

IN THE SUPREME COURT OF THE STATE OF NEVADA

STEVEN FLOYD VOSS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 54033

FILED

SEP 29 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK


ORDER OF AFFIRMANCE


This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Jerome Polaha, Judge.

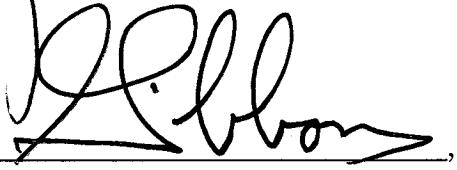
Having reviewed the record on appeal, we conclude that substantial evidence supports the decision of the district court to deny relief and that the district court did not err as a matter of law. Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994). We therefore affirm the denial of the petition for the reasons stated in the attached district

court orders.¹ Accordingly, we

ORDER the judgment of the district court AFFIRMED.²


_____, J.
Saitta


_____, J.
Cherry


_____, J.
Gibbons

cc: Hon. Jerome Polaha, District Judge
Law Office of Thomas L. Qualls, Ltd.
Steven Floyd Voss
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

¹In an order filed on March 4, 2008, the district court dismissed 11 claims raised by appellant because they were procedurally barred, dismissed several proper person motions and petitions, and declined to consider several supplemental petitions filed in proper person, but stated that it would consider claims raised in two supplemental petitions filed by post-conviction counsel. We conclude that the district court did not abuse its discretion in declining to consider the proper person supplemental petitions. NRS 34.750(5). In an order filed on June 5, 2009, the district court denied the remaining claims.

²We have reviewed all documents that appellant has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that appellant has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.

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CR97P2077
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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

STEVEN FLOYD VOSS,

Petitioner,

Case No. CR97P2077

vs.

Dept. No. 3

STATE OF NEVADA,

Respondent.

ORDER CLARIFYING ISSUES TO BE HEARD AT EVIDENTIARY HEARING; ORDERING ATTORNEYS TO SET HEARING DATE; DISMISSING VARIOUS FUGITIVE MOTIONS AND DISMISSING SUCCESSIVE PETITION FOR POST-CONVICTION RELIEF

On November 2, 2007 Mr. Qualls filed on behalf of his client, Steven Voss, a motion entitled, Motion to Consolidate/Clarify Claims. The State did not respond to the motion and it was submitted to the court for decision on November 21, 2007.

In reviewing the motion and the files in this matter, the court discovered two motions that were filed by Mr. Voss in pro per and which

1 have been submitted for decision: on January 5, 2007 a discovery motion
2 and on April 20th a motion to strike the State's motion to dismiss. A second
3 motion was filed on January 5th, concerning Mr. Qualls's motion to withdraw
4 from the case, but that motion was not submitted and the precipitating
5 motion was withdrawn by Mr. Qualls and he continues to represent Mr.
6 Voss.
7

8 As a matter of fact, and more importantly, of court procedure, Mr.
9 Qualls has continuously represented Mr. Voss throughout the time of his
10 appointment since he was not relieved of that responsibility by court order.
11 Consequently, the two said motions under submission are deemed to be
12 fugitive motions and they will not be decided by the court, since only a
13 lawyer may file such motions on behalf of a represented party. In the event
14 they are considered necessary to Mr. Voss's position, his attorney is able to
15 pursue them in proper form. Accordingly said motions are **denied**.
16
17

18 This case, not unlike the boulder of Sisyphus, has rolled up and down
19 and around the courts, spanning in excess of a decade. At every level, the
20 case has returned to its previous point only to be forced back up the hill. The
21 task of this court is to provide the parties with the opportunity to put an end
22 to this perpetual undulation and delay.
23

24 This case began in 1996 with the kidnapping and killing of a woman
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1 named Beverly Baxter. Petitioner was charged with those crimes by
2 Indictment and was tried by a jury which found him guilty of murder and of
3 kidnapping in the 1st degree on June 3, 1998. On July 8, 1998 Petitioner
4 was sentenced to consecutive terms of life without the possibility of parole
5 for his crime of murder and for a concurrent term of 15 years to life with
6 parole possibility for his crime of kidnapping.
7

8 Petitioner appealed and won a reduction of his sentence as the
9 Supreme Court struck the weapon enhancement. On July 13, 2000 this
10 court effectuated an amended sentence by striking the weapon enhancement
11 from the original sentence. Petitioner's judgment of conviction and sentence
12 was amended to concurrent terms of life imprisonment without parole
13 possibility for his crime of murder and a term of 15 years to life for his crime
14 of kidnapping. The date of conviction remained unchanged - July 8, 1998.
15
16

17 Petitioner filed his first petition for post-conviction relief on October 9,
18 2000 and thereafter filed an unauthorized supplemental petition on October
19 20, 2000. The court ordered the State to respond and the State filed an
20 answer on March 12, 2001.
21

22 On March 14, 2001 Petitioner filed an addendum to his original and
23 supplemental petitions. NRS 34.750(5) requires an order from the court to
24 enable a petitioner to file more than a petition and a supplement. The
25
26

1 supplement and the addendum were unauthorized filings by the petitioner
2 and will not be considered by this court.

3 On April 3, 2001 this court appointed counsel and provided counsel
4 with the opportunity to file a supplemental petition per NRS 34.750(5) and it
5 ordered that an evidentiary hearing be set. Although hearing dates were set,
6 they were ultimately vacated and the matter has yet to be heard.
7

8 On August 14, 2001 Petitioner filed another fugitive document entitled
9 'Addendum to Supplemental Petition.' That document will not be considered
10 by the court since Petitioner was represented by counsel throughout the
11 entire time since his conviction.
12

13 On December 10, 2001 Carter King, Esq. was appointed replacement
14 counsel for Petitioner, replacing Scott Edwards, Esq. He caused to be filed a
15 supplemental petition on January 31, 2003 which was responded to by the
16 State on February 11, 2003.
17

18 On May 28, 2003 Petitioner filed two additional fugitive documents
19 entitled an addendum to the supplemental petition and Motion for Petitioner
20 to Act as Co-counsel.
21

22 Since these were filed by Petitioner while he was represented by counsel and
23 since the addendum was not ordered by the court, they being fugitive
24 documents will not be considered.
25
26

1 On October 6, 2003 Petitioner filed another fugitive document entitled
2 'Motion to Produce Case Records.' That motion will not be considered by the
3 court.

