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IN THE SUPREME COURT FOR THE STATE OF NEVADA

D’VAUGHN KING,

Appellant/Petitioner,

vs.

THE STATE OF NEVADA,

Appellee/Respondent.

Case No. 85838

APPELLANT D’VAUGHN KING’S OPENING BRIEF

NRAP 26.1 Disclosure

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that the following are persons and entities described in NRAP 26.1(a) that must be disclosed. These representations are made in order that the Court may evaluate possible disqualification or recusal. Appellant D’Vaughn King is an individual who was represented in Washoe County district court by Attorney Richard Molezzo and Attorney John Ohlson. Attorney Karla Butko represented Mr. King on his direct appeal. Attorney Mary Lou Wilson, Attorney Troy Jordan and Attorney Victoria Oldenburg represented Mr. King on his post-conviction proceedings. Respondent counsel is Washoe County Chief Deputy District Attorney Jennifer Noble.

Dated this 23rd day of August, 2023.

By: /s/Theresa Ristenpart, Esq.
Theresa Ristenpart, Esq.
Counsel for Mr. D’Vaughn King

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I. JURISDICTIONAL STATEMENT

The Second Judicial District Court, Washoe County, entered a judgement of conviction against Mr. King for Murder in the Second Degree with the Use of a Deadly Weapon, sentenced to imprisonment in the Nevada State Prison for the term of Life with the Possibility of Parole, with parole eligibility beginning when a minimum of Ten (10) years has been served. Additionally, a consecutive term of imprisonment for a minimum term of Fifty-Three (53) months to a maximum of Two Hundred and Forty (240) months for the Use of a Deadly Weapon enhancement. The district court ordered both sentences to be served consecutively to the sentence previously imposed in Case No. 10F07761 (State of California).

Mr. King filed a timely notice of appeal which was denied on December 8, 2014. On July 16, 2015, Mr. King filed a timely pro per petition for writ of habeas corpus. That petition and supplemental amended petition were dismissed by the Second Judicial District court on November 21, 2017. Mr. King filed a timely notice of appeal on December 12, 2017. On March 14, 2019, the Nevada Court of Appeals reversed and remanded the order dismissing Mr. King's petition and supplemental for habeas relief. Upon remand, the district court on January 3, 2023 ordered Mr. King's petition and supplemental petition be dismissed. Mr. King timely filed a notice of appeal on January 25, 2023. This Court has jurisdiction over this final order in a criminal case based upon the timely filing of the notice of appeal. *See* NRAP 4(b)(1)(A); NRS 177.015(3).

Mr. King is detained at High Desert State Prison.

II. ROUTING STATEMENT

This case is not presumptively assigned to the Court of Appeals as it is a postconviction appeal from a judgment of conviction based on a verdict for a category A felony and deadly weapon enhancement. *See* NRAP 17(b)(3).

III. ISSUES ON APPEAL

- a. Whether the district court violated Mr. King's constitutional rights by denying him the right to proceed pro per at his post-conviction evidentiary hearing?
- b. Whether the district court violated Mr. King's constitutional rights by forcing - with legal authority- conflicted counsel upon Mr. King for the post-conviction evidentiary hearing?
- c. Whether post-conviction counsels' performance was deficient and contrary to the interests of justice?
- d. Whether the cumulative effect of these constitutional errors deprived Mr. King of due process in violation of his constitutional rights?

IV. STATEMENT OF RELEVANT FACTS

On the morning of November 5, 2010, Mr. D’Vaughn King (Mr. King) and Mr. Henry Toy (Mr. Toy) picked up Ms. Cheri Mitchell (Ms. Mitchell) from the Grand Sierra Resort in Reno, Nevada. AA 0044-47. Ms. Mitchell provided directions to Mr. Tommy Young’s home. AA 0046-47. The vehicle was parked around the corner and Ms. Mitchell remained in the car while the Petitioner and Mr. Toy exited the vehicle and approached Mr. Tommy Young’s house. AA 0048;

Ms. Mitchell then observed Mr. King helping Mr. Toy walk back to the car. Mr. Toy had been shot in the legs. Ms. Mitchell remembers Mr. Toy making a comment about “dropping his gun.” AA 0048.

