

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRANDON JEFFERSON,)
)
Appellant,)
)
vs.)
)
THE STATE OF NEVADA,)
)
Respondent.)
_____)

DOCKET NUMBER: 70732

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APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

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

Attorney of record for Appellant: Matthew Lay, Esq.

Corporation: Nguyen & Lay.

There are no parent corporations involved in the instant appeal.

Dated this 09th day of January, 2017.



Matthew Lay, Esq.
Nevada Bar Identification No. 12249
Attorney for Appellant

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ROUTING STATEMENT

NRAP 28(a)(5) mandates that an appellant's brief contain a routing statement setting forth the following:

whether the matter is presumptively retained by the Supreme Court or assigned to the Court of Appeals under NRAP 17, and citing the subparagraph(s) of the Rule under which the matter falls.

NRAP 17(b) provides that the Court of Appeals "shall hear and decide only those matters assigned to it by the Supreme Court." NRAP 17(b)(1) further provides that, "[a]ll postconviction appeal except those in death penalty cases and cases that involve a conviction for any offenses that are a category A felony ..." are presumptively assigned to the Court of Appeals.

The foregoing Appellant's Opening brief should be assigned to the Nevada Supreme Court, because Mr. Jefferson is appealing denial of a post-conviction petition, and his case involves convictions for category A felonies.

Dated this 09th day of January, 2017.



Matthew Lay, Esq.
Nevada Bar Identification No. 12249
Attorney for Appellant

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STATEMENT OF JURISDICTION

This Court has jurisdiction over the present appeal pursuant to NRS 34.575(1). This appeal arises from the district court’s entry of Findings of Fact, Conclusions of Law and an Order on August 03, 2016. Appellant’s Appendix, Volume II, pages 191-197 (hereinafter referenced “[Volume Number] [Page Number]”).

STATEMENT OF ISSUE PRESENTED FOR REVIEW

- I. **THE DISTRICT COURT ERRED BY DENYING MR. JEFFERSON'S POST-CONVICTION PETITION AND SUPPLEMENT WITHOUT AN EVIDENTIARY HEARING.**
- II. **THE DISTRICT COURT ABUSED ITS DISCRETION BY FINDING THAT MR. JEFFERSON'S TRIAL AND APPELLATE COUNSEL DID NOT ACTIVELY REPRESENT CONFLICTING INTERESTS THAT ADVERSELY AFFECTED COUNSEL'S PERFORMANCE.**
- III. **THE CUMULATIVE EFFECT OF TRIAL COUNSEL'S ERRORS VIOLATED MR. JEFFERSON'S RIGHT TO A FAIR TRIAL.**

STATEMENT OF PROCEDURAL HISTORY

On November 16, 2011, the State of Nevada filed a Second Amended Information charging the Appellant, Brandon Jefferson, with six (6) counts of sex assault on a minor under fourteen, a category A felony in violation of NRS 200.364 and 200.366, and five (5) counts of lewdness with a minor under fourteen, a category A felony in violation of NRS 201.230. AA 8-12. Jurors convicted Mr. Jefferson on Counts I, IX, and X, sex assault on a minor under fourteen, and Counts II and IV, lewdness with a minor under fourteen. AA 13-16. Jurors acquitted Mr. Jefferson of all other counts. AA 13-16.

On October 30, 2012, the State filed the Judgment of Conviction. AA 17-19. The Court sentenced Mr. Jefferson to thirty-five years to life on Count I; ten years to life on Count IV, concurrent; thirty-five years to life on Count IX, consecutive to Counts I and IV; and thirty-five years to life on Count X, concurrent with Count IX, plus fees, restitution and lifetime supervision. Id.

On July 29, 2014, the Nevada Supreme Court entered an Order of Affirmance. AA 21-36. On September 09, 2014, the Court issued Remittitur. AA 38. On October 02, 2014, Mr. Jefferson filed a proper person, post-conviction petition for writ of habeas corpus. 39-120. On December 22, 2015, the undersigned filed a supplemental post-conviction petition. AA 121-145.