4 On March 4, 2004 the court appointed Richard Cornell, Esq. to replace
5 Mr. King as Petitioner's attorney.
6

7 On August 6, 2004 the State filed a motion to dismiss or partially
8 dismiss Petitioner's petition.

9 On December 6, 2004 Petitioner filed in pro per a 59 page motion to
10 strike the State's dismissal motion and his response to it in addition to a
11 motion to show cause and a motion to be permitted to file proper person
12 pleadings. The motion to strike is a fugitive document and will not be
13 considered and the motion to allow petitioner to file proper person pleadings
14 is **denied**. The pleadings are closed. NRS 34.750.
15
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17 On January 6, 2005 Thomas L. Qualls, Esq. was appointed as counsel
18 for Petitioner and is so acting as of this time.

19 On November 2, 2006 Petitioner in pro per filed a document entitled
20 'Petition for a Writ off Habeas Corpus (Post Conviction)' alleging lack of
21 jurisdiction of this court to have tried and sentenced him for the murder and
22 of kidnapping in the 1st degree on June 3, 1998.
23

24 Finally, on November 2, 2007 Mr. Qualls filed on behalf of his client,
25
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1 Steven Voss, the pending and submitted motion entitled, Motion to
2 Consolidate/Clarify Claims. The motion was not responded to by the State.

3 The court recited the pertinent procedural steps from the filing of the
4 original petition back in October, 2000. The court ordered a hearing but
5 that has not taken place. The court hereby directs the attorneys to meet
6 within 10 days of this order and set a hearing date on the original petition
7 and on the supplemental petition.
8

9 The State's motion to dismiss was filed way too late for the court to
10 consider it. The State is free to argue their position at the hearing.
11

12 The standards this Court must follow when considering a post-
13 conviction petition for relief are set out in NRS 34. 720 et seq. and certain
14 relevant case decisions of the Nevada Supreme Court. *State v. Haberstroh*,
15 119 Nev. 173, 69 P.3d 676 (2003) holds that the application of the
16 procedural default rules to post-conviction petitions for writs of habeas
17 corpus is mandatory. *State v. 8th Judicial District Court*, 121 Nev. 225, 112
18 P3d. 1070 (2005) holds that a district judge has a duty to consider whether
19 any or all of the claims made are procedurally barred and the failure to do so
20 is an abuse of discretion. *Hathaway v. State*, 119 Nev. 248, 71 P.3d 503
21 (2003). Also, matters that should have been raised on direct appeal are
22 considered waived in subsequent proceedings. *Franklin v. State*, 110 Nev.
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1 750,752, 877 P.2d 1058 (1994).

2 Petitions that allege ineffective assistance of counsel will generally be
3 given an evidentiary hearing. However, to establish ineffective assistance of
4 counsel or IAC, a claimant must show both that counsels' performance was
5 deficient and the deficient performance prejudiced the defense. *Kirksey v.*
6 *State*, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996). To show prejudice,
7 the claimant must show a reasonable probability that but for counsel's
8 errors the result of the trial would have been different. *Id.* at 988. Judicial
9 review of a lawyer's representation is highly deferential and a claimant must
10 overcome the presumption that a challenged action might be considered
11 sound strategy. *Strickland v. Washington*, 466 U.S. 668 (1984). A petitioner
12 for post-conviction relief is entitled to an evidentiary hearing only if he
13 supports his claims with specific factual allegations that if true would entitle
14 him to relief. *Hargrove v. State*, 100 Nev. 498,502, 686 P.2d 222,225(1984).
15 The petitioner is not entitled to an evidentiary hearing if the factual
16 allegations are belied or repelled by the record. *Id.* at 503. The petitioner has
17 the burden of establishing the factual allegations in support of his petition.
18 *Bejarano v Warden*, 112 Nev. 1466, 1471, 929 P2d 922,925(1996).

19 The constitutional right to effective assistance of counsel extends to a
20 direct appeal. *Kirksey v. State*, 112 Nev. 980, 987, 923 P.2d 1102, 1107
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1 (1996). However, to establish prejudice, the claimant must show that an
2 omitted issue would have had a reasonable probability of success on appeal.
3 *Id* at 998.

4 Those being the standards in post-conviction actions only the following
5 points raised in the three petitions will be entertained: from the original
6 petition only Ground 12 will be considered. Grounds 1 through 11 are
7 dismissed because they should have been raised on appeal. *Franklin, supra.*

8 Grounds 1 through 11 complain about what the State did, or the jury, or
9 the trial court and they are proper issues on appeal. Ground 9 raises a
10 jurisdictional issue but one that ought to have been raised on the appeal,
11 hence it is waived. *Franklin, supra.*

12 Petitioner's unauthorized supplemental petition repeats the original 12
13 issues and raises 3 others. Ground 12 being the same as the original
14 Ground 12 will be heard; Grounds 1 through 11 and 13 through 15 were
15 proper issues for appellate review and will not be heard. That supplement
16 was not authorized, nevertheless all but ground 12 are **dismissed**.

17 Petitioner's supplemental petition prepared by counsel raises three
18 grounds of ineffective assistance of counsel and they can be addressed at the
19 hearing.

20 As for the Petition filed on November 2, 2007, the court hereby
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1 **dismisses** it for several reasons.

