Strickland. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). In order to satisfy Strickland's second prong, the defendant must show that the omitted issue would have had a reasonable probability of success on appeal. Id.

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

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

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

that purported outcome, had Sheets raised the issue, provided Petitioner with discovery, and petitioned for rehearing. Kirksey, 112 Nev. at 998, 923 P.2d at 1114. Therefore, Petitioner fails to meet his burden under Strickland for demonstrating ineffective assistance of appellate counsel.

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

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

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

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

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

/ / /

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. PETITIONER FAILS TO DEMONSTRATE THE NECESSITY FOR AN EVIDENTIARY HEARING

The Nevada Supreme Court has held that if a petition can be resolved without expanding the record, then no evidentiary hearing is necessary. Marshall v. State, 110 Nev. 1328, 885 P.2d 603 (1994); Mann, 118 Nev. at 356, 46 P.3d at 1231. A defendant is entitled to an evidentiary hearing if her petition is supported by specific factual allegations, which, if

true, would entitle her to relief unless the factual allegations are repelled by the record. Marshall, 110 Nev. at 1331, 885 P.2d at 605; see also Hargrove, 100 Nev. at 503, 686 P.2d at 225 (holding that "[a] defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record"). It is improper to hold an evidentiary hearing simply to make a complete record. See Riker, 121 Nev. at 234, 112 P.3d at 1076 ("The district court considered itself the 'equivalent of . . . the trial judge' and consequently wanted 'to make as complete a record as possible.' This is an incorrect basis for an evidentiary hearing.")**)**.

Petitioner makes the singular claim that he is "unable to adequately present [Petitioner's] claims without an evidentiary hearing." Instant Motion at 2. However, Petitioner fails to appreciate that his Petition consists of conclusory allegations, lacking any basis in relevant legal authority, and absent any substantiating evidence or reference to the trial record. Therefore, Petitioner has failed to meet his burden under Marshall. 110 Nev. at 1331, 885 P.2d at 605.

Furthermore, Petitioner's claims are procedurally defaulted as waived due to Petitioner's failure to raise them on direct appeal, and are otherwise belied and repelled by the record. NRS 34.810(1)(b)(2); Hargrove, 100 Nev. at 503, 686 P.2d at 225. Therefore, expanding the record is unnecessary and Petitioner cannot demonstrate that he is entitled to an evidentiary hearing.

Because Petitioner fails to meet his burden under Marshall, and because his claims can be disposed of without expanding the existing record, Petitioner's request for an evidentiary hearing must be denied.

III. PETITIONER FAILS TO DEMONSTRATE THAT APPOINTMENT OF COUNSEL IS NECESSARY

Under the U.S. Constitution, the Sixth Amendment provides no right to counsel in post-conviction proceedings. Coleman v. Thompson, 501 U.S. 722, 752, 111 S. Ct. 2546, 2566 (1991). In McKague v. Warden, 112 Nev. 159, 163, 912 P.2d 255, 258 (1996), the Nevada Supreme Court similarly observed that "[t]he Nevada Constitution…does not guarantee a right

to counsel in post-conviction proceedings, as we interpret the Nevada Constitution's right to counsel provision as being coextensive with the Sixth Amendment to the United States Constitution." McKague specifically held that, with the exception of NRS 34.820(1)(a) (entitling appointed counsel when petitioner is under a sentence of death), one does not have "any constitutional or statutory right to counsel at all" in post-conviction proceedings. Id. at 164, 912 P.2d at 258.

However, the Nevada Legislature has given courts the discretion to appoint post-conviction counsel so long as "the court is satisfied that the allegation of indigency is true and the petition is not dismissed summarily." NRS 34.750. NRS 34.750 reads:

> A petition may allege that the Defendant is unable to pay the costs of the proceedings or employ counsel. If the court is satisfied that the allegation of indigency is true and the petition *is not dismissed summarily*, the court may appoint counsel at the time the court orders the filing of an answer and a return. In making its determination, the court may consider whether:
>
> (a) The issues are difficult;
>
> (b) The defendant is unable to comprehend the proceedings; or
>
> (c) Counsel is necessary to proceed with discovery.

(emphasis added). Under NRS 34.750, it is clear that the court has discretion in determining whether to appoint counsel.

