

Theresa A. Ristenpart, Esq. (NSBN 9665)
RISTENPART LAW, LLC
464 South Sierra Street
Reno, NV 89501
(775) 200-1699

Attorney for Appellant Mr. D’Vaughn King

Electronically Filed
Nov 07 2023 05:21 PM
Elizabeth A. Brown
Clerk of Supreme Court

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 REPLY 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 7th day of November, 2023.

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

TABLE OF CONTENTS

NRAP 26.1 DISCLOSURE.....	ii
TABLE OF AUTHORITIES.....	iv
I. REPLY ARGUMENTS.....	1
a. The district court erred by denying Mr. King's his right to proceed forward pro per at his post-conviction evidentiary hearing.....	1
b. Forced appointment of counsel in post-conviction proceedings is subject to effective assistance of counsel standards and post- conviction counsels' performance was deficient and contrary to the interests of justice.....	5
II. CONCLUSION.....	7
ATTORNEY CERTIFICATE.....	9

TABLE OF AUTHORITIES

CASES

Page Number

U.S. Supreme Court Cases

<i>Faretta v. California</i> , 422 U.S. 806 (1975)	4, 5
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984)	6
<i>Evitts v. Lucey</i> , 469 U.S. 387, 105 S. Ct. 830 (1985)	6

Nevada Cases

<i>Blandino v. State</i> , 112 Nev. 352 (1996)	4, 5, 6
<i>Brown v. McDaniel</i> , 130 Nev. 565 (2014)	4
<i>Burke v. State</i> , 110 Nev. 1366 (1994)	6
<i>Kirksey v. State</i> , 112 Nev. 980, 998 (1996)	6
<i>Young v. State</i> , 120 Nev. 963 (2004)	7

I. REPLY ARGUMENTS

a. THE DISTRICT COURT ERRED BY DENYING MR. KING HIS RIGHT TO PROCEED FORWARD PRO PER AT HIS POST-CONVICTION EVIDENTIARY HEARING.

The State argues that Mr. King’s request to represent himself was “equivocal at best, made in order to delay, so that he could get a new evaluation, and to disrupt the judicial process.” Response p. 15. The record clearly belies the State’s claims and argument.

At the post-conviction evidentiary hearing, the State did not object to Mr. King’s request to proceed pro per at the hearing. “If he wants to proceed today in proper person, I have no objection to that.” AA 00128. The State conceded at the hearing that Mr. King was competent to represent himself. Instead, it argues that Mr. King’s request to proceed pro per was done last minute allegedly as a ploy to disrupt the proceedings and continue the hearing.

Mr. King’s conflict with court appointed counsel Oldenburg was well known to the district court and the State several months prior to the evidentiary hearing. On June 6, 2022, almost six months before the evidentiary hearing in November, 2022, Mr. King filed a pro per motion to have Ms. Oldenburg removed as his counsel and cited the conflict and reasons. Reply Appendix (RA On June 16, 2022, the State opposed Mr. King’s motion for new counsel. Instead of addressing the issues raised in Mr. King’s motion, the district court struck Mr. King’s motions as “fugitive

documents” on July 21, 2022 since he had court appointed counsel and had not authorized Mr. King to file “on his own behalf.”

Notably, Mr. King did not request a continuance of the hearing. He requested to proceed pro per at the evidentiary hearing given his court appointed counsel, who expressed her reservations proceeding forward given the conflict and immediately withdrew from the case two weeks after the evidentiary hearing, would “crash and burn” Mr. King at the evidentiary hearing.

There is absolutely no evidence in the record that Mr. King was trying to disrupt the judicial process or delay proceedings. Mr. King originally filed a pro per motion to have court appointed counsel Oldenburg removed from his case back in June 2022. Mr. King was respectful to the court, not disruptive, and engaged appropriately in answering the court’s questions. This is particularly relevant considering the district court’s belittling demeanor to Mr. King.

Mr. King: You struck them from the record and said I don't have any bearing to talk to you because in pro se I'm represented by her, correct? Or do you --

Court: I didn't do any orders in this case.