V. STATEMENT OF RELEVANT PROCEDURAL HISTORY

A. Trial Proceedings

Sparks Justice Court Proceedings

On April 19, 2012, the State filed a criminal complaint against Mr. King in the Sparks Justice Court in Reno, Nevada. AA 001. The criminal complaint contained one count: Murder with the Use of a Deadly Weapon, a violation of NRS 200.010, NRS 200.030, and NRS 193.165. AA 001. A Warrant for Arrest and an Affidavit in Support of Warrant were issued on April 19, 2012. AA 001. The Warrant was served on June 6, 2012. AA 001. Mr. King’s Arraignment and Bail Hearing were set on June 7, 2012, and he was placed on a no bail hold by Judge, Honorable Susan Deriso. AA 001.

Initially, the Sparks Justice Court appointed Conflict Counsel Attorney Richard Molezzo, Esq., to represent Petitioner on June 7, 2012. AA 001. On June 20, 2012, the Sparks Justice Court vacated the Preliminary Hearing for Mr. King. AA 001. The Preliminary Hearing was continued to July 20, 2012. AA 001. On July 20, 2012, the Preliminary Hearing was waived on behalf of the Petitioner by his counsel. AA 001. On July 23, 2012, the State filed an Information charging Mr. King with one count of Murder with the Use of a Deadly Weapon, a violation of NRS 200.010, NRS 200.030, and NRS 193.165. AA 0025.

Second Judicial Washoe County District Court Proceedings (CR12-1160)

On August 22, 2012, an arraignment hearing was held in the Second Judicial District Court with Honorable, Judge Patrick Flanagan presiding. AA 0025. Mr. King entered a plea of not guilty. AA 0025. After entry, Mr. King through his counsel requested a November 2013 trial date, mentioning that both parties executed a stipulation extending the trial date, but it not to exceed April 30, 2013. AA 0024.

On November 28, 2012, the Motion to set Trial was held, and defense counsel, Richard Molezzo. AA 0024. A status hearing was set for February 20, 2013, and jury trial set for August 12, 2013. AA 0024-25. At the status hearing on February 20, 2013, defense counsel requested the jury trial be continued to a further date due to the voluminous discovery, this request was denied by Judge, Honorable Patrick Flanagan. AA 0024. Following this, an ex-parte motion was filed by the Petitioner to relieve defense counsel. AA 0025.

A status hearing was held on May 3, 2013, which directly addressed the filed ex-parte motion to relieve counsel. AA 0023. Following this, an additional status hearing was held on May 8, 2013, which discussed new counsel for the Petitioner, a continuation of the jury trial, and an entry of exhibits and testimony. AA 0023. An order was filed on May 13, 2013, which appointed Mr. John Ohlson Esq. as new defense counsel for Mr. King. AA0023.

A status hearing was held on May 22, 2013, with Attorney Ohlson as the counsel for the Petitioner. AA 0023. On January 22, 2014, the Court held a Motion to Confirm Hearing which set jury trial for February 18, 2013. AA 0022.

On November 22, 2013, an Amended Information was filed. AA 0020. Mr. King changed his plea on November 25, 2013 entering a plea of guilty to Murder in the Second Degree with the Use of a Deadly Weapon, a violation of NRS 200.010, NRS 200.030, and NRS 193.165. AA 0020. Sentencing was held on January 22, 2014, whereupon Mr. King was sentenced to imprisonment in the Nevada State Prison for the term of Life with the Possibility of Parole, with parole eligibility beginning when a minimum of Ten (10) years has been served. Additionally, a consecutive term of imprisonment for a minimum term of Fifty-Three (53) months to a maximum of Two Hundred and Forty (240) months for the Use of a Deadly Weapon enhancement. AA 0065-68. The district court ordered both sentences to be served consecutively to the sentence previously imposed in Case No. 10F07761 (State of California).

The Judgment of Conviction was issued on January 22, 2014. AA 0070-71. The Defendant's Counsel withdrew on January 27, 2014. AA 0019. Mr. King filed a timely Notice of Appeal to the Nevada Supreme Court on January 31, 2014. AA 0019.

Direct Appeal Proceedings (Nevada S. Ct. Case Number 64983)

On February 7, 2014, a notice of appeal and appeal statement was filed in this Court stating Petitioner would represent himself pro per. AA 0018-19. Attorney Karla Butko was appointed to represent Mr. King on his direct appeal. AA 0018. This Court affirmed Mr. King's conviction on December 8, 2014. AA 0018. Remittitur was filed on December 30, 2014. AA 0018.