As demonstrated in Section I, *supra*., the instant Petition should be summarily dismissed; therefore, counsel is not required. NRS 34.750. Furthermore, the instant Petition does not satisfy the conditions under NRS 34.750. Petitioner has not presented difficult issues for review – instead, he has presented conclusory allegations that he believes entitle him to relief. NRS 34.750(a). However, Petitioner's organization and submission of the instant Petition demonstrates that Petitioner is able to comprehend the proceedings, and what options were available to him after remittitur issued from his direct appeal. Therefore, Petitioner's comprehension undermines his request that counsel be appointed in the instant case. NRS 34.750(b). Finally, Petitioner does not allege that any further discovery is necessary, much less argue how any discovery will affect his conviction. Instead, Petitioner simply submits a

boilerplate request to be appointed counsel. Instant Motion at 2. Therefore, Petitioner fails to demonstrate that counsel should be appointed in this case. NRS 34.750(c).

Petitioner has failed to recognize the standard for discretionary appointment of counsel, much less demonstrated that, under that standard, appointment of counsel is necessary for the instant case. Further, the instant Petition should be summarily dismissed. Therefore, this Court should decline to appoint counsel in this case.

CONCLUSION

For the forgoing reasons, the State respectfully requests that Petitioner Barry Harris's Petition for Writ of Habeas Corpus (Postconviction) and Ex Parte Motion for Appointment of Counsel and Request for Evidentiary Hearing be DENIED in their entireties.

DATED this 2nd day of October, 2020.

Respectfully submitted,

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

BY /s/ *Jonathan VanBoskerck*
JONATHAN VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 2nd day of October, 2020, by U.S. Mail, postage pre-paid, addressed to:

BARRY HARRIS, #95363
c/o HDSP
P.O. Box 650
Indian Springs, NV 89070-0650

BY: /s/ *J. Georges*
Secretary for the District Attorney's Office

C326569/jg/DVU

FILED
SEP 23 2020
CLERK OF COURT

BARRY HARRIS
NDOC No. 95363

In proper person

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE
STATE OF NEVADA IN AND FOR THE
COUNTY OF CLARK

BARRY HARRIS)
)
Petitioner,)
v.)
) Case No. A-20-813935-W
)
THE STATE OF NEVADA) Dept. No. 20
Respondent.)
)

MOTION AND ORDER FOR TRANSPORTATION
OF INMATE FOR COURT APPEARANCE
OR, IN THE ALTERNATIVE,
FOR APPEARANCE BY TELEPHONE OR VIDEO CONFERENCE

Petitioner, BARRY HARRIS, proceeding pro se, requests that this Honorable Court order transportation for his personal appearance or, in the alternative, that he be made available to appear by telephone or by video conference at the hearing in the instant case that is scheduled for NOVEMBER 3, 2020 at 8:00AM.

RECEIVED
SEP 21 2020
CLERK OF THE COURT

In support of this Motion, I allege the following:

1. I am an inmate incarcerated at HIGH DESERT STATE PRISON. My mandatory release date is AUGUST 29, 2035.

2. The Department of Corrections is required to transport offenders to and from Court if an inmate is required or requests to appear before a Court in this state.

NRS 209.274 Transportation of Offender to Appear Before Court states:

"1. Except as otherwise provided in this section, when an offender is required or requested to appear before a Court in this state, the Department shall transport the offender to and from Court on the day scheduled for his appearance.

2. If notice is not provided within the time set forth in NRS 50.215, the Department shall transport the offender to Court on the date scheduled for his appearance if it is possible to transport the offender in the usual manner for the transportation of offenders by the Department. If it is not possible for the Department to transport the offender in the usual manner:

(a) The Department shall make the offender available on the date scheduled for his appearance to provide testimony by telephone or by video conference, if so requested by the Court.

(b) The Department shall provide for special transportation of the offender to and from the Court, if the Court so orders. If the Court orders special transportation, it shall order the county in which the Court is located to reimburse the Department for any cost incurred for the special transportation.

(c) The Court may order the county sheriff to transport the offender to and from the Court at the expense of the county."

3. My presence is required at the hearing because:

☐ I AM NEEDED AS A WITNESS.

My petition raises substantial issues of fact concerning events in which I participated and about which only I can testify. *See U.S. v. Hayman*, 342 U.S. 205 (1952) (District Court erred when it made findings of fact concerning Hayman's knowledge and consent to his counsel's representation of a witness against Hayman without notice to Hayman or Hayman's presence at the evidentiary hearing).

☒ THE HEARING WILL BE AN EVIDENTIARY HEARING.