Mr. King: You're Judge Walker, correct?

Court: No. Polaha.¹

(AA 0033-34)

¹ This was a Department 7 case in the Second Judicial District Court which is Judge Egan K. Walker’s department. Judge Polaha was judge for Department 3 in the Second Judicial District Court, but retired January 2021. The record does not explain why retired Judge Polaha was presiding over this post-conviction evidentiary hearing in November 2022 in place of Judge Walker.

Mr. King: Can I get one of these off[referring to his handcuffs]?

Court: What for?

Mr. King: Just to navigate my paperwork.

Court: No. That's okay. Just do what you're doing here.

(AA 0033)

Mr. King: Excuse me, your Honor.

Court: No. That's okay.

Mr. King: Well, if you're leaning towards –

Court: That's enough.

Mr. King: Okay. Okay. I didn't hear you.

(AA 0039)

Court: And the Court is willing, so –

Mr. King: Excuse me, your Honor.

Court: No.

Mr. King: I would like to request a Ferrata hearing.

(AA 0040)

Court: Okay. Then that takes me back to my initial question, what are we doing here?

Mr. King: Excuse me.

Court: No, I won't excuse you. If I find I guess that the report comes in and it makes a difference, does this turn into a sentencing hearing or do we schedule a sentencing hearing?

(AA 0047)

Regardless of the district court's demeanor, Mr. King remained calm, polite, and respectful to the court and the parties. Mr. King was prepared to proceed forward representing himself at this post-conviction evidentiary hearing. Mr. King was articulate and well versed in his legal proceedings. Mr. King was more than capable under *Faretta* to represent himself at the post-conviction proceedings. Despite this the district court judge summarily - without any analysis or explanation - denied Mr.

King's request to proceed pro per. As such, the district court violated Mr. King's constitutional right to proceed pro per.

The State does not address the most significant issue of this case - what is the standard for when a defendant is forced court appointed counsel during post-conviction proceedings and not allowed to proceed pro per? The State acknowledges that Mr. King had no constitutional or statutory right to court appointed counsel in noncapital post-conviction proceedings. *Brown v. McDaniel*, 130 Nev. 565, 569, 331 P.3d 867, 870 (2014).

This Court has held that the Sixth Amendment right to effective counsel, and the inverse right to self-representation, only applies to criminal trial proceedings. *Blandino v. State*, 112 Nev. 352, 354 (1996) citing *Faretta v. California*, 422 U.S. 806, 818-819 (1975). This Court determined that because the Sixth Amendment only applies to trials, it does not support the existence of a right to self-representation on direct appeal. *Id.* As such, every indigent defendant convicted of a criminal allegation who appeals a conviction is court appointed a direct appeal counsel and is entitled to effective direct appeal counsel. *Id.*; *Burke v. State*, 110 Nev. 1366, 1368, (1994).

In stark contrast, the post-conviction proceedings pursuant to N.R.S. 34.720, et al., require an indigent petitioner to file - pro se - a petition for writ of habeas corpus arguing ineffective assistance of counsel. The court then has the discretion pursuant to N.R.S. 34.750 to appoint counsel for an indigent petitioner in all non-capital cases.

But is the petitioner forced to accept that post-conviction court appointment or does the petitioner have a right to represent themselves? It would be a paradoxical position if this Court held petitioners are not entitled to court appointed counsel in post-conviction proceedings, but simultaneously do not have the right to represent themselves. As such, post-conviction petitioners have the right to proceed pro per during post-convictions proceedings and not have court appointment counsel forced upon them. Mr. King had the right to represent himself in this post-conviction evidentiary hearing. There is no standard or any legal requirement that the district court, in post-conviction proceedings, must canvass under *Faretta* as this Court has held *Faretta* only applies to criminal trials. *Blandino* at 354. Once a petitioner requests to proceed forward pro per at post-conviction, it must be granted. The district court erred by not allowing Mr. King to proceed forward pro per at the hearing. This Court should reverse and remand this proceeding for a new evidentiary hearing in which Mr. King is allowed to represent himself.

b. FORCED APPOINTMENT OF COUNSEL IN POST-CONVICTION PROCEEDINGS IS SUBJECT TO EFFECTIVE ASSISTANCE OF COUNSEL STANDARDS AND POST-CONVICTION COUNSELS' PERFORMANCE WAS DEFICIENT AND CONTRARY TO THE INTERESTS OF JUSTICE.