2 First, the legal position of the petitioner, that the trial court lacked
3 personal or subject matter jurisdiction based upon the prosecutor not
4 providing exculpatory evidence for the grand jury's consideration is without
5 supporting legal authority and lacks merit.
6

7 Second, the issue of the alleged exculpatory evidence was addressed in
8 the original petition, the first supplemental petition and the second
9 supplemental petition and will be heard at the hearing as part of the
10 ineffective assistance of counsel allegations, however, as an independent
11 ground for an additional writ petition, it is redundant and an abuse of the
12 writ process since it is a successive petition.
13

14 Third, the issue is waived since it was available as an issue for
15 appellate review.
16

17 Fourth, a jurisdiction issue was raised as Ground 10 of the original
18 petition and the law does not countenance piece meal approaches to these
19 matters. The court considers this as an abuse of the writ process. NRS
20 34.810,
21

22 IT IS SO ORDERED.

23 DATED this 28th day of February, 2008.

24 
25 JEROME M. POLAHA
26 DISTRICT JUDGE

FILED

2009 JUN -5 PM 3: 55

HOWARD W. CONYERS

BY  DEPUTY

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE

STEVEN FLOYD VOSS,

Petitioner,

v.

Case No. CR97P2077

THE STATE OF NEVADA,

Dept. No. 3

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND JUDGMENT

This matter came before the Court on Voss's Petition for Writ of Habeas Corpus and the supplemental pleadings submitted by counsel. The Court conducted an evidentiary hearing, and, now being fully advised of the premises, hereby denies the relief requested. All prior orders are incorporated by reference.

Findings of Fact and Conclusions of Law

Voss's moving papers allege a variety of claims for relief. Since each of the claims is premised on ineffective assistance of trial counsel and/or appellate counsel, the Court will begin by addressing the guiding legal standards.

A. The Strickland Standard

Post-conviction claims of ineffective assistance of counsel are evaluated under the two

1 prong test found in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *Accord Warden v.*
2 *Lyons*, 100 Nev. 430, 683 P.2d 504 (1984). The Court will address each prong in turn.

3 To prevail on a claim of actual ineffective assistance of trial counsel, Voss had to
4 demonstrate first that the performance of his trial lawyers, Deputy Public Defenders Maizie
5 Pusich and Cotter Conway, fell below an objective standard of reasonableness. This requires
6 showing that counsel made errors so serious that counsel was not functioning as "counsel"
7 guaranteed by the Sixth Amendment. *Strickland*, 466 U.S. at p. 687. The Court's view of
8 counsel's performance must be highly deferential, with every effort being taken to eliminate the
9 distorting effects of hindsight. *Id.*, pp. 689, 691. Consequently, this Court is mindful that, in
10 making a fair assessment of counsel's performance, it must reconstruct the circumstances of
11 counsel's challenged conduct and evaluate that challenged act or omission from counsel's
12 perspective at the time, while remaining perfectly mindful that counsel is "strongly presumed
13 to have rendered adequate assistance and made all significant decisions in the exercise of
14 reasonable professional judgment." *Id.*, pp. 689-90. The presumption may, however, be
15 rebutted, but only if Voss presented a preponderance of evidence. *Means v. State*, 120 Nev.
16 1001, 1012-13, 103 P.3d 25 (2004)(holding habeas petitioners must first establish the facts that
17 form the basis for his claim of ineffective assistance, and then demonstrate that those facts
18 show that counsel's performance fell below an objective standard of reasonableness).

19 In addition to showing that counsel's performance was deficient, Voss also had to
20 establish that he was prejudiced by that performance. *Strickland*, 466 U.S. at p. 687. This
21 showing requires showing counsel's errors were so serious as to deprive the defendant of a fair
22 trial, a trial whose result is reliable. *Id.* Consequently, Voss had to show that there is a
23 reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding
24 would have been different, that is, when it is the conviction that is being challenged, as it is
25 here, it must be shown that the factfinder would have had a reasonable doubt respecting guilt.
26 *Id.*, pp. 694-95. In making the determination whether the specified attorney error resulted in

1 the required prejudice, the Court must and will consider the totality of evidence, and presume,
2 absent challenge to the judgment on grounds of evidentiary sufficiency, that the trial judge or
3 jury acted according to law. *Id.*

4 Finally, Voss also accused his appellate lawyer of ineffective assistance on appeal, owing
5 primarily to counsel's failure to raise certain claims on appeal. To prevail on that claim, Voss
6 had to prove the facts that form the basis for his claim of ineffective assistance by a
7 preponderance of evidence, then demonstrate that those facts show that counsel's performance
8 fell below an objective standard of reasonableness, and finally show that the omitted appellate
9 claim, if raised on direct appeal, enjoyed a reasonable likelihood of winning reversal of the
10 conviction. *See Kirksey v. State*, 112 Nev. 980, 997-98, 923 P.2d 1102 (1996).

11 B. Application of the Standard

12 In this section, the Court will apply the *Strickland* standard to all the claims of
13 ineffective assistance specifically alleged by Voss in his original petition, but not previously
14 ruled on in prior orders, and the various claims alleged in the supplemental pleadings. *Accord*
15 NRS 34.830(1). The Court will consider them in roughly the order presented, grouping them
16 when appropriate. Many of the claims, however, are pleaded in more than one of the
17 aforementioned documents and will be dealt with accordingly.

18 1. Supplemental Petition Filed by Carter King

19 King's Supplemental Petition alleged seven claims for relief with sub-parts. The Court
20 did not summarily dismiss these claims. Nevertheless, Voss failed to prove he was entitled to
21 relief.