B. Post-Conviction Proceedings

Second Judicial Washoe County District Court Proceedings (CR12-1160)

On July 16, 2015, Mr. King filed a pro se Petition for Writ of Habeas Corpus, a Motion for Leave of Court for permission to exceed page limit, an application to Appoint Counsel, and a Motion to Proceed Forma Pauperis. AA 0017. His pro se petition was typed and contained eight different grounds for ineffective assistance of counsel. Ground I of Mr. King's petition argued Attorney Ohlson was ineffective at sentencing for failing to present mitigating evidence, including evidence supporting Mr. King's ability to be rehabilitated as demonstrated by his counseling and programming achievements at Washoe County jail prior to sentencing.

Attorney Mary Lou Wilson was appointed counsel for Mr. King. AA 0017. A motion for an extension of time was filed on May 20, 2016 followed by a second motion for extension of time filed on July 28, 2016. AA 0016-17.

On October 8, 2016, the district court appointed Attorney Troy Jordon to represent Mr. King on his petition. AA 0015-16. On December 12, 2016, Mr. Jordan filed a stipulation for an extension of time and Washoe County District Appellate Attorney Jennifer Noble substituted in for the State. AA 0016. Following several additional stipulations for extensions of time, Mr. Jordan filed a supplemental petition for writ of habeas corpus on March 30, 2017. AA 0014-15.

In that supplemental petition, Attorney Jordan argued that expert witness Dr. Martha Mahaffey was expected to testify that had the psychological evaluation been presented, it would have shown a low risk to re-offend, and that Petitioner was amenable to treatment and rehabilitation. AA 0076.

“If granted an evidentiary hearing, would present Dr. Martha Mahaffey who is expected to testify that had the evaluation been presented, it would have shown a low risk to reoffend, was amenable to treatment and rehabilitation. Further, other mitigating psychological evidence such as the impact Mr. King’s ADHD, learning disabilities, drug abuse, and childhood would have been presented indicating the need for rehabilitation. This piece of mitigating evidence would have been crucial for sentencing. The failure of counsel to present this evidence was deficient performance.” AA 0076.

On May 10, 2017, the State filed an Answer to the Petition and Supplemental Petition for Writ of Habeas Corpus (Post-Conviction). AA 0014.

On September 15, 2017, Petitioner's counsel filed a request for submission and for an evidentiary hearing. AA 0014. On November 21, 2017, Washoe County District Court Judge David Hardy summarily ordered the petition dismissed without an evidentiary hearing. AA 0014.

Direct Appeal Order Dismissing Post-Conviction Petition

(Nevada S.Ct. 74703, 74703-COA)

On December 12, 2017, Attorney Jordan filed a timely notice of appeal. AA 0013-14. In the opening brief filed on May 2, 2018, Attorney Jordan argued that the district court should have granted an evidentiary hearing pursuant to *Hartgrove v. State*, 100 Nev. 498 (1984) and *Evans v. State*, 117 Nev. 609, 621, 28 P.3d 498, 507 (2001). AA 0090. Attorney Jordan argued:

“Ground I of the supplemental petition indicated that that Petitioner's trial counsel failed to call Dr. Martha Mahaffey in mitigation at sentencing and had she been called at sentencing the outcome would have been different. AA124-AA125. Despite, Dr. Mahaffey never testifying previously, the Court found the claim to be belied by the record. AA135. Given that Mahaffey never testified, the claim cannot as a matter of law be belied by the record because the evidence was not before the court in the first instance. There was no argument by the State nor a finding made by the court that the claim was inadequately pled. Therefore, pursuant to *Hargrove*, the claim was entitled to an evidentiary hearing. The Court's finding was an abuse of discretion and not supported by the record.” AA 0090.

The case was transferred to the Nevada Court of Appeals on September 13, 2018. On March 14, 2019, the Nevada Court of Appeals issued an order reversing and remanding and remand finding “we are unable to conclude the district court did not err by dismissing King's petition without first conducting an evidentiary hearing. We

therefore remand this matter to the district court to conduct an evidentiary hearing on King's claim that counsel was ineffective for failing to present expert mitigating evidence at the sentencing hearing.” AA 0095-102.

