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5 Elizabeth A. Brown  
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7 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

8 IN AND FOR THE COUNTY OF WASHOE

9 \* \* \*

10 D'VAUGHN KEITHAN KING,

11 Petitioner,

Case No. CR12-1160

12 v.

Dept. No. 7

13 THE STATE OF NEVADA,

14 Respondent.

15 \_\_\_\_\_/

16 ORDER DENYING PETITION

17 On November 22, 2017, the Honorable David A. Hardy entered an Order  
18 Dismissing Petition for Writ of Habeas Corpus (Post-Conviction) ("Order"). Petitioner  
19 timely appealed the Order to the Nevada Supreme Court in Nevada Supreme Court Case  
20 No. 74703. The case was transferred to the Court of Appeals of the State of Nevada  
21 which issued an Order of Reversal and Remand on March 14, 2019.

22 The Court of Appeals found the district court erred by not holding an evidentiary  
23 hearing on Petitioner's claim that trial counsel was ineffective for failing to present  
24 expert psychological testimony in mitigation at sentencing. In the Supplemental  
25 Petition for Writ of Habeas Corpus (Post-Conviction), prior habeas counsel argued that  
26 expert witness Dr. Martha Mahaffey was expected to testify that had the psychological

1 evaluation been presented, it would have shown a low risk to re-offend, and that  
2 Petitioner was amenable to treatment and rehabilitation. Supplemental Petition for  
3 Writ of Habeas Corpus (Post-Conviction) at 5:8-10. Petitioner further alleged that  
4 “other mitigating psychological evidence such as the impact of Mr. King’s ADHD,  
5 learning disabilities, drug abuse, and childhood would have been presented indicating  
6 the need for rehabilitation.” *Id.* at 5:10-12. After the reversal and remand, an  
7 evidentiary hearing was held on November 21, 2022.

### 8 **Findings of Fact and Conclusions of Law**

9 At the beginning of the hearing, Petitioner’s counsel informed the Court that  
10 although prior post-conviction counsel had alleged that Dr. Mahaffey would testify that  
11 Petitioner was a low risk to re-offend, Dr. Mahaffey had never evaluated Petitioner.  
12 TOP, Evidentiary Hearing, November 21, 2022, 6. Counsel had successfully sought and  
13 obtained an evaluation by another qualified expert, clinical psychologist Dr. Sharon  
14 Hixon-Brenenstall, Ph.D. However, Petitioner was dissatisfied with the result of the  
15 evaluation, and with appointed counsel’s performance. *Id.*, 8-11. His counsel explained  
16 that after Petitioner was dissatisfied with Dr. Hixon-Brenenstall’s evaluation, she  
17 reached out to another expert, Dr. Paglini who declined to do a second evaluation. *Id.*,  
18 12-13. The Court declined Petitioner’s request to remove Ms. Oldenburg as counsel.

19 Dr. Hixon-Brenenstall testified that she conducted a psychological evaluation risk  
20 assessment on February 11<sup>th</sup>, 2020 at the Northern Nevada Correctional Facility. *Id.*, 31.  
21 She related that Petitioner reported being abused by his parents as a child, and  
22 witnessed domestic violence and substance abuse. She testified that such circumstances  
23 can impact an individual’s emotional and social development. *Id.*, 35. She further  
24 testified that Petitioner demonstrated below average and grade range in reading and  
25 mathematics. *Id.* Dr. Hixon-Brenenstall further opined that testing revealed that  
26 Petitioner suffers from post-traumatic stress disorder, depression, and anxiety. *Id.* 36-

1 37. She assessed Petitioner as a moderate to moderately high risk to re-offend, based on  
2 his history of drug use and lifestyle behaviors. *Id.*, 38. She also reported that he  
3 reportedly had been receptive to some interventions and classes in prison, which  
4 indicated that he could be receptive to additional rehabilitative services. *Id.*, 39-40.

5 On cross-examination, Dr. Hixon-Brenenstall acknowledged a portion of her  
6 report which opined that Petitioner struggles with managing stress in positive ways, and  
7 may be vulnerable to behaving in self-defeating ways, such as substance abuse. *Id.*, 43.  
8 She further testified that Petitioner had a lengthy history of poly-substance abuse. *Id.* In  
9 response to the Court's questions, she indicated that Petitioner presented well,  
10 answered her questions appropriately, and understood the purpose of the evaluation.  
11 *Id.*, 53-54.

12 Petitioner's trial attorney, John Ohlson, Esq., also testified. Mr. Ohlson informed  
13 the Court that he practiced criminal defense for approximately 40 years prior to his  
14 retirement. *Id.*, 56. He testified that he did not seek a psychological evaluation for  
15 Petitioner, because the offense in this case arose out of a drug debt, and it would have  
16 been "difficult with a straight face to stand up in court and say that the defendant's  
17 motivations were rooted in a psychological or emotional condition." *Id.*, 57-58.

18 This Court evaluates Petitioner's ineffective assistance of counsel claim pursuant  
19 *Strickland v. Washington*, 466 U.S. 668 (1984). This Court's evaluation begins with the  
20 "strong presumption that counsel's conduct falls within the wide range of reasonable  
21 professional assistance." *Strickland, supra; Harrington v. Richter*, 562 U.S. 86 (2011).  
22 The Supreme Court further explained that the "defendant must overcome the  
23 presumption that, under the circumstances, the challenged action might be considered  
24 sound trial strategy." *Id.* Within the context of this strong presumption, the petitioner  
25 must demonstrate, by a preponderance of evidence, that his counsel's performance was  
26 deficient, falling below an objective standard of reasonableness, and that counsel's

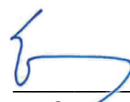
1 deficient performance prejudiced the defense. *Means v. State*, 120 Nev.1001, 1012, 103  
2 P.3d 25, 33 (2004).

3 This Court may evaluate the questions of deficient performance and prejudice in  
4 either order and need not consider both issues if the defendant fails to make a sufficient  
5 showing on one. Where a petitioner claims he is entitled to relief due to ineffective  
6 assistance of counsel, he must demonstrate the facts underlying such a claim by a  
7 preponderance of the evidence; the district court's factual findings regarding a claim of  
8 ineffective assistance of counsel are entitled to deference when reviewed on appeal.  
9 *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004); *Riley v. State*, 110 Nev.  
10 638, 647, 878 P.2d 272, 278 (1994).

11 Having considered the pleadings, the testimony adduced at the evidentiary  
12 hearing, and heard the testimony of Dr. Hixon-Brenenstall, and Mr. Ohlson, the Court  
13 finds that Petitioner has not demonstrated by a preponderance of the evidence that Mr.  
14 Ohlson's representation was objectively unreasonable. The Court further finds that  
15 Petitioner has not demonstrated prejudice. The record reveals that the late Honorable  
16 Patrick Flanagan based the sentence imposed on the facts of the offense, as well as  
17 Petitioner's criminal history, and a psychiatric evaluation opining that Petitioner was a  
18 moderate to moderately high risk to re-offend would not have materially affected Judge  
19 Flanagan's decision.

20 GOOD CAUSE APPEARING, the Petition is DENIED.

21 Dated this 2 day of January, 2023.

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24 DISTRICT JUDGE for  
25 Senior Judge Polaha  
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