22 Ground One

23 Ground One alleges that trial counsel were ineffective under the Sixth Amendment
24 because they failed to object when the prosecutor proposed to offer the victim's actual remains,
25 i.e. her bones, as trial exhibits. Although the Court is not convinced that an objective standard
26 of reasonableness required trial counsel to object to the proffer of the victim's remains, the

1 prosecutor's maneuver was certainly singular in the Court's experience. But that uniqueness,
2 standing alone, would not create a duty to object. Accordingly, the Court finds that counsels'
3 failure to object was not shown to have been unreasonable under a prevailing professional
4 norm. In addition, the Court finds that, had counsel objected, that objection would have been
5 overruled. The victim's remains were undoubtedly relevant as they were used by the State's
6 experts to explain their testimony and ultimately explain their opinions on the cause, manner
7 and method of death as well as overcome any suggestion that the State could not establish the
8 corpus delicti of murder. Each of the former matters was a fact of consequence in Voss's trial.
9 This is not to say that the actual presence of the victim's remains was not prejudicial, but it is to
10 say that their presence was not substantially more prejudicial than probative. Moreover, Voss
11 failed to demonstrate that photographs or other available evidence would have served the
12 State's appropriate purposes better than the actual remains would. Indeed, the testimony of the
13 State's experts underscore why the actual remains were needed and important for them to
14 explain themselves. In short, counsels' failure to object was not shown to have been prejudicial
15 under the *Strickland* test.

16 Ground Two

17 Ground Two alleges that trial counsel were ineffective under the Sixth Amendment
18 because they failed to hire certain experts—namely, a forensic anthropologist, a forensic
19 archeologist, and other experts—to testify regarding the “evidentiary value for the defense of
20 the victim's remains.” This claim was not proved. First, Ms. Pusich testified credibly that she
21 consulted with expert witnesses, but did not interview the State's experts. While this
22 investigation was limited in scope, it was not shown to have been unreasonable. More
23 important, Voss failed to call the expert witnesses he believed a reasonably competent trial
24 lawyer would have called. As a result, Voss failed to prove there were identifiable experts who
25 would have testified for the defense, and who would have either affirmed some element of the
26 defense case or otherwise contradicted or undermined the testimony presented by the State's

1 experts. In short, Voss failed to prove prejudice under the *Strickland* test.

2 Ground Three

3 Ground Three alleges that trial counsel were ineffective under the Sixth Amendment
4 because they failed to recognize and then investigate 15 possible lines of defense. This claim
5 was not proved. *The Court will consider the items in turn.*

6 (1) Failure to investigate secret witness report suggesting the victim was seen alive after
7 she was believed to have been abducted. Counsel testified credibly that they investigated this
8 subject. Moreover, the trial record shows that the evidence in question was presented. Hence,
9 the Court finds this claim to have been unproved and/or otherwise belied by the trial record.

10 (2) Failure to investigate a possible suspect named Gary Plank. Counsel testified credibly
11 that they investigated this subject. Indeed, Plank's status as the killer was an important part of
12 the defense case. Moreover, the trial record shows that counsel presented evidence designed to
13 prove that Plank, the victim's boyfriend, had both a motive and the opportunity to commit the
14 murder. Hence, the Court finds this claim to have been unproved and/or otherwise belied by
15 the trial record. Related claims will be considered below.

16 (a) Failure to investigate Plank's alibi. While Plank testified at trial that he had
17 been with Rose Holthouse the evening before Ms. Baxter disappeared and spent the entire day
18 she disappeared with a fellow named Sean Lewis, Voss alleged counsel failed to investigate
19 Plank's alibi. Counsel testified credibly that they, with the aid of an experienced investigator,
20 did investigate the alleged alibi, but uncovered no evidence drawing it into question. That
21 testimony was uncontradicted. Moreover, Ms. Holthouse testified at trial, and she confirmed
22 Plank's account of his whereabouts. On the other hand, Mr. Lewis did not testify at trial or at
23 our evidentiary hearing. As a result, it is unknown whether he would confirm or deny Plank's
24 alibi. Absent Mr. Lewis's testimony, specifically testimony that would undermine Plank's alibi,
25 Voss failed to prove prejudice under the *Strickland* test.

26 (b) Failure to investigate the campsite at which Plank claimed he and Ms. Baxter

1 camped. While counsel conceded they did not investigate the campsite, Voss failed to establish
2 just exactly what it was a reasonable investigation would have uncovered. Accordingly, even
3 assuming counsel should have looked into the campsite, Voss failed to prove the allegedly
4 deficient investigation was prejudicially deficient under *Strickland*.

5 (d) Counsel failed to play an answering machine tape recording "indicating that
6 Ms. Baxter had an argument with Plank." Presumably, this recording would demonstrate
7 Plank's ill will and thereby reveal a motive. Since the tape was played to the jury, the Court
8 finds this claim is belied by the record.

9 (e) Counsel failed "to get all of Ms. Baxter's telephone records so that the Defense
10 could figure out if Plank had been calling Beverly prior to her disappearance." Voss failed to
11 prove that a reasonably competent defense attorney would investigate Ms. Baxter's phone
12 records. In addition, Voss failed to prove what these records would have revealed, assuming
13 such records existed. In short, assuming counsel did not look into Ms. Baxter's phone records,
14 Voss failed to prove this omission was prejudicially deficient under *Strickland*.

15 (f) Counsel failed to inform or otherwise explain to the jury that Plank was a
16 viable suspect. While it is unclear whether Plank really was a "viable suspect," it is
17 unmistakably clear that defense counsel tried to show he was, at least insofar as that phrase is
18 commonly understood. Hence, this claim is also belied by the record.

19 (3) Failure to investigate and secure a videotape from the gas station where the victim
20 was believed to have been seen with Voss. Although Voss presented no evidence confirming
21 that his lawyers unreasonably overlooked investigating the existence of a videotape recording,
22 Voss completely failed to prove that such a tape ever existed, and, consequently, he failed to
23 prove that it had exculpatory value. As a result, the Court finds that Voss failed to demonstrate
24 prejudice under the *Strickland* test.