STATEMENT OF FACTUAL HISTORY

The State alleges that, on or between July and September of 2010, Mr. Jefferson sexually assaulted and committed lewdness with C.J., a minor under the age of fourteen. AA 8-12.

SUMMARY OF THE ARGUMENT

The district court abused its discretion by denying Mr. Jefferson's supplemental post-conviction petition without an evidentiary hearing. Additionally, the district court's ruling was arbitrary, because it was not supported by substantial evidence. Specifically, attorneys from the Clark County Public Defender's Office continued to represent Mr. Jefferson at trial and on appeal despite the fact that he filed a complaint with the State Bar of Nevada against his public defender.

ARGUMENT

I. THE DISTRICT COURT ERRED BY DENYING MR. JEFFERSON'S POST-CONVICTION PETITION AND SUPPLEMENT WITHOUT AN EVIDENTIARY HEARING.

A petitioner is entitled to an evidentiary hearing if he raises claims supported by sufficient factual allegations that, if true, would entitle him to relief and that are not belied by the record. Toston v. State, 127 Nev. Adv. Rep. 87, 267 P.3d 795, 799 (2011) (citing Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984)).

Here, the district court erred by denying Mr. Jefferson an evidentiary hearing. Mr. Jefferson was entitled to an evidentiary hearing because, as demonstrated below, his claims were supported by sufficient factual allegations that, if true, entitled him to relief, and his claims were not belied by the record.

Therefore, the district court should have ordered an evidentiary hearing pursuant to Toston.

However, the district court ultimately found that Mr. Jefferson's petition and supplement could be resolved without an evidentiary hearing, because "... Jefferson has not shown error based on a conflict of interest because he has not shown that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance'" AA 195.

II. THE DISTRICT COURT ABUSED ITS DISCRETION BY FINDING THAT MR. JEFFERSON'S TRIAL AND APPELLATE COUNSEL DID NOT ACTIVELY REPRESENT CONFLICTING INTERESTS THAT ADVERSELY AFFECTED COUNSEL'S PERFORMANCE.

A claim of ineffective assistance of counsel presents a mixed question of law and fact that is subject to independent review. Lader v. Warden, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005) (citing Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996)). This Court reviews a district court's denial of a writ petition under an abuse of discretion standard. County of Clark v. Doumani, 114 Nev. 46, 53, 952 P.2d 13, 17 (1998). "If a discretionary act is supported by substantial evidence, there is no abuse of discretion." Id. (citing Enterprise Citizens v. Clark Co. Comm'rs, 112 Nev. 649, 918 P.2d 305 (1996)).

The Sixth Amendment to the United States Constitution guarantees that, "in all criminal prosecutions, the accused shall enjoy the right . . . to have the

Assistance of Counsel for his defense.” U.S. Const. amend. VI. The right to confrontation is incorporated in the Fourteenth Amendment and, therefore, available in state proceedings. Olden v. Kentucky, 488 U.S. 227, 232, 109 S. Ct. 480, 102 L. Ed. 2d 513 (1988) (per curiam) (citing Pointer v. Texas, 380 U.S. 400 (1965)); see also Cox v. State, 102 Nev. 253, 256, 721 P.2d 358, 360 (1986)).

“[T]he right to counsel is the right to the effective assistance of counsel.”

Strickland v. Washington, 466 U.S. 668, 686 (1984) (quoting McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970)). The Sixth Amendment right to counsel attaches when “judicial proceedings have been initiated” against a defendant. Coleman v. State, 109 Nev. 1, 4, 846 P.2d 276, 278 (1993) (citing Brewer v. Williams, 430 U.S. 387, 398 (1977)). Attorneys appointed to represent defendants should be competent. Ex parte Kramer, 61 Nev. 174, 207, 122 P.2d 862, 876 (1942). The ineffective assistance of counsel denies a defendant of due process. Id.