Remand Second Judicial Washoe County District Court Proceedings
(CR12-1162)

Remittitur was issued on April 10, 2019. AA 0012. On May 9, 2019, Attorney Jordan filed a motion to withdraw as counsel which was granted on May 14, 2019. AA 0012. The district court then appointed Attorney Victoria Oldenburg on June 7, 2019 as Mr. King’s counsel. AA 0012. An evidentiary hearing was set for September 4, 2019. AA 0012. This evidentiary hearing was continued by stipulation of the parties and reset to January 16, 2020. AA 0011.

On December 16, 2019, Attorney Oldenburg filed a stipulated second request to continue the evidentiary hearing indicating that counsel needed time to secure a psychological expert for Mr. King. AA 0011. The district court directed parties to file a supplemental memorandum to support their request for a continuance. AA 0011. On December 20, 2019, Attorney Oldenburg filed a memorandum attesting that she received an incomplete case file from Attorney Jordan which was missing documents. AA 0103-106. Attorney Oldenburg also attested that Dr. Martha Mahaffey declared she had never worked on Mr. King’s case and had never evaluated him. AA 0103-106.

The district court granted the continuance, and the evidentiary hearing was reset for April 29, 2020. AA 0011. On April 21, 2020, parties filed a stipulation to continue the evidentiary hearing again pursuant to Administrative Order 2020-04 (pertaining to COVID) and the hearing was reset for August 4, 2020. AA 0010. That hearing was rescheduled for September 29, 2020 via audiovisual means. AA 0009. On August 20, 2020, Attorney Oldenburg filed a stipulation to continue that September court date to accommodate in person and transport for Mr. King. AA 009. The evidentiary hearing was reset for March 1, 2022. AA 0008. The district court then reset the evidentiary hearing due to a calendar conflict and the hearing was reset for June 27, 2022. AA 0008.

On June 6, 2022, Mr. King, pro per, filed a motion to substitute counsel, a motion for Attorney Oldenburg to withdraw, and a motion for enlargement of time. AA 0007. On June 14, 2022, Attorney Oldenburg filed a stipulation to vacate the June 27, 2022 evidentiary hearing based upon Mr. King's recent pleadings. AA 0006. On June 27, 2022, the district court ordered Mr. King's motions stricken as "fugitive documents." AA 0006.

Direct Appeal Order Striking Motions (Nevada S. Ct. 85135)

On August 8, 2022, Mr. King filed pro per a notice appealing the district court's order striking his motions and request for Attorney Oldenburg to be removed as counsel from his case. AA 0006. This Court issued an order on August 22, 2022

dismissing Mr. King’s appeal citing lack of jurisdiction. AA 0005. Remittitur was issued September 20, 2022. AA 0005.

Remanded Second Judicial Washoe County District Court Proceedings –

Evidentiary Hearing (CR12-1162)

On November 21, 2022, the district court held an evidentiary hearing. AA 0109. Senior Judge Jerome Polaha presided over the hearing instead of assigned District Court Judge Henry Walker. AA 00115-116.

At the hearing, Mr. King reiterated his request to have Attorney Oldenburg removed as his counsel. AA 00111-121. Attorney Oldenburg informed the court that Mr. King had filed a bar complaint and civil suit against her. AA 00111. Judge Polaha ruled that there was no issue with Attorney Oldenburg continuing to represent Mr. King, despite a bar complaint and pending civil litigation. AA 00121.

Mr. King then requested a “Faretta hearing” stating that he “would request to represent himself.” AA 00122.

The Court: You want to represent yourself?

Mr. King: If you are not willing to relieve her [Oldenburg] of the chair, yes.

The Court: I have to relieve her if I’m going to appoint –

Mr. King: I mean, I don’t want to be a fool as a client and represent myself, but if I’m under this situation where she refuses to remove herself and you refuse to remove her from my case, yes, I’m left with no other option.

AA 00127.

Mr. King reiterated several times that he wanted to represent himself. AA 00130-131.

The district court denied Mr. King's request and proceeded forward with the evidentiary hearing. AA 00131. Attorney Oldenburg called one (1) witness Dr. Hixon-Brenenstall. AA 00128. The State called Attorney John Ohlson. AA 00163.

At the conclusion of the hearing, Judge Polaha ruled that he did not find ineffective assistance of trial counsel. AA 00190. Judge Polaha stated that he, personally, would reduce Mr. King's weapon enhancement sentence to the agreed upon maximum of 72 months from the imposed sentence 240 months. AA 00191. The State opposed that idea arguing there were no grounds for resentencing. AA 00191-192.