25 (4) Failure to investigate and secure a surveillance videotape from Wells Fargo depicting
26 the area in which the victim's vehicle was found after her disappearance. Presumably, this

1 videotape would have revealed who abandoned the victim's car. As above, Voss presented no
2 evidence confirming that his lawyers unreasonably overlooked investigating the existence of
3 this videotape recording. Also, Voss completely failed to prove that such a tape ever existed.
4 And finally, he failed to prove that the tape would exonerate him. Consequently, he failed to
5 prove that the recording had exculpatory value, or, if presented, would have created a
6 reasonable probability of a different outcome. As a result, the Court finds that Voss failed to
7 demonstrate prejudice under the *Strickland* test.

8 (5) Failure to investigate Barbara Jacobson as a possible suspect and her account of the
9 events the evening before Ms. Baxter disappeared. Voss failed to present any evidence proving
10 or tending to prove that Ms. Jacobson was or could have been a possible suspect. Moreover,
11 Voss failed to prove that a reasonably competent lawyer would have either investigated Ms.
12 Jacobson as a suspect or otherwise investigated her version of the events prior to Ms. Baxter's
13 disappearance. Hence, Voss failed to prove counsels' performance was objectively
14 unreasonable. The Court also notes that Ms. Jacobson testified at trial, but Voss did not
15 identify any portion of her testimony that was false or inaccurate. Consequently, Voss failed to
16 prove that an investigation of Ms. Jacobson would have uncovered any evidence that would
17 have created a reasonable probability of a different outcome. As a result, the Court finds that
18 Voss failed to demonstrate prejudice under the *Strickland* test.

19 (6) Failure to investigate Linda Wheats and Kelly Sue Whitesell. Voss failed to prove
20 that a reasonably competent lawyer would have investigated either of these ladies. Moreover,
21 Voss failed to present any evidence proving or tending to prove what an investigation of either
22 Ms. Wheats or Ms. Whitesell would have uncovered. Hence, Voss failed to prove that the scope
23 of counsels' investigation was objectively unreasonable. The Court also notes that both of these
24 ladies testified at trial, but Voss did not identify any portion of their testimony that was false or
25 inaccurate. Consequently, Voss failed to prove that an investigation would have uncovered any
26 evidence that would have created a reasonable probability of a different outcome. As a result,

1 the Court finds that Voss failed to demonstrate prejudice under the *Strickland* test.

2 (7) Failure to investigate a fellow named "Ziegler" and another man named "Michael
3 Aguire" as possible suspects. Counsel testified credibly that these men were investigated.
4 Indeed, their status a possible suspects, particularly "Zeigler," whose actual name is David
5 Michael Zybert, was fully discussed during the trial. In fact, Mr. Zybert testified at trial.
6 Consequently, to the extent Voss's claim is not belied by the record, he failed to prove counsels'
7 performance was prejudicially deficient under the *Strickland* test.

8 (8) Failure to investigate reports submitted by an unnamed women about "a male
9 stalker in the area of Keystone Plaza." To the extent that the man in question was not "Zeigler,"
10 Voss did not demonstrate that counsels' failure to look into these alleged reports, assuming
11 they existed, was objectively unreasonable, and he failed to prove what exactly that
12 investigation would have uncovered. Consequently, Voss failed to present any evidence that
13 would have created a reasonable probability of a different outcome. As a result, the Court finds
14 that Voss failed to demonstrate prejudice under the *Strickland* test.

15 (9) Conflict of interest. Voss also alleged that Ms. Pusich operated under a conflict of
16 interest, because she and a State witness, Detective John Yaryan, were friends. Voss presented
17 no evidence demonstrating any conflict of interest, or, if there was one, that it adversely
18 affected Ms. Pusich's representation. Accordingly, this claim is denied.

19 (10) Transcript read back. Voss alleged that, during their deliberations, the jury
20 requested that some testimony be read back, but before the task could be accomplished, the
21 jury reached a decision. Now Voss claims counsel should have "insisted" that the read back take
22 place before the verdicts were returned. The Court disagrees. First, Voss presented no evidence
23 proving or tending to prove that a reasonably competent lawyer would have "insisted" on the
24 read back. As a result, Voss failed to prove counsels' failure to do so was objectively
25 unreasonable. Moreover, Voss failed to demonstrate whether the demand would have been
26 allowed by the trial judge, particularly where, as here, the jury had reached a verdict, an action

1 strongly suggesting the read back was no longer necessary. And finally, Voss failed to prove
2 what the read back would have accomplished. In other words, Voss failed to prove that the read
3 back would have created a reasonable probability of a different outcome.

4 (11) The State failed to prove kidnaping. Whether the State presented sufficient evidence
5 to sustain the kidnaping conviction was raised in Voss's direct appeal. That claim was rejected
6 on the merits by the Nevada Supreme Court. *See Voss v. State*, Docket No. 32830.

7 Ground Four

8 Like Ground Three, Ground Four alleges (and repeats) a number of ineffective
9 assistance claims. The Court will consider them in turn.

10 (1) Failure to investigate other suspects: namely, Plank, Edward Vilardi, Ms. Wheats,
11 Ms. Whitesell and Mr. Zybert (i.e., Zybert). This claim is alleged in a very conclusionary
12 manner, and, as such, merely repeats the theme outlined in Ground Three. The relief requested
13 is therefore denied.

14 (2) Failure to obtain and introduce a recording from Ms. Baxter's answering machine. As
15 noted above, the recording was admitted at trial. Hence, this claim is belied by the record.

16 (3) Failure to investigate whether Plank had a fishing license or paid camping fees. Voss
17 failed to present any evidence proving or tending to prove that a reasonably competent lawyer
18 would have investigated these matters. As a result, Voss failed to prove that the scope of
19 counsels' investigation was objectively unreasonable. Likewise, Voss failed to prove what
20 exactly it is that the investigation would have uncovered. Consequently, Voss failed to present
21 any evidence that would have created a reasonable probability of a different outcome. As a
22 result, the Court finds that Voss failed to demonstrate prejudice under the *Strickland* test.