My petition raises material issues of fact that can be determined only in my presence. *See Walker v. Johnston*, 312 U.S. 275 (1941) (government's contention that allegations are improbable and unbelievable cannot serve to deny the petitioner an opportunity to support them by evidence). The Nevada Supreme Court has held that the presence of the petitioner for habeas corpus relief is required at any evidentiary hearing conducted on the merits of the claim asserted in the petition. *See Gebers v. Nevada*, 118 Nev. 500 (2002).

4. The prohibition against ex parte communication requires that I be present at any hearing at which the state is present and at which issues concerning the claims raised in my petition are addressed. U.S. Const. amends. V, VI.

5. If a person incarcerated in a state prison is required or is requested to appear as a witness in any action, the Department of Corrections must be notified in writing not less than 7 business days before the date scheduled for his appearance in Court if the inmate is incarcerated in a prison located not more than 40 miles from Las Vegas. NRS 50.215(4). If a person is incarcerated in a prison located 41 miles or more from Las Vegas, the Department of Corrections must be notified in writing not less than 14 business days before the date scheduled for the person's appearance in Court.

6. HIGH DESERT STATE PRISON is located approximately LESS THEN 30 miles from Las Vegas, Nevada.

7. If there is insufficient time to provide the required notice to the Department of Corrections for me to be transported to the hearing, I respectfully request that this Honorable Court order the Warden to make me available on the date of the scheduled appearance, by telephone, or video conference, pursuant to NRS 209.274(2)(a), so that I may provide relevant testimony and/or be present for the evidentiary hearing.

8. The rules of the institution prohibit me from placing telephone calls from the institution, except for collect calls, unless special arrangements are made with prison staff. Nev. Admin. Code DOC 718.01. However, arrangements for my telephone appearance can be made by contacting the following staff member at my institution: WARDEN JOHNSON, CASEWORKER "K", whose telephone number is (702) 879-6789

Dated this 16 day of SEPTEMBER, 2020.

Barry Harris

CERTFICATE OF SERVICE BY MAILING

I, BARRY HARRIS, hereby certify, pursuant to NRCP 5(b), that on this 16 day of SEPTEMBER, 2020, I mailed a true and correct copy of the foregoing, "_____"

by depositing it in the High Desert State Prison, Legal Library, First-Class Postage, fully prepaid, addressed as follows:

STEVEN D. GRIERSON
200 LEWIS AVE 3RD FLOOR
LAS VEGAS, NV 89155

STEVEN WOLFERSON
200 LEWIS AVE
LAS VEGAS, NV 89155

CC:FILE

DATED: this 16 day of SEPTEMBER, 2020.

BARRY HARRIS
#95362
/In Propria Personam
Post Office box 650 [HDSP]
Indian Springs, Nevada 89018
IN FORMA PAUPERIS

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding _____

EVIDENTIARY HEARING
(Title of Document)

filed in District Court Case number A-20-813935-W

☑ Does not contain the social security number of any person.

-OR-

☐ Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

_____
(State specific law)

-or-

B. For the administration of a public program or for an application for a federal or state grant.

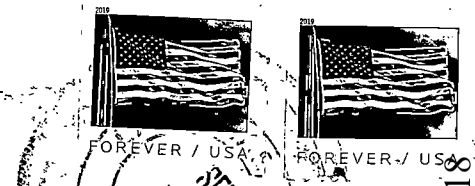
Barry Harris
Signature

9/16/20
Date

BARRY HARRIS
Print Name

MOTION
Title

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



STEVEN D. GRIERSON
200 LEWIS AVE, 3RD. FLOOR
LAS VEGAS, NEVADA 89155-1160

PPOW

DISTRICT COURT
CLARK COUNTY, NEVADA

Barry Harris,

Petitioner,

vs.

William Gittere,

Respondent,

Case No: A-20-813935-W
Department 20

ORDER FOR PETITION FOR WRIT OF HABEAS CORPUS

Petitioner filed a Petition for Writ of Habeas Corpus (Post-Conviction Relief) on April 21, 2020. The Court has reviewed the Petition and has determined that a response would assist the Court in determining whether Petitioner is illegally imprisoned and restrained of his/her liberty, and good cause appearing therefore,

IT IS HEREBY ORDERED that Respondent shall, within 45 days after the date of this Order, answer or otherwise respond to the Petition and file a return in accordance with the provisions of NRS 34.360 to 34.830, inclusive.

IT IS HEREBY FURTHER ORDERED that this matter shall be placed on this Court's Calendar on the 20th day of AUGUST, 20 20, at the hour of 9:30 o'clock for further proceedings.