In Nevada, the appropriate vehicle for reviewing whether counsel was effective is a post-conviction relief proceeding. McKague v. Warden, 112 Nev. 159, 164 n.4, 912 P.2d 255, 258 n.4 (1996). In order to assert a claim for ineffective assistance of counsel, a defendant must prove that he was denied “reasonably effective assistance” of counsel by satisfying the two-pronged test enunciated in Strickland. 466 U.S. at 687; see State v. Love, 109 Nev. 1136, 1138,

865 P.2d 322, 323 (1993). Under Strickland, the defendant must show that his counsel's representation fell below an objective standard of reasonableness, and 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 697. "[A] reasonable probability is a probability sufficient to undermine confidence in the outcome." Wiggins v. Smith, 539 U.S. 510, 533 (2003); see Ennis v. State, 122 Nev. 694, 137 P.3d 1095, 1102 n.44 (2006). "A court may evaluate the questions of deficient performance and prejudice in either order and need not consider both issues if the defendant fails to make a sufficient showing on one." Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004) (citing Strickland, 466 U.S. at 689).

"In order to avoid the distorting effects of hindsight," a reviewing court begins the evaluation of an ineffective assistance of counsel claim "with a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Ennis, 122 Nev. 694, 137 P.3d at 1102 (quoting Strickland, 466 U.S. at 689). A petitioner must prove the "factual allegations underlying his ineffective assistance of counsel claim by a preponderance of the evidence." Id. at 1012, 103 P.3d at 33. The benchmark for assessing claims of ineffective assistance of counsel is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as

having produced a just result.’” Paine v. State, 110 Nev. 609, 620, 877 P.2d 1025, 1031 (1994) (quoting Strickland, 466 U.S. at 686).

Defense counsel has a duty to “make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” Love, 109 Nev. At 1138, 865 P.2d at 323 (quoting Strickland, 466 U.S. at 691).

Here, Mr. Jefferson’s trial and appellate counsel actively represented conflicting interests that adversely affected counsel’s performance, because Mr. Jefferson filed a bar complaint against his trial attorney prior to trial. Consequently, Mr. Jefferson trial and appellate counsel represented Mr. Jefferson despite the existence of a concurrent conflict of interest.

The Sixth Amendment guarantees a criminal defendant the right to conflict-free representation. Coleman v. State, 109 Nev. 1, 3, 846 P.2d 276, 277 (1993) (citing Clark v. State, 108 Nev. 324, 831 P.2d 1374 (1992)). When counsel is burdened by an actual conflict of interest, “counsel breaches the duty of loyalty, perhaps the most basic of counsel’s duties.” Strickland, 466 U.S. at 692. The Court of Appeals for the Ninth Circuit has noted “an attorney is ‘not inclined to seek out and assert his own prior ineffectiveness.’” United States v. Del Muro, 87 F.3d 1078, 1080 (9th Cir. 1996) (quoting Abbamonte v. United States, 160 F.3d 922, 925 (2nd Cir. 1998)).

Similarly, Nevada Rule of Professional Conduct 1.7(a) prohibits lawyers from representing a client if the representation involves a concurrent conflict of interest. Nev. R. Prof. Conduct 1.7(a). Under Rule 1.7(a)(2), a “concurrent conflict of interest” exists if “there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to ... a personal interest of the lawyer.” Nev. R. Prof. Conduct 1.7(a)(2). Pursuant to Rule 1.7(b)(4), the attorney must also secure the informed consent of each affected client in writing before engaging in the dual representation. Nev. R. Prof. Conduct 1.7(b)(4).

Additionally, Rule 1.10(a) provides that, while lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, “unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.”

Where a defendant claims error based on counsel’s conflict of interest, he must show that counsel “‘actively represented conflicting interests’ and that ‘an actual conflict of interest adversely affected his lawyer’s performance.’” Leonard v. State, 117 Nev. 53, 63, 17 P.3d 397, 404 (2001) (quoting Strickland, 466 U.S. at 692). “‘Conflict of interest and divided loyalty situations can take many forms, and

whether an actual conflict exists must be evaluated on the specific facts of each case. In general, a conflict exists when an attorney is placed in a situation conducive to divided loyalties.’’ Clark, 108 Nev. at 326, 831 P.2d at 1376 (quoting Smith v. Lockhart, 923 F.2d 1314, 1320 (8th Cir. 1991)). A defendant who establishes an actual conflict ‘‘need only show that some effect on counsel’s handling of particular aspects of the trial was likely.’’ Del Muro, 87 F.3d at 1078 (quoting United States v. Miskinis, 966 F.2d 1263, 1268 (9th Cir. 1992)).