23 (4) Failure to investigate Mr. Vilardi as a possible suspect. Voss failed to present any
24 evidence proving or tending to prove that a reasonably competent lawyer would have suspected
25 Mr. Vilardi let alone investigated him as a suspect. Moreover, as Voss continues to expand the
26 list of possible suspects, the entire notion of a third man (or woman), that is, a viable suspect

1 beyond Plank or Zybert, begins to lose coherence. This is particularly true of Mr. Vilardi who is
2 the only person who claims to have been able to place the victim with another man at a time
3 she is believed to be dead or missing. The Court is confident that, while a reasonably
4 competent lawyer would consider and present evidence of other suspects, as was done here, no
5 reasonably competent lawyer would take the strategy to absurd lengths. As a result, Voss failed
6 to prove that the scope of counsels' investigation of Vilardi was objectively unreasonable.
7 Likewise, Voss failed to prove what exactly it is that the investigation would have uncovered
8 that would solidify Vilardi as a suspect. Consequently, Voss failed to present any evidence that
9 would have created a reasonable probability of a different outcome. As a result, the Court finds
10 that Voss failed to demonstrate prejudice under the *Strickland* test.

11 (5) Failure to investigate Zybert-Zybert. As noted above, Zybert-Zybert was investigated.
12 Voss adds nothing new to that allegation under this hearing. The relief requested is denied.

13 (6) Failure to present the defense Voss wanted. This claim is repelled by the trial record.
14 The relief requested is denied.

15 (7) Failure to put Voss on the witness stand. While it is true that Voss did not testify,
16 that decision was his alone. Moreover, the trial judge addressed Voss outside the presence of
17 the jury as required by *Phillips v. State*, 105 Nev. 631, 782 P.2d 381 (1989), and Voss decided
18 against testifying, a decision he apparently reached with the aid of counsel. In either event,
19 Voss never testified in our evidentiary hearing. As a result, it is unknown whether he, in fact,
20 wanted to testify, and secondly, since he did not testify, it is completely unknown what he
21 would have said or could have said that would have created a reasonable probability of an
22 acquittal. Hence, the Court finds that Voss failed to prove either prong of the *Strickland* test.

23 (8) Failure to have the jury instructed on the defense theory of the case. Given the
24 manner in which this claim is pleaded, it is unclear what instruction it was that Voss wanted.
25 Moreover, even though we have had a hearing, the Court is no more enlightened now.
26 Furthermore, Voss failed to establish which instruction a reasonably competent lawyer would

1 have requested, or why, in the face of that instruction, the jury would not have convicted. In
2 fact, after having reviewed the trial transcript, along with the jury instructions, it seems quite
3 obvious that the jury was well aware of Voss's theory of defense: he did not murder Ms. Baxter,
4 someone else did, and the State failed to prove otherwise beyond a reasonable doubt. Hence,
5 the Court finds that Voss failed to prove either prong of the *Strickland* test.

6 Ground Five

7 Ground Five alleges that counsel were ineffective in failing to file and litigate a motion to
8 suppress Voss's statements to the police and any other evidence derived from those statements.
9 Since Voss litigated this very claim, based on the same evidence, in a post-conviction habeas
10 proceeding filed in his other case, Case No. CR96-1581, the parties elected to admit the
11 transcript of that prior hearing, a hearing in which the key witnesses appeared and were
12 examined, along with the findings of fact and conclusions of law entered in that case. The Court
13 further notes that this instance of ineffective assistance was denied in the former litigation, and
14 that that ruling was affirmed by the Nevada Supreme Court on the merits. *See Voss v. State*,
15 Docket No. 38373. To the extent that the present claim is not barred under principles of res
16 judicata or collateral estoppel, the Court finds that *counsel's* failure to file and litigate the
17 motion to suppress was not objectively unreasonable, because the motion enjoyed no
18 reasonable probability of being granted. Hence, the Court finds that Voss failed to prove either
19 prong of the *Strickland* test.

20 Ground Six

21 Ground Six alleges that Voss's murder conviction and kidnaping convictions were barred
22 by principles of double jeopardy analysis, owing to the fact that he had already been punished
23 in Case No. CR96-1581, which involved the various charges stemming from his unlawful
24 acquisition and use of Ms. Baxter's checking account. Since this claim could have been raised
25 on direct appeal, and Voss failed to allege here good cause excusing that omission, this claim,
26 as pleaded, is dismissed. *See* NRS 34.810(1)(b)(2); NRS 34.810(3).

1 Ground Seven

2 Ground Seven alleged that, in Case No. CR96-1581, he was interviewed by the
3 Department of Parole and Probation without benefit of a *Miranda* warning, that his requests
4 for counsel were ignored by the Department, and that counsel were ineffective because they
5 failed to be present for the interview. Since this claim addresses events in another case, this
6 claim is dismissed.

7 Insofar as this case is concerned, the Department's report reflects the fact that it gave
8 Voss an opportunity to give a statement, and in light of that opportunity he maintained his
9 innocence. Whether Voss believed there was some sort of unfairness or impropriety leading up
10 to his comments is unclear, because, as noted already, he did not testify in our hearing.

11 On the other hand, Conway indicated that he did not attend the interview, and merely
12 told Voss to cooperate with the Department, which he did. Voss presented no evidence proving
13 Conway's actions were objectively unreasonable or that his own actions were coerced.
14 Moreover, Voss failed to demonstrate how, if at all, the result of his sentencing hearing would
15 have been different had Conway participated in the interview or attended it. Furthermore, the
16 record shows that no palpable or highly suspect evidence was admitted during the
17 sentencing hearing, and the contents of Voss's remarks to the Department were not even an
18 issue in that hearing. Hence, the Court finds that Voss failed to prove either prong of the
19 *Strickland* test.