4-30-2020

District Court Judge

SG

ERIC JOHNSON

Case No. C326569

Dept. No. 20

IN THE EIGHT JUDICIAL DISTRICT COURT OF THE
STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK.

A-20-813935-W

BARRY HARRIS #95363
Petitioner,

v.

WILLIAM GITTERE ESP
Respondent. WARDEN

PETITION FOR WRIT OF HABEAS CORPUS (POSTCONVICTION)

INSTRUCTIONS:

(1) This petition must be legibly handwritten or typewritten, signed by the petitioner and verified.

(2) Additional pages are not permitted except where noted or with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) If you want an attorney appointed, you must complete the Affidavit in Support of Request to Proceed in Forma Pauperis. You must have an authorized officer at the prison complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.

(4) You must name as respondent the person by whom you are confined or restrained. If you are in a specific institution of the Department of Corrections, name the warden or head of the institution. If you're not in a specific institution of the Department but within its custody, name the Director of the Department of Corrections.

(5) You must include all grounds or claims for relief which you may have regarding your conviction or sentence. Failure to raise all grounds in this petition may preclude you from filing future petitions challenging your conviction and sentence.

(6) You must allege specific facts supporting the claims in the petition you file seeking relief from any conviction or sentence. Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed. If your petition contains a claim of ineffective assistance of counsel, that claim will operate to waive the attorney-client privilege for the proceeding in which you claim your counsel was ineffective.

(7) When the petition is fully completed, the original and one copy must be filed with the clerk of the state district court for the county in which you were convicted. One copy must be mailed to the respondent, one copy to the Attorney General's Office, and one copy to the district attorney of the county in which you were convicted or to the original prosecutor if you are challenging your original conviction or sentence. Copies must conform in all particulars to the original submitted for filing.

PETITION

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: ELY STATE PRISON WHITE PINE COUNT

2. Name and location of court which entered the judgment of conviction under attack: CLARK COUNTY DISTRICT EIGHT NEVADA

3. Date of judgment of conviction: 8-14-2018

4. Case number: C326569

5. (a) Length of sentence: 15 to Life

(b) If sentence is death, state any date upon which execution is scheduled: N/A

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion? Yes ____ No X
If "yes", list crime, case number and sentence being served at this time: ____

7. Nature of offense involved in conviction being challenged: KIDNAPPING FIRST DEGREE, BATTERY D.V.

8. What was your plea? (check one):
(a) Not guilty X (b) Guilty ____ (c) Nolo contendere ____

9. If you entered a plea of guilty to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty was negotiated, give details: N/A

10. If you were found guilty after a plea of not guilty, was the finding made by: (check one)
(a) Jury X (b) Judge without a jury ____

11. Did you testify at the trial? Yes ____ No X

12. Did you appeal form the judgment of conviction? Yes X No ____

13. If you did appeal, answer the following:
(a) Name of Court: SUPREME COURT NEVADA
(b) Case number or citation: 76[illegible]
(c) Result: AFFIRMED

(d) Date of result: DECEMBER 19, 2019
(Attach copy of order or decision, if available.)

14. If you did not appeal, explain briefly why you did not: N/A

15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal?
Yes _____ No X

16. If your answer to No. 15 was "yes", give the following information:
(a)(1) Name of court:
(2) Nature of proceeding: N/A
(3) Grounds raised:
(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes _____ No _____
(5) Result: N/A
(6) Date of result:
(7) If known, citations of any written opinion or date of orders entered pursuant to such result:

(b) As to any second petition, application or motion, give the same information:
(1) Name of court:
(2) Nature of proceeding: N/A
(3) Grounds raised:
(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes _____ No _____
(5) Result: N/A
(6) Date of result:
(7) If known, citations of any written opinion or date of orders entered pursuant to such a result:

(c) As to any third or subsequent additional applications or motions, give the same Information as above, list them on a separate sheet and attach.

(d) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any petition, application or motion?
(1) First petition, application or motion? Yes _____ No _____
Citation or date of decision: N/A
(2) Second petition, application or motion? Yes _____ No _____
Citation or date of decision:
(3) Third or subsequent petitions, applications or motions? Yes _____ No _____
Citation or date of decision:

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) N/A

17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion, application or any other postconviction proceeding? If so, identify:

(a) Which of the grounds is the same: JUSTICE COURT VIOLATION OF LEGAL STANDARDS AND MR. HARRIS DUE PROCESS RIGHTS; AND SUPREME COURT OF NEVADA VIOLATION OF MR. HARRIS 5TH, 6TH, AND 14TH. RIGHTS TO HAVE EFFECTIVE ASSISTANCE OF COUNSEL

(b) The proceedings in which these grounds were raised: AT PRELIMINARY HEARING ON 10-26-2017 AGAIN THROUGH WRIT OF MANDAMUS ON 11-2-2017 (17F15263 CASE NO.