Where counsel faces a conflict of interest, a defendant may continue to be represented by that attorney if he makes a voluntary, knowing, and understanding waiver of conflict-free representation. Kabase v. Eighth Judicial Dist. Court, 96 Nev. 471, 473, 611 P.2d 194, 195 (1980). The United States Supreme Court has stated that a valid waiver of a fundamental constitutional right ordinarily requires ‘‘an intentional relinquishment or abandonment of a known right or privilege.’’ Gallego v. State, 117 Nev. 348, 368, 23 P.3d 227, 241 (2001) overruled on other grounds by Nunnery v. State, 127 Nev. Adv. Rep. 69, *45-*46 n.12, 263 P.3d 235 (2011) (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). Thus, when a criminal defendant offers to waive objections to a conflict, the district judge ‘‘should fully explain ... the nature of the conflict, the disabilities which it may place on counsel in his conduct of the defense, and the nature of the potential claims which appellants will be waiving.’’ Kabase, 96 Nev. at 473, 611 P.2d at

195-96 (citing United States v. Arredo-Sarmiento, 524 F.2d 591, 593 (2d Cir. 1975), United States v. Garcia, 517 F.2d 272, 278 (5th Cir. 1975), and Zuck v. Alabama, 588 F.2d 436, 440 (5th Cir. 1979)). However, “[c]ourts should indulge every reasonable presumption against waiver and should not presume acquiescence in the loss of fundamental rights.” Gallego, 117 Nev. at 368, 23 P.3d at 241 (citing Barker v. Wingo, 407 U.S. 514, 525-26 (1972)).

When a defendant knowingly, intelligently, and voluntarily waives her right to conflict-free representation, the waiver is binding on the defendant throughout trial, on appeal, and in habeas proceedings. Ryan v. Eighth Judicial Dist. Court, 123 Nev. 419, 430, 168 P.3d 703, 711 (2007) (citing Gomez v. Ahitow, 29 F.3d 1128, 1135-36 (7th Cir. 1994) (holding that where the defendant knowingly and intelligently waives the right to conflict-free counsel, the waiver precludes claims of ineffective assistance of counsel based on the conflict)). In Ryan, the Nevada Supreme Court considered whether the district court abused its discretion when it refused to substitute in counsel as defendant's counsel of choice. Id. at 421, 168 P.3d at 705. The defendant and her husband were accused of murdering their roommate, stuffing her body in the trunk of their vehicle, and setting the vehicle on fire to cover up the alleged crimes. Id. The defendant sought to have an attorney represent her at trial whose partner already represented her codefendant. Id.

The law firm drafted a conflict-waiver letter, which both defendants signed. Ryan, 123 Nev. at 423, 168 P.3d at 706. The conflict-waiver letter stated, in pertinent part, the following:

(1) neither defendant has implicated the other in the crimes charged; (2) after a thorough review of discovery and lengthy discussions with multiple counsel, neither defendant intends to plead guilty or cooperate with the State; (3) a joint defense agreement has been prepared to be executed by both defendants and both attorneys; (4) either defendant's decision to cooperate with the State might change the firm's ability to continue representation; (5) in the event of a serious conflict or disagreement, the firm would be required to withdraw and represent neither defendant; and (6) the firm's withdrawal would be 'inconvenient and potentially adverse to each [defendant],' but the defendants understood that the 'present benefits of dual representation outweigh this contingent problem.'

Id.

The district court held several hearings on the defendant's motion for substitution. Ryan, 123 Nev. at 423, 168 P.3d at 706. Additionally, the district court appointed advisory counsel to speak with the defendant about the ramifications of dual representation. Id. Moreover, the district court canvassed both defendants regarding the ramifications of dual representation. Id. at 424, 168 P.3d at 706. Ultimately, however, the district court ruled that there was "an actual or serious potential conflict inherent in the dual representation, and issued a written order denying [the defendant's] request for substitution of counsel." Id. at 425, 168 P.3d at 707. Consequently, the defendant filed a petition for a writ of mandamus

challenging the district court's order denying the defendant's motion to substitute counsel. Id. at 421, 168 P.3d at 705.