20 2. Ground Twelve of Voss' Original Petition

21 In his original petition, Voss alleged eleven claims of constitutional error, or what are
22 commonly called freestanding claims, that is, claims not alleging an associated claim of
23 ineffective assistance of counsel. Those freestanding claims were addressed in a prior order,
24 which the Court incorporates here by reference.¹

25 _____
26 ¹In an effort to get those freestanding claims in front of the Court for a hearing on the
merits, Mr. Qualls, Voss's current counsel, filed a motion seeking leave to amend the

1 Ground Twelve alleged seven claims of ineffective assistance with subparts. Many of the
2 claims are pleaded in a conclusory manner, and Voss did not offer any evidence on many of
3 those claims. The Court will take them in order.

4 (1) Failure "to investigate other known or likely suspects." The Court addressed this
5 claim above and incorporates those findings here by reference.

6 (2) Failure "to locate and to interview prospective defense witnesses." Since Voss failed
7 to name the omitted witnesses and also failed to call those witnesses at our evidentiary hearing,
8 he failed to prove the claim. Consequently the relief requested is denied.

9 (3) Failure "to investigate petitioner's claims that the police were withholding material
10 exculpatory evidence." Since the evidence is not identified in the pleading, and Voss failed to
11 present any evidence in support of this claim, the relief requested is denied.

12 (4) Failure to file and litigate a motion to suppress pretrial statements to the police and
13 physical evidence derived from those statements. The Court addressed this claim above and
14 incorporates those findings here by reference.

15 (5) Failure to file a pre-trial petition for writ of habeas corpus. While it is true that good
16 lawyers will seek pretrial habeas relief in most murder cases, Voss failed to present any
17 evidence proving that counsels' failure to do so here was objectively unreasonable. Moreover,
18 while the Court cannot predict with any certainty the argument Voss believes his lawyers
19 should have made to achieve habeas relief, the Court nevertheless finds that, insofar as Voss
20 planned to challenge the sufficiency of evidence supporting the charging document, that
21 argument enjoyed no reasonable probability of success. Hence, the Court finds that Voss failed
22 to prove either prong of the *Strickland* test.

23 (6) Failure to object to the testimony of Kaylan Reedy. In salient part, Ms. Reedy

24 _____
25 supplemental petition alleging that Voss's appellate lawyer was ineffective because she failed to
26 raise those freestanding claims as issues in the direct appeal. Consequently, Mr. Qualls alleged
Voss had good cause to amend the petitions and add these new claims. That aspect of the
argument, and related points, will be addressed below.

1 testified, without objection, about some out of court statements made to her by Ms. Baxter
2 indicating Ms. Baxter was afraid of Voss. Counsel's failure to object to this hearsay was
3 objectively unreasonable. Moreover, had counsel objected, that objection would have been
4 sustained and the testimony would have been stricken, because, despite the State's claim to the
5 contrary, no exception to the hearsay rule applies. Nevertheless, the Court finds that counsel's
6 omission was not prejudicial under the *Strickland* test. Whether the testimony in question was
7 stricken or not does not undermine the Court's confidence in the reliability of the convictions.

8 (7) Failure to object to the admission of Ms. Baxter's remains. The Court addressed this
9 claim above and incorporates those findings here by reference.

10 (8) Failure "to represent petitioner in regard to his presentencing investigation and
11 statement." The Court addressed this claim above and incorporates those findings here by
12 reference.

13 (9) Failure to present mitigating evidence at sentencing. Voss failed to identify the
14 information a reasonably competent lawyer would have presented, and failed to present that
15 evidence at our evidentiary hearing. Hence, the Court finds that Voss failed to prove either
16 prong of the *Strickland* test.²

17 (10) Failure to locate and interview potential witnesses from "Dilagas Bar." Since none
18 of the witnesses are named in the moving papers and none of those witnesses appeared for our
19 hearing, Voss failed to prove either prong of the *Strickland* test.

20 (11) Failure to investigate whether the police withheld material exculpatory evidence:
21 namely, a report from a fellow named Vernon Woodward. Woodward testified at trial and his
22 contribution to the case cannot be considered exculpatory. Nevertheless, Voss failed to identify
23 what counsel should have uncovered, and Voss also failed to present any evidence respecting
24

25 ²Under item (9), Voss also mentions (or revisits) a number of items dealing with the
26 scope of counsel's investigation of Gary Plank. Each of these items has been addressed above,
and those findings are incorporated by reference.

1 that evidence, its content, or its reasonably probable effect on the verdicts. As a result, Voss
2 failed to prove either prong of the *Strickland* test.

3 (12) Failure to file and litigate a motion to suppress statements and physical evidence
4 derived from those statements. The Court addressed this claim above and incorporates those
5 findings here by reference.

6 (13) Failure to file a pre-trial petition for writ of habeas corpus. As noted above, Voss
7 failed to present any evidence proving that counsels' failure to do so here was objectively
8 unreasonable, and he presented no evidence proving or tending to prove that the petition, if
9 filed, enjoyed a reasonable probability of being granted. As a result, Voss failed to prove either
10 prong of the *Strickland* test.

11 (14) Next, Voss alludes to trial counsels' failure to file and litigate a motion to suppress
12 physical evidence seized from a motel room he shared with his mother. Although Voss alleges
13 that the search and seizure was unlawful under the Fourth Amendment, he failed to present
14 any evidence proving up his claim. Moreover, the trial record strongly suggests that the police
15 conducted the search after Voss voluntarily consented to it. Accordingly, the Court finds that
16 counsels' failure to file and litigate the motion to suppress was not objectively unreasonable. In
17 addition, since the motion enjoyed no reasonable probability of being granted, he failed to
18 prove prejudice. Accordingly, the Court also finds that Voss failed to prove either prong of the
19 *Strickland* test.³

20 (15) Next, Voss revisits his allegations of ineffective assistance stemming from counsels'
21 failure to present mitigating witnesses and their failure to involve themselves with his interview
22 with the Department. These matters have been addressed already, and those findings are
23 incorporated by reference.