On December 16, 2022, Mr. King pro per filed a timely notice of appeal. AA 004-5. On the same day, Attorney Oldenburg filed a motion to withdraw stating "Over the last several months the level of communication between counsel and Mr. King has degraded to the point where little to no meaningful communication is had." AA 00194-195. The order dismissing Mr. King's petition was filed on January 3, 2023. AA 00199-202. On January 25, 2023, Mr. King filed another pro per notice of appeal given the order being appealed was filed on January 3, 2023 after his first pro per notice of appeal. AA 002.

VI. ARGUMENT

a. THE DISTRICT COURT VIOLATED MR. KING'S CONSTITUTIONAL RIGHTS BY DENYING HIM THE RIGHT TO PROCEED PRO PER AT HIS EVIDENTIARY HEARING.

“The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails. It is the defendant who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of that respect for the individual which is the lifeblood of the law.” *Johnson v. State*, 117 Nev. 153, 155, 17 P.3d 1008 (2001) citing *Faretta v. California*, 422 U.S. 806, 819-820 (1975).

The constitution does not force a lawyer upon a defendant. *Faretta v. California*, 422 U.S. 806, 807 (1975). The right to defend is personal. *Id.* at 834. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. *Id.* In assessing a waiver of counsel, the question before the district court is not whether the defendant can competently represent himself, but whether he can knowingly and voluntarily waive his right to counsel. *Tanksley v. State*, 113 Nev. 997, 1001, 946 P.2d 148, 150 (1997)

“The defendant's technical knowledge is not the relevant inquiry. In order for a defendant's waiver of right to counsel to withstand constitutional scrutiny, the judge need only be convinced that the defendant made his decision with a clear comprehension of the attendant risks.” *Graves v. State*, 112 Nev. 118, 124, 912 P.2d 234, 238 (1996) (citing *Faretta*, 422 U.S. at 835-36). A request for self-representation may *not* be denied solely because the court considers the defendant to lack reasonable

legal skills or because of the inherent inconvenience often caused by *pro se* litigants. *Lyons v. State*, 106 Nev. 438, 444, 796 P.2d 210, 217 (1990).

Here, the district court violated Mr. King's constitutional right to represent himself at the evidentiary hearing. Though a court may in limited circumstances deny a defendant the right to proceed *pro per*, *see Lyons v. State*, 106 Nev. 438, 443-44, 796 P.2d 210, 213 (1990), none of those circumstances existed in this case. The State did not object to Mr. King's request to represent himself at the hearing. "If he wants to proceed today in proper person, I have no objection to that." AA 00128. Mr. King informed the judge that he was taking college classes and about to graduate college. AA 00117, AA 00182. When asked about the nature of the proceedings, Mr. King artfully and correctly articulated the purpose of the evidentiary hearing. AA 00123. The district court judge even complimented Mr. King's *pro per* pleadings as "very lawyer like." AA 00182. The district court judge at sentencing found Mr. King "very intelligent, articulate individual." AA 0065. Mr. King was respectful to the court, not disruptive, and engaged appropriately in answering the court's questions.

Judge Polaha never articulated the grounds for his decision to summarily deny Mr. King's request to proceed *pro per*. AA 00131.

The denial of this right to proceed *pro per* is never subject to harmful error analysis; it is *per se* harmful. *McKaskle v. Wiggins*, 465 U.S. 168, 177 (1984). The denial of the right to proceed *pro se* at trial requires automatic reversal. *See Arizona v. Fulminante*, 499 U.S. 279, 309, 113 L. Ed. 2d 302, 111 S. Ct. 1246 (1991). As such,

this Court should reverse this district court's order dismissing Mr. King's post-conviction petition and supplemental petition.

b. THE DISTRICT COURT HAD NO STATUTORY OR CONSTITUTIONAL BASIS TO FORCE COUNSEL UPON MR. KING FOR THE POST-CONVICTION EVIDENTIARY HEARING.

There is no constitutional or statutory right to the assistance of counsel in noncapital post-conviction proceedings. *Brown v. McDaniel*, 130 Nev. 565, 569, 331 P.3d 867, 870 (2014). Under the Sixth Amendment to the United States Constitution there is no right to effective assistance of counsel, or to counsel at all, in post-conviction proceedings. *See Coleman v. Thompson*, 501 U.S. 722, 752 (1991); *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *Bonin v. Vasquez*, 999 F.2d 425, 429-30 (9th Cir. 1993).