(c) Briefly explain why you are again raising these grounds. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) MY RIGHTS WERE VIOLATED AND I SHOULD HAVE HAD THE SAME EQUAL PROTECTION OF LAW AS ANY OTHER CITIZEN THAT'S WHY I AM RE-RAISING THESE GROUNDS AGAIN.

18. If any of the grounds listed in No.'s 23(a), (b), (c) and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) N/A

19. Are you filing this petition more than one year following the filing of the judgment of conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) N/A

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes _____ No _____

If yes, state what court and case number: N/A

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal: COURT APPOINTED JOHN PRUM DANIEL MARKS FOR TRIAL & DIRECT APPEAL

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack? Yes _____ No X

If yes, specify where and when it is to be served, if you know: _____

23. State concisely every ground on which you claim that you are being held unlawfully. summarize briefly the facts supporting each ground. If necessary you may attach pages stating additional grounds and facts supporting same.

(a) Ground ONE: PETITIONER IS IN CUSTODY IN VIOLATION OF HIS RIGHT TO DUE PROCESS AND FAIR TRIAL AS GUARANTEED BY THE 5TH AND FOURTEENTH AMENDMENT TO THE UNITED STATE CONSTITUTION

Supporting FACTS (Tell your story briefly without citing cases or law.): TRIAL COUNSEL DAMIAN SHEETS WAS INEFFECTIVE FROM THE START WHEN HE TOOK MR. HARRIS CASE MID-WAY OF THE PRELIMINARY HEARING "SEE TRANSCRIPTS" JAN. 16, 2018 35: 7-25 WHERE COUNSEL ADMITTED ON RECORD HE ONLY HAD TIME TO REVIEW TRANSCRIPTS, AND NOT THE WHOLE CASE. FURTHERMORE COUNSEL WAS ALSO INEFFECTIVE FOR NOT ADDRESSING MY WRIT OF MANDAMUS TO THE SUPREME COURT OF NEVADA PRIOR TO TRIAL AND NOT TAKING IT UP ON APPEAL (DIRECT APPEAL) WHICH HE WAS COUNSEL FOR BOTH.

AS STATED ABOVE WHICH DEPRIVED PETITIONER OF HIS RIGHT TO A FAIR AND IMPARTIAL TRIAL AS WELL AS DUE PROCESS OF LAW GUARANTEED BY THE 6TH, 5TH, AND 14TH, AMENDMENT OF THE U.S. CONSTITUTION.

(b) Ground TWO: PETITIONERS SIXTH, FIFTH, AND 14TH, AMENDMENT RIGHTS WERE VIOLATED BY SUPREME COURT OF NEVADA.

Supporting FACTS (Tell your story briefly without citing cases or law.): THE SUPREME COURT OF NEVADA FORCED THIS PETITIONER TO GO THROUGH MY DIRECT APPEAL WITH COUNSEL I HAD CONFLICT WITH, I SHOWED THE SUPREME COURT OF NEVADA COUNSEL WAS INEFFECTIVE FOR NOT PRESENTING AN ISSUE ABOUT MR. HARRIS RIGHTS THROUGH MEMORANDUM, HILL AND BUSTOS STANDARDS. DUE TO COUNSEL FAILURE TO PRESENT THESE CLAIMS ON DIRECT APPEAL, PETITIONER MUST NOW SHOULDER THE ONEROUS BURDEN OF "CAUSE AND PREJUDICE" FOR THE FAILURE TO PRESENT THE ISSUES ON DIRECT APPEAL. BASED ON TRIAL/APPELLATE COUNSEL'S FAILURE BRIEF THEM AT THE PROPER TIME.

