

IN THE SUPREME COURT OF THE STATE OF NEVADA

D’VAUGHN KEITHAN KING,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Case No. 74703

District Court Case No.
CR12-1160

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Appeal from an Order Dismissing Post-Conviction Petition

Honorable David Hardy, Second Judicial District Court

APPELLANT’S REPLY BRIEF

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RULE 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that judges of this court may evaluate possible disqualification or recusal:

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ARGUMENT IN REPLY

I. The District Court erred in concluding that Ground I of the Petition and Supplemental petition did not meet or exceed the standard in *Hargrove*.

Mr. King was denied due process of law pursuant to the Fifth and Fourteenth Amendments to the United States Constitution when the District Court abused its discretion and dismissed Ground I of the Petition and Supplemental Petition finding it was belied by the record and failing to grant an evidentiary hearing.

This Court has already articulated the standard for to receive an evidentiary hearing on claims in a post-conviction petition for writ of habeas corpus in *Hargrove v. State*, 100 Nev. 498 (1984). In *Hargrove*, the Court found that a petitioner cannot make bare or naked allegations. *Hargrove* at 100 Nev. 502. The petitioner must support his allegations with factual allegations that if true would entitle him to relief to receive an evidentiary hearing. *Id.*

This Court later held that a petitioner for post-conviction relief cannot rely on conclusory claims for relief but must make specific factual allegations that if true would entitle him to relief. *Evans v. State*, 117 Nev. 609, 621, 28 P.3d 498, 507 (2001). The petitioner is not entitled to an evidentiary hearing if the record belies or repels the allegations. *Id.* It is proper to raise claims of ineffective assistance of trial or appellate counsel initially in a timely, first post-conviction petition for a writ of habeas corpus. *Id.* at 117 Nev. 622.

The State in its answering brief now alleges that Ground I was somehow inadequately pled but did not make the argument below. Indeed, the State simply answered by denying all factual allegations without further comment. AA130. The Court did not find Ground I of the supplemental petition inadequately pled, the Court found it belied by the record. AA135. The State does not take this issue head on in its answering brief and simply regurgitates the District Court Order finding that not every avenue of mitigation needs to be explored. The Court's order is an abuse of discretion because something cannot be belied by the record if it is new evidence that has not been presented. In this case Dr. Martha Mahaffey's evaluation was mitigation that was not previously presented. Therefore, by definition it cannot be belied by the record. The Court's finding to the contrary was an abuse of discretion and should be reversed for further proceedings. There was no argument by the State in the District Court that the claim was inadequately pled nor a finding made by the court that the claim was inadequately pled. Therefore, pursuant to *Hargrove* and *Evans*, the claim was entitled to an evidentiary hearing. The Court's finding was an abuse of discretion and not supported by the record.

CONCLUSION

The District Court erred in dismissing Appellant's Petition for Writ of Habeas Corpus. The District Court's findings of fact and conclusions of law

should be reversed and Appellant should be granted an evidentiary hearing on these matters.

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Reply brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because: This Reply Brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 font size;

2. I further certify that this opening complies with the page- or type-volume limitations of NRAP 32(a)(7) because it is:

[X] Proportionately spaced, has a typeface of 14 points or more and does not exceed 15 pages

3. Finally, I hereby certify that I have read this opening brief and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this reply brief complies with all applicable Nevada Rule of Appellate Procedure including NRAP 28(e)(1), which every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the

Nevada Rules of Appellate Procedure.

Dated this 16th Day of July, 2018

/S/ TROY JORDAN
TROY JORDAN
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CERTIFICATE OF SERVICE

I hereby certify that I, Troy Jordan, on the 16th Day of July, 2018, served the foregoing Opening Brief by electronically filing the document with notice to:

Washoe County District Attorney

Nevada Attorney General

/S/ TROY JORDAN

TROY JORDAN

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