The Nevada Supreme Court reasoned that a district court "has broad discretion to balance a non-indigent criminal defendant's right to choose her own counsel against the administration of justice." Ryan, 123 Nev. at 428, 168 P.3d at 709. Therefore, the Supreme Court concluded that a district court must honor a criminal defendant's voluntary, knowing, and intelligent waiver of conflict-free representation so long as the conflicted representation will not interfere with the administration of justice. Id. at 422-23, 168 P.3d at 705. Additionally, the Nevada Supreme Court concluded that before engaging in dual representation, the attorney must advise the criminal defendant of his right to consult with independent counsel to review the potential conflicts of interest posed by the representation. Id. at 422, 168 P.3d at 705. And, if the defendant chooses not to seek independent counsel, then the defendant must expressly waive his right to do so before the defendant's waiver of conflict-free representation can be valid. Id. Ultimately, the Court granted the defendant's petition, and issued a writ directing the district court to canvass both defendants to determine whether they knowingly, intelligently, and voluntarily waived their right to conflict-free representation. Id. at 421, 168 P.3d at 705.

In Middleton v. Warden, 120 Nev. 664, 664, 98 P.3d 694, 695 (2004), the Nevada Supreme Court considered whether a district court erred in denying a defendant's post-conviction petition for a writ of habeas corpus. The defendant was convicted of two counts of first-degree murder, sentenced to death. Id. at 665, 98 P.3d at 695. The Court affirmed the defendant's murder convictions and death sentences on direct appeal. Id. The defendant filed a post-conviction habeas corpus petition in the district court. Id. The district court appointed public defenders to represent the defendant. Id. Later, the district court removed the public defenders as the defendant's counsel due to a perceived conflict of interest. Id. The district court subsequently appointed private attorneys to represent the defendant. Id. The district court denied the defendant's post-conviction petition for a writ of habeas corpus. Id. The defendant sought review of the district court's order denying his petition. Id. at 664, 98 P.3d at 695. One of the private attorneys appointed by the district court represented the defendant on appeal to the Court. Id. at 665, 98 P.3d at 695.

The Nevada Supreme Court found that the defendant's appointed private attorney had "repeatedly violated [the Nevada Supreme Court's] orders and procedural deadlines," and "the work product he ultimately submitted was wholly substandard and unacceptable." Middleton, 120 Nev. at 665, 98 P.3d at 695. Therefore, the Court removed the appointed private attorney as counsel, vacated

the district court order denying the defendant's habeas corpus petition, and remanded with an instruction to the district court to appoint new post-conviction counsel to represent the defendant. Id. at 669, 98 P.3d at 698. More importantly, however, in remanding the case to the district court, the Nevada Supreme Court noted, "[b]ecause the [public defender] represented [the defendant] in his direct appeal and because post-conviction claims respecting that representation may again be presented below, the [public defender] should not be appointed as [the defendant's] new post-conviction counsel." Id. at 665 n.3, 98 P.3d at 695 n.3.

In United States v. Del Muro, 87 F.3d 1078, 1080 (9th Cir. 1996), the United States Court of Appeals for the Ninth Circuit considered whether a federal district court erroneously denied a defendant's request for the appointment of substitute counsel. The defendant charged under federal law with falsely claiming to be a United States citizen. Id. A jury found the defendant guilty, and he was sentenced to a term of imprisonment. Id. The defendant filed a motion for new trial, claiming trial counsel had rendered ineffective assistance by failing to interview or subpoena witnesses suggested by the defendant. Id. The defendant requested that the federal district court appoint substitute counsel to present the motion on his behalf. Id. The federal district court denied the defendant's request. Id. The federal district court held an evidentiary hearing on the motion at which it reviewed declarations and heard live testimony of the potential witnesses. Id. The federal district court

required trial counsel to examine the potential trial witness who testified, and argue that counsel's own failure to investigate and call this witness and two others prejudiced the defendant's case. Id. The federal district court denied the motion on the ground that the witness' testimony would not have affected the outcome of the trial. Id. On appeal, the defendant argued that the federal district court created an inherent conflict of interest by forcing trial counsel to prove his own ineffectiveness, and thereby deprived the defendant of his Sixth Amendment right to effective assistance of counsel. Id.