(c) Ground THREE: PETITIONERS FIFTH AND FOURTEENTH AMENDMENT RIGHT WAS VIOLATED BY JUDGE ERIC JOHNSON THE TRIAL JUDGE WHEN HE TOLD PETITIONERS LAWYER TO TREAD LIGHTLY

Supporting FACTS (Tell your story briefly without citing cases or law.): ON BODY CAM EVIDENCE

FURTHERMORE, IF JUDGE ERIC JOHNSON WOULD HAVE LET PETITIONERS LAWYER DO HIS JOB, HE SHOULD HAVE ASKED ~~A DISMISSAL ON THE~~ GRANTED HIM FOR A DISMISSAL ON THE BODYCAM GROUNDS, BECAUSE IT SHOW OFFICERS' TELLINGS THE VICTIM IN THIS ALLEDGED CASE... WHAT TO SAY AND HOW TO SAY WHAT HAPPEN.

(d) Ground FOUR: APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESENT MERITIOUS ISSUES ON DIRECT APPEAL VIOLATING PETITIONER'S SIXTH AND FOURTEEN AMENDMENT RIGHT TO THE UNITED STATE CONSTITUTION.

Supporting FACTS (Tell your story briefly without citing cases or law.): PETITIONER WOULD HEREBY INCORPORATE ALL OTHER GROUNDS OF THIS PETITION IN SUPPORT HEREOF ON APPEAL COUNSEL PRESENTED . NONE MERITORIOUS ISSUES. THERE WAS INSUFFICIANT EVIDENCE TO SUSTAIN THE CONVICTION AGAINST MR. HARRIS. APPELLANT COUNSEL SHOULD HAVE PRESENTED THE FOLLOWING MERITORIOUS ISSUES FOR REVIEW ON DIRECT APPEAL, THERE BY PRESERVING THEM FOR FEDERAL REVIEW SHOULD THEY BE UNSUCCESSFUL IN STATE COURT.

. COUNSEL INEFFECTIVE ~~ASSIST~~ ASSISTANCE TOOK PLACE WHEN HE FAIL TO RAISE INSUFFICIENT EVIDENCE TO AND ON THE FIRST DEGREE KIDNAPPING COUNT ON MR. HARRIS APPEAL — PLEASE SEE NEVADA LAW ON KIDNAPPING.

GROUND (FIVE) PETITIONER IS IN CUSTODY IN VIOLATION OF HIS RIGHT TO DUE PROCESS AND A SPEEDY TRIAL WHICH WAS VIOLATED BY THE COURTS WHEN THE RECORD SHOWS MR. HARRIS INVOKED TO HAVE HIS TRIAL IN 60 DAYS

SUPPORTING FACTS: FURTHER MORE TRIAL COUNSEL DIDN'T OBJECT... ON JANUARY 18, 2018 MR. HARRIS ASK TO HAVE TRIAL IN 60 DAYS THE COURT SET A CALENDAR CALL 2.27.2018 AND TRIAL ON 3.19.2018. THE COURTS NEVER SEEN MR. HARRIS IN THEM DATES ABOVE WHICH THE LAW ALLOW MR. HARRIS TO HAVE TRIAL ON INSTEAD MR. HARRIS END UP HAVING HIS CALENDAR CALL 8-EIGHT DAYS AFTER HIS TRIAL DATE WHICH CLEARLY SHOW THE COURT WENT OVER 60 DAYS. AND ~~THE~~ AT THE HEARING COUNSEL ASK FOR MORE TIME OVER MR. HARRIS OBJECTION AND THE JUDGE ERIC JOHNSON STILL BYPASS MR. HARRIS TO DUE PROCESS RIGHTS NOT ONE TIME BUT TWO AND COUNSEL WAS IN ON THE VIOLATION

WHEREFORE, BASED UPON THE ABOVE PETITIONERS CONVICTION AND SENTENCE MUST BE VACATED.

GROUND (Six) PETITIONERS 5TH, AND 14TH AMENDMENT RIGHTS WERE VIOLATED BY THE SUPREME COURT OF NEVADA FOR NOT ALLOWING MR. HARRIS TO HAVE MOTION REVIEWED IN THAT COURTS.

SUPPORTING FACTS: IF THE SUPREME COURT OF NEVADA WOULD OF REVIEWED MR. HARRIS MOTION OF MANDAMUS THE OUTCOME OF THE APPEAL WOULD HAVE BEEN DIFFERENT, PLEASE SEE MOTION 12F15265X.

GROUND (7 SEVEN) MR. HARRIS 6th Amendment Rights were violated when counsel failed to impeach key witness

Supporting facts: TRIAL Counsel WAS ineffective for failing to impeach the key witness with PRIOR INCONSISTANT STATEMENTS. Counsel Admitted IN Appellant's Reply BRIEF THAT Ms. Dotson gave widely diverging VERSIONS OF what took place, despite ~~of~~ not impeaching witness AT TRIAL OR RAISING the INCONSISTENCY ON DIRECT Appeal.