The Nevada Constitution also does not guarantee a right to counsel in post-conviction proceedings, as we interpret the Nevada Constitution's right to counsel provision as being coextensive with the Sixth Amendment to the United States Constitution. *Cf. Warden v. Lyons*, 100 Nev. 430, 683 P.2d 504 (1984), *cert. denied*, 471 U.S. 1004, 85 L. Ed. 2d 159, 105 S. Ct. 1865, (1985) (adopting the federal standard of review for petitions alleging ineffective assistance of counsel claims in Nevada); *McKague v. Warden, Nev. State Prison*, 112 Nev. 159, 163, 912 P.2d 255, 257 (1996).

Appellate issues involving a purely legal question are reviewed de novo.

Settelmeyer & Sons v. Smith & Harmer, 124 Nev. 1206, 1215, 197 P.3d 1051, 1057 (2008). Issues of statutory interpretation are questions of law reviewed de novo. *Bank of Am., N.A. v. SFR Invs. Pool 1, Ltd. Liab. Co.*, 134 Nev. 604, 609, 427 P.3d 113, 119 (2018)

As the State pointed out at the hearing, “So under N.R.S. Chapter 34.810, Mr. King is not entitled to any counsel at all in these noncapital habeas proceedings.” AA 00128. If Mr. King is not entitled to any counsel at the post-conviction evidentiary hearing, then what law or statute authorized the district court to force Mr. King to proceed forward with court appointed counsel? Here, the district court - without any legal authority - forced Mr. King to have court appointed counsel represent him at the noncapital post-conviction evidentiary hearing. The district court erred in refusing Mr. King’s repeated requests to relieve court appointed counsel. As such, this Court should reverse and remand this proceeding for a new evidentiary hearing in which Mr. King is allowed to represent himself.

c. POST-CONVICTION COUNSELS’ PERFORMANCE WAS DEFICIENT AND CONTRARY TO THE INTERESTS OF JUSTICE.

This Court has held “where there is no right to counsel there can be no deprivation of effective assistance of counsel.” *McKague v. Warden, Nev. State Prison*, 112 Nev. at 164-65. Yet, what is the standard when a defendant is forced by a district court with no legal authority to have court appointed counsel on post-

conviction habeas proceedings and that court appointed counsels' performance is deficient prejudicing the petitioner?

A claim of ineffective assistance of counsel presents a mixed question of law and fact and is therefore subject to independent review. *State v. Love*, 109 Nev. 1136, 1139, 865 P.2d 322, 323 (1993). Nevada courts evaluate a claim of ineffective assistance of trial counsel under the “reasonably effective assistance” test articulated in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984) and followed in *Warden v. Lyons*, 100 Nev. 430, 683 P.2d 504 (1984), cert. denied, 471 U.S. 1004, 85 L. Ed. 2d 159, 105 S. Ct. 1865 (1985). The *Strickland* analysis applies to both the guilt and penalty phases of a trial. 466 U.S. at 686-87; see also *Paine v. State*, 110 Nev. 609, 877 P.2d 1025, 1031 (1994), cert. denied, 514 U.S. 1038, 131 L. Ed. 2d 291, 115 S. Ct. 1405 (1995).

To prove ineffective assistance of counsel, a petitioner must show “(1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced the defense.” *Kirksey v. State*, 112 Nev. 980, 987, 999, 923 P.2d 1102, 1114 (1996) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). The first prong of this test asks whether counsel's representation fell “below an objective standard of reasonableness” as evaluated from counsel's perspective at the time. *Id.* at 987-88, 923 P.2d at 1107. The second prong asks whether there is “a reasonable probability that, but for counsel's errors, the result of the [proceeding] would have been different.” *Id.* at 988, 923 P.2d at 1107. “Deficient” assistance of

counsel is representation that falls below an objective standard of reasonableness.

Dawson v. State, 108 Nev. 112,115, 825 P.2d 593, 595 (1992).

A court may consider the two test elements in any order and need not consider both prongs if the defendant makes an insufficient showing on either one. *Kirksey v. State*, 112 Nev. at 987, 923 P.2d at 1107 citing *Strickland*, 466 U.S. at 697.