The Ninth Circuit found that "[t]here was an actual, irreconcilable conflict between [the defendant] and his trial counsel at the hearing on the motion for new trial." Del Muro, 87 F.3d at 1080. Specifically, the Court found that, "[w]hen [the defendant's] allegedly incompetent trial attorney was compelled to produce new evidence and examine witnesses to prove his services to the defendant were ineffective, he was burdened with a strong disincentive to engage in vigorous argument and examination, or to communicate candidly with his client." Id. Thus, this conflict was "likely to affect counsel's performance." Id. Therefore, the Ninth Circuit vacated the sentence and remanded the case to the federal district court to conduct a hearing on the defendant's motion for a new trial with the defendant represented by appointed substitute counsel. Id. at 1081.

In this case, an evidentiary hearing was warranted to determine whether trial or appellate counsel were aware of the complaint Mr. Jefferson filed with the State Bar of Nevada against his public defender.

First, Mr. Jefferson contended that his trial and appellate counsel were ineffective, because counsel actively represented a concurrent conflict of interest that affected their performance. Specifically, attorney Bryan Cox of the Clark County Public Defender's office represented Mr. Jefferson throughout the proceedings in the district court. Similarly, attorney Audrey Conway, also of the Clark County Public Defender's office, represented Mr. Jefferson during the appellate stages of the instant case. As this Court is well aware, the appropriate vehicle for reviewing claims of ineffective assistance of counsel is a timely post-conviction petition for writ of habeas corpus. This is the only means of assigning error to the ineffective assistance of both trial and appellate counsel. However, in this case, Mr. Cox actively represented a conflicting interest, because he represented Mr. Jefferson despite the fact that Mr. Jefferson filed a complaint with the Nevada State Bar on October 18, 2011, during the course of that representation. AA 140. The conflict should be imputed to Ms. Conway, because she and Mr. Cox both work for the public defender.

Additionally, Mr. Jefferson contended that he never made a voluntary, knowing, or understanding waiver of his right to conflict-free representation.

Unlike Ryan, in which this Court acknowledged a defendant's ability to waive the right to conflict-free counsel, Mr. Cox never drafted a conflict waiver letter, nor did Mr. Jefferson ever sign such a waiver. Furthermore, unlike Ryan, the district court never held a hearing regarding a waiver. Additionally, unlike Ryan, the district court never appointed advisory counsel to speak with Mr. Jefferson about the ramifications of his counsel's active conflict of interest. Moreover, unlike Ryan, the district court never canvassed Mr. Jefferson regarding the ramifications of a waiver of his right to conflict-free representation.

Here, the district court failed to explain the nature of the conflict to the defendant. Moreover, the district court failed to explain the disabilities that the conflict placed on counsel in his conduct of the defense. Furthermore, the district court failed to explain the nature of the potential claims that Mr. Jefferson would be waiving. Instead, Mr. Jefferson asserts that he never discussed the disqualification issue with Mr. Cox, or that the representation was barred by existing case law.

"[I]n certain limited instances, a defendant is relieved of the responsibility of establishing the prejudicial effect of his counsel's actions." Clark, 108 Nev. at 326, 831 P.2d at 1376. A presumption of prejudice arises when an actual conflict of interest adversely affects counsel's performance. Nika v. State, 120 Nev. 600, 97 P.3d 1140 (2004) (citing Clark, 108 Nev. at 326, 831 P.2d at 1376); see also

Strickland, 466 U.S. at 692 (“Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts, ... it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest.”); Coleman, 109 Nev. at 3-4, 846 P.2d at 277-278 (citing Holloway v. Arkansas, 435 U.S. 475 (1978) and Clark, 108 Nev. at 326, 831 P.2d at 1376). “‘To hold otherwise would engage a reviewing court in unreliable and misguided speculation as to the amount of prejudice suffered by a particular defendant. An accused’s constitutional right to effective representation of counsel is too precious to allow such imprecise calculations.’” Coleman, 109 Nev. at 3, 846 P.2d at 277 (quoting United States v. Alvarez, 580 F.2d 1251, 1259 (5th Cir. 1978)).