IF this court finds that the key witness statements ARE INCONSISTANT, it should Also find that such FAILURE to IMPEACH Amounts to INEFFECTIVE ASSISTANCE OF Counsel.

GROUND (EIGHT) MR. HARRIS 6th Amendment Rights has been Violated due to Ineffective Counsel.

SUPPORTING FACTS: Appellant counsel failed to send MR. HARRIS All of his discovery which Render Some of MR HARRIS post-conviction challenges. Counsel Also failed to Advise the Appellant of the Right to ASK the Supreme Court of Nevada for A Rehearing under NRAP 40 (A)(1) which MR. HARRIS found out he was time barred when his motion was denied. Had it not been for Appellant Counsel's failure to Advise of that Rule, Motion for Rehearing may have been granted.

Again Appellant's Claim of Ineffective Assistance of Counsel should be granted.

GROUND (9 NINE) Appellant was deprived of his Constitutional Rights of fair trial when witness used knowingly perjured testimony.

SUPPORTING FACTS: The evidence at trial was totally contrary to police Report and Affadavit. Witness changed account of events several times forcing my Attorney to be ineffective in trial. Due to this knowing perjured testimony, Plaintiff was denied due process and a fair trial.

Ground (10 TEN)

The Accumulation of errors in this case violated MR. HARRIS' rights to fair trial and due process

Supporting facts:

See ABove Meritoras grounds and Supporting facts.

WHEREFORE, petitioner prays that the court grant petitioner relief to which he may be entitled in this proceeding.

EXECUTED at Ely State Prison, on the 19 day of the month of FEBRUARY of the year 2020.

Signature of petitioner

Ely State Prison
Post Office Box 1989
Ely, Nevada 89301-1989

Signature of Attorney (if any)

Attorney for petitioner

Address

VERIFICATION

Under penalty of perjury, the undersigned declares that he is the petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and as to such matters he believes them to be true.

Petitioner

Attorney for petitioner

CERTIFICATE OF SERVICE BY MAIL

I, BARRY HICKS, hereby certify pursuant to N.R.C.P. 5(b), that on this 19 day of the month of FEBRUARY, of the year 2021 mailed a true and correct copy of the foregoing **PETITION FOR WRIT OF HABEAS CORPUS** addressed to:

WILLIAM GITTERE WARDEN
Respondent prison or jail official

3849 N. STATE ROUTE 490
ELY, NEVADA 89301
Address

Attorney General
Heroes' Memorial Building
100 North Carson Street
Carson City, Nevada 89710-4717

STEVEN WOLFSON
~~CHAD W. LEWIS~~ E
District Attorney of County of Conviction

200 LEWIS AVE STE #701
LAS VEGAS, NV 89155
Address

Barry Hicks
Signature of Petitioner

AFFIRMATION PURSUANT TO NRS 239B.030

I, BARRY HARRIS, NDOC# 9536,

CERTIFY THAT I AM THE UNDERSIGNED INDIVIDUAL AND THAT THE ATTACHED DOCUMENT ENTITLED HABEAS CORPUS,

DOES NOT CONTAIN THE SOCIAL SECURITY NUMBER OF ANY PERSONS, UNDER THE PAINS AND PENALTIES OF PERJURY.

DATED THIS 19 DAY OF FEBRUARY, 2020.