In this case, the greatest unanswered question at the evidentiary hearing - why Attorney Jordan would file in two different legal pleadings that Dr. Martha Mahaffey had conducted a risk assessment evaluation on Mr. King and concluded that he was a low-risk to reoffend if no such evaluation existed? AA 0076; AA 0090. Attorney Jordan was either presenting a false claim to the district court and this Court in his pleadings, or Attorney Oldenburg had incorrect information about whether an evaluation was completed. Either scenario, Attorney Jordan mispresenting or Attorney Oldenburg proceeding with incorrect information, is deficient performance. This deficient performance prejudiced Mr. King.

At the evidentiary hearing, it was argued that Mr. King was a “moderate to moderately high risk” to reoffend based upon Dr. Hixon-Brenenstall’s assessment. AA 00145. This directly contradicts Attorney Jordan’s statements in pleadings that Mr. King was assessed as low risk to reoffend. AA 0076; AA 0090. Attorney Oldenburg admitted in pleadings that the client file from Attorney Jordan was incomplete and missing documents. AA 0103-106. Why did Attorney Oldenburg not subpoena Attorney Jordan to question about the low risk finding and evaluation?

Additionally, Attorney Oldenburg, facing a civil lawsuit and bar complaints by Mr. King, was deficient in presenting a conflicting evaluation which prejudiced Mr. King before the court, labeling him a moderate to moderately high risk to reoffend.

Because the district court forced Mr. King to proceed forward with post-conviction counsel despite requesting to proceed pro per, this Court should review the attorneys' performance under *Strickland*. The post-conviction counsels' performance was deficient, prejudiced Mr. King, and is contrary to the interests of justice.

d. THE CUMULATIVE EFFECT OF THESE CONSTITUTIONAL ERRORS DEPRIVED MR. KING OF DUE PROCESS, IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS.

A cumulative error analysis must be conducted regarding every claim properly presented to this Court. *See Parle v. Runnels*, 505 F.3d 922, 927-28 (9th Cir. 2007); *Alcala v. Woodford*, 334 F.3d 862, 883, 893-94 (9th Cir. 2003); *Bailey v. Rae*, 339 F.3d 1107, 1118-19 (9th Cir. 2003); *Mak v. Blodgett*, 970 F.2d 614, 619 (9th Cir. 1992).

This Court must assess each of the violations above to determine whether Mr. King was denied his constitutional rights. *See Parle*, 505 F.3d at 927-28. Even if Mr. King failed to establish prejudice resulting from any one violation, this Court must examine whether the cumulative effect of these errors violated Mr. King's right to due process and a fair trial. *See Taylor v. Kentucky*, 436 U.S. 478, 487-88 & n.15 (1978) (holding cumulative effect of potentially damaging instruction and prosecution

argument violated due process guarantee of fundamental fairness); *Chambers v. Mississippi*, 410 U.S. 284, 290 n.3 (1973) (reviewing claim of cumulative error).

Assessing the prejudicial impact of the cumulative error requires an examination of the entire record. Mr. King's federal and state constitutional rights were violated in several ways, including violating Mr. King's right to proceed pro per pursuant to *Faretta*, the district court forcing Mr. King to have conflicted court appointed counsel during post-conviction proceedings whose performance was deficient and greatly prejudiced Mr. King. Whether or not any individual error warrants relief, the totality of these errors demands relief.

VII. CONCLUSION

Mr. King respectfully requests that this Court vacate the Second Judicial District Court order dismissing his Petition and Supplemental Petition, or alternatively, reverse and remand for a proper evidentiary hearing.

Respectfully Submitted this 23rd day of August, 2023.

By: /s/Theresa Ristenpart, Esq.
Theresa Ristenpart, Esq.
Counsel for Mr. D'Vaughn King

CERTIFICATE OF COMPLIANCE WITH NRAP 32(a)

Certificate of Compliance with Formatting Requirements, Volume Limitation, Typeface Requirements, and Type Style Requirements in Case Number 85838.

1. This brief complies with the type-volume limitations of Nevada R. App. P. 32(a)(7)(B) because:

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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 if the

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Dated this 23rd day of August, 2023.

By: /s/Theresa Ristenpart, Esq.

Theresa Ristenpart, Esq.

Counsel for Mr. D’Vaughn King

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of RISTENPART LAW, LLC and that on the 24th day of August, 2023, a true and correct copy of the above D’Vaughn King **Opening Brief** was e-filed and e-served on all registered parties to the Nevada Supreme Court’s electronic filing system as listed below:

Jennifer Noble
Washoe County District Attorney Chief Appellate Deputy

Attorney General/Carson City

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document to the following non-CM/ECF participants:

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