24
25 ³In conjunction with this claim, Voss also revisits a number of other claims, such as the
26 admissibility of Ms. Reedy's testimony and the admissibility of Ms. Baxter's remains as
exhibits. These matters have been addressed already.

1 (16) Next, Voss alleges that, because he wore a leg restraint during trial and seated
2 jurors saw it, along with the fact that there were several armed security personnel present
3 during his trial, his right to a fair trial was denied. First, the Court notes that nothing in the
4 trial record shows whether Voss wore such a device. By the same token, it appears that trial
5 counsel did not take issue with Voss wearing it, or, if they did, they did not put it on the record.
6 In either event, the Court will assume Voss did wear the device. Nevertheless, Voss presented
7 no evidence showing that any seated juror saw (or heard) the device, and, absent such proof,
8 the Court will not assume any seated juror saw (or heard) it. Similarly, while the Court will
9 assume that security personnel were present during Voss's trial, the Court will not assume,
10 absent proof of some untoward actions by the security personnel, that Voss suffered any
11 prejudice from the mere presence of those individuals in courtroom. Accordingly, insofar as
12 Voss claims a denial of his constitutional right to a fair trial, due process, or effective assistance
13 of counsel, those claims were not proved.

14 (17) Finally, Voss claims that the trial judge abused her discretion in admitting the
15 testimony of Linda Foust. First, Voss does not identify the testimony in question. Second,
16 whether the trial judge erred in admitting testimony is an issue that could have been raised on
17 direct appeal; consequently, this claim must be dismissed unless Voss pleaded facts
18 demonstrating both good cause and prejudice. NRS 34.810. He did not do so. Accordingly, this
19 claim is dismissed. Moreover, Voss presented no evidence proving or tending to prove that a
20 reasonably competent appellate lawyer would have challenged the admissibility of any part of
21 Ms. Foust's testimony. Accordingly, Voss failed to prove appellate counsel was ineffective.

22 3. The Supplemental Petition Filed by Mr. Qualls

23 As noted above, Voss, in his original petition, alleged eleven claims of constitutional
24 error, or what are commonly called freestanding claims, that is, claims not alleging an
25 associated claim of ineffective assistance of counsel. Those freestanding claims were addressed
26 in a prior order, which the Court incorporates here by reference.

1 In an effort to get those freestanding claims in front of the Court for a hearing on the
2 merits, Mr. Qualls filed a motion seeking leave to amend the supplemental petition alleging
3 that Voss's appellate lawyer was ineffective because she failed to raise those freestanding claims
4 as issues in the direct appeal. The State opposed the motion. The Court, finding good cause,
5 granted Voss's motion over the State's objection. Voss has now had a full and fair opportunity
6 to present those new claims. None of those claims warrant relief.

7 (1) Grounds (1)-(4), (7)-(9) and (11). Voss abandoned these claim at the evidentiary
8 hearing or otherwise dismissed them. Accordingly, the relief requested is denied.

9 (5) This claim alleges that appellate counsel was ineffective by failing to argue on appeal
10 that the convictions must be reversed because Ms. Reedy presented hearsay testimony not
11 within an exception. As above, the Court finds that a reasonably competent appellate lawyer
12 would have raised the hearsay-confrontation claim, despite the fact it was not preserved by a
13 timely objection, and would have argued, as a matter of plain error, that reversal was
14 warranted. This Court finds, however, that, even though the claim could have been raised, it
15 enjoyed no reasonable probability of success because the error, if any, was harmless beyond a
16 reasonable doubt. Hence, the Court finds that appellate counsel's failure to raise the claim was
17 not prejudicially deficient under *Strickland* or *Kirksey*.

18 (6) This claim alleges that appellate counsel should have argued on appeal that the
19 convictions must be reversed because Ms. Baxter's remains were admitted as exhibits. Unlike
20 the preceding claim, the Court is not persuaded that a reasonably competent appellate lawyer
21 would have raised this claim here where she would have to demonstrate plain error, mindful
22 that admission of the exhibits was within the discretion of the trial judge. Consequently,
23 appellate counsel would need to show an abuse of that discretion. For the reasons stated above,
24 and despite the fact that actual human remains are rarely used as exhibits, the Court finds
25 appellate counsel's failure to raise and brief this issue was not objectively unreasonable in this
26 case. The Court further finds that, had the claim been raised, it did not enjoy a reasonable

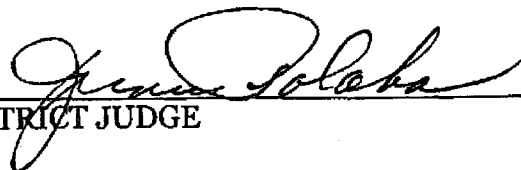
1 likelihood of winning a reversal whether taken alone or in conjunction with the omitted
2 hearsay-confrontation claim discussed above.

3 (10) This claim alleges that appellate counsel was ineffective because she failed to argue
4 on appeal that the convictions must be reversed due to the State's failure to prove jurisdiction.
5 Specifically, Voss alleges that appellate counsel should have argued for reversal on the theory
6 that neither the kidnaping nor the murder were committed in Washoe County, and/or on the
7 theory that Ms. Baxter was not "kidnaped and transported out of Washoe County, for the
8 purpose of murdering the alleged victim." First, Voss presented no evidence demonstrating
9 that a reasonably competent appellate lawyer would have raised the claims mentioned here.
10 Accordingly, the Court finds appellate counsel's failure to raise and brief this issue was not
11 objectively unreasonable in this case. The Court further finds that, had the claim been raised, it
12 did not enjoy a reasonable likelihood of winning a reversal because the trial record belies the
13 claim on the merits.

14 Judgment

15 It is therefor the judgment and order of the Court that Voss's Petition for Writ of Habeas
16 Corpus (Post-Conviction) and other supporting pleadings are denied.

17 DATED this 3rd day of June, 2009.

18
19 
20 DISTRICT JUDGE