SIGNATURE: BARRY HARRIS

INMATE PRINTED NAME: BARRY HARRIS

INMATE NDOC # 9536

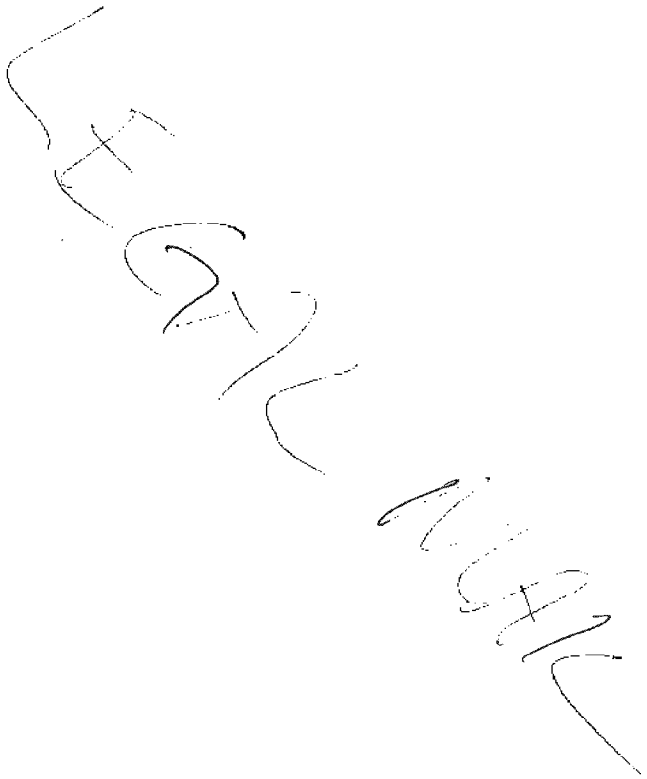
INMATE ADDRESS: ELY STATE PRISON
P. O. BOX 1989
ELY, NV 89301

P.O. BOX 1989
ELY, NEVADA 89301

Las Vegas
MON 23 MAR

STEVEN D. GRIERSON
200 LEWIS AVENUE, 3RD FLOOR
LAS VEGAS, NEVADA 89155-1160

CONFIDENTIAL
LEGAL MAIL



IN THE SUPREME COURT OF THE STATE OF NEVADA

BARRY RASHAD HARRIS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 76774

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of first-degree kidnapping resulting in substantial bodily harm, assault, battery constituting domestic violence, and battery resulting in substantial bodily harm constituting domestic violence. Eighth Judicial District Court, Clark County; Eric Johnson, Judge.

Appellant Barry Harris argues the district court improperly instructed the jury on flight as consciousness of guilt. We agree. A flight instruction is proper if there is admitted evidence of flight and the record demonstrates the appellant "fled with consciousness of guilt and to evade arrest." *Rosky v. State*, 121 Nev. 184, 199, 111 P.3d 690, 699-700 (2005). Here, there is no evidence that Harris fled with consciousness of guilt or to evade arrest. However, we conclude the district court's error does not require reversal of Harris's convictions because sufficient evidence in the record supports these convictions. *See Potter v. State*, 96 Nev. 875, 876, 619 P.2d 1222, 1222-23 (1980) (holding that a flight instruction error requires reversal only if the record indicates a miscarriage of justice or prejudice to the appellant's substantial rights).

Next, Harris contends there was insufficient evidence to support the substantial bodily harm enhancement to his kidnapping conviction because he inflicted bodily harm prior to the kidnapping. We

disagree. In reviewing the sufficiency of the evidence, this court must decide "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Guerrina v. State*, 134 Nev. 338, 343, 419 P.3d 705, 710 (2018) (emphasis omitted) (internal quotation marks omitted). The substantial bodily harm enhancement for a first-degree kidnapping conviction applies "[w]here the kidnapped person suffers substantial bodily harm during the act of kidnapping or the subsequent detention and confinement or in attempted escape or escape therefrom." NRS 200.320(1). Here, the jury considered multiple versions of Harris's altercation with the victim. Based on this evidence, a reasonable juror could have found that the victim suffered substantial bodily harm during the kidnapping. Thus, we will not disturb the bodily harm enhancement on appeal.

Finally, Harris argues that the district court erred in not giving his proffered jury instruction on kidnapping. We disagree. The district court has broad discretion to settle jury instructions, and this court reviews the district court's decision to give or not give a specific jury instruction for abuse of that discretion or judicial error. *Mathews v. State*, 134 Nev. 512, 517, 424 P.3d 634, 639 (2018). Here, Harris's proffered jury instruction misstated the law. *See Mendoza v. State*, 122 Nev. 267, 274-75, 130 P.3d

176, 180-81 (2006). Therefore, we conclude the district court did not err in refusing to give the instruction.

Accordingly, we

ORDER the judgment of conviction AFFIRMED.[1]

Pickering, J.
Pickering

Parraguirre, J.
Parraguirre

Cadish, J.
Cadish

cc: Hon. Eric Johnson, District Judge
Mayfield, Gruber & Sheets
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

[1]Harris also argues that (1) his conviction of first-degree kidnapping resulting in substantial bodily harm should be reversed because the kidnapping charge included a deadly weapon enhancement and he was acquitted of deadly weapon use, (2) the district court erred in admitting the victim's statements to officers under the excited utterance hearsay exception, and (3) cumulative error warrants reversal. We have considered these arguments and conclude they are without merit.