Here, the State argues that Mr. King is not entitled to effective assistance of post-conviction counsel (Response p. 18-19), but never addresses the issue – what is standard when court appointed counsel is forced upon the petitioner in post-conviction proceedings?

As this Court determined, a defendant does not have the right to represent themselves in direct appeal, *Blandino* at 354, and “the constitutional right to effective assistance of counsel extends to a direct appeal.” *Burke v. State*, 110 Nev. 1366, 1368 (1994); *Kirksey v. State*, 112 Nev. 980, 998 (1996); *Evitts v. Lucey*, 469 U.S. 387, 394, 105 S. Ct. 830, 834-35 (1985).

Here as argued above, Mr. King, was stripped of his right to represent himself at the post-conviction evidentiary hearing. The district court forced Mr. King to proceed forward with a court appointed counsel. Following this Court’s holdings regarding court appointed counsel in direct appeals, Mr. King was entitled to effective assistance of counsel in this post-conviction hearing because, just like in direct appeals, he was prohibited from proceeding pro per. In removing the right to proceed pro per, court appointed counsel forced upon post-conviction petitioners must also be held to effective assistance of counsel standards. *Kirksey v. State*, 112 Nev. at 987, 999, (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

The State does not even address the great 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. This evaluation conducted by Dr. Martha Mahaffey as described by Attorney Jordan was the entire basis upon which this Court reversed and remanded the

matter to district court. Instead of questioning or addressing this issue, the State argues that Attorney Oldenburg went “above and beyond to secure an evaluation” even though this evaluation deemed Mr. King as higher risk for violence than the previous purported evaluation by Dr. Mahaffey. Attorney Oldenburg did not question why Attorney Jordan would represent that Dr. Mahaffey conducted a risk assessment evaluation on Mr. King and found him to be a low risk. This deficient performance prejudiced Mr. King as the district court concluded Mr. King represented a moderate to moderately high risk for violence. Additionally, Attorney Oldenburg was aware for months prior to this hearing that Mr. King was not satisfied with her counsel due to Mr. King’s pro per motion to withdraw counsel filed on June 6, 2022, the State’s opposition filed on June 16, 2022, and the district court’s order filed on July 21, 2022. Despite this, Attorney Oldenburg did not address Mr. King’s request and concerns and failed to request the district court to hold an *ex parte* hearing pursuant to *Young*. *Young v. State*, 120 Nev. 963 (2004).

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.

II. CONCLUSION

Mr. King respectfully requests that this Court clarify (1) whether

petitioners have the right to proceed pro per at post-conviction proceedings; (2) what is the standard, if any, to not allow a petitioner to proceed pro per at post-conviction proceedings; and (3) if petitioner is forced to have court appointed counsel then that counsel must be effective pursuant to *Strikland*.

Petitioner asks 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 to exercise his right to proceed forward pro per.

Respectfully Submitted this 7th day of November, 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:

This brief contains 1,830 words, excluding the parts of the brief exempted by Nevada R. App. P. 32(a)(7)(C).

2. This brief complies with the typeface requirements of Nevada R. App. P. 32(a)(5) and the type style requirements of Nevada R. App. P. 32(a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point font and Times New Roman type style.

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

accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 7th day of November, 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 7th day of November, 2023, a true and correct copy of the above D’Vaughn King **Reply 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:

Mr. D’Vaughn King
#1115593
High Desert State Prison
22010 Cold Creek Road
Indian Springs, Nevada 89070

/s/ Stacey Cota-Sanchez
Stacey Cota-Sanchez, Legal Assistant