Prejudice may be presumed where counsel’s actions are improper per se. Jones v. State, 110 Nev. 730, 738, 877 P.2d 1052, 1057 (1994).

In the instant matter, Mr. Jefferson need not establish the prejudicial effect of counsels’ representation, because, under the Nevada Supreme Court’s holding in Jones, Mr. Cox’s active conflict of interest is improper per se. Specifically, in the instant matter, Mr. Cox represented Mr. Jefferson after Mr. Jefferson filed a bar complaint. The public defender’s office continued to represent at the appellate stages through Ms. Conway. Post-conviction is the vehicle by which a court measures the question of whether counsel rendered ineffective assistance.

Therefore, counsel's active conflict of interest amounts to prejudice per se, and Mr. Jefferson should be relieved of his burden of demonstrating any prejudice resulting from Mr. Jefferson's conflict of interest.

In the instant matter, Mr. Jefferson was prejudiced by counsels' ineffective assistance, because he filed a bar complaint against Mr. Cox prior to trial in this case. The district court erred by failing to hold an evidentiary hearing in this matter. Alternatively, the district court's decision denying Mr. Jefferson's post-conviction petition and supplement was arbitrary, because the existence of the bar complaint is prima facie evidence of counsel's ineffective assistance.

III. THE CUMULATIVE EFFECT OF TRIAL COUNSEL'S ERRORS VIOLATED MR. JEFFERSON'S RIGHT TO A FAIR TRIAL.

“The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually.”¹ Maestas v. State, 128 Nev. Adv. Rep. 12, 275 P.3d 74, 90 (2012) (quoting Hernandez v. State,

¹ According to the Nevada Supreme Court, this is the cumulative error standard that the Nevada Supreme Court applies on direct appeal from a judgment of conviction. McConnell v. State, 125 Nev. Adv. Rep. 24, 212 P.3d 307, 318 n.17 (2009). However, in McConnell, the Nevada Supreme Court acknowledged that “some courts have taken an approach similar to cumulative error in addressing ineffective-assistance claims, holding that multiple deficiencies in counsel's performance may be cumulated for purposes of the prejudice prong of the Strickland test when the individual deficiencies otherwise would not meet the prejudice prong.” Id. Ultimately, however, the McConnell Court noted that, “[a]ssuming that multiple claims of constitutionally deficient counsel may be cumulated to demonstrate prejudice,” the petitioner still was not entitled to relief. Id.

118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002)). When evaluating a claim of cumulative error, an appellate court considers the following factors: “(1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged.” Valdez v. State, 124 Nev. 1172, 1195, 196 P.3d 465, 481 (2008) (quoting Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000)).

Mr. Jefferson claimed he was further prejudiced by the cumulative impact of trial and appellate counsel’s ineffective assistance as demonstrated in his post-conviction petition and supplement. Thus, Mr. Jefferson was prejudiced by the cumulative weight of counsel’s errors. Therefore, the cumulative effect of trial counsel’s errors violated Mr. Jefferson’s right to a fair trial.

CONCLUSION

The Court should reverse the district court's decision denying Mr. Jefferson's post-conviction petition and supplement, and remand this matter for an evidentiary hearing.

Dated this 09th day of January, 2017.

NGUYEN & LAY

A handwritten signature in black ink, appearing to read 'M Lay'.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this 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 brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman.
2. I further certify that this brief does not comply with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 4,504 words.
3. Finally, I hereby certify that I have read this appellate 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 brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires 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 09th day of January, 2017.



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The undersigned hereby declares that the 09th day of January, 2017, a copy of the foregoing APPELLANT'S OPENING BRIEF was sent via United States

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