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IN THE SUPREME COURT OF THE STATE OF NEVADA

ALFRED P. CENTOFANTI III)

Appellant,)

vs.)

E.K. McDANIEL, WARDEN,)
ELY STATE PRISON)

Respondent.)
_____)

DOCKET NUMBER: 58562

APPELLANT'S REPLY BRIEF

I. MR. CENTOFANTI IS ENTITLED EFFECTIVE ASSISTANCE OF COUNSEL FOR HIS DIRECT APPEAL AND WAS ENTITLED TO CONFLICT FREE COUNSEL.

The State argues that the appellant was not entitled to effective post-conviction counsel. However, the State fails to address the inherent conflict that arises when direct or trial counsel represents the same client in post-conviction habeas proceedings. In Nevada, the appropriate vehicle for review of 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 this case, Mr. Centofanti's appellate and post-conviction counsel actively represented conflicting interests that adversely affected his performance, because, by virtue of representing Mr. Centofanti at these stages, counsel was forced to balance his duty of loyalty to Mr. Centofanti with a strong disincentive to prove his own

1 ineffectiveness. At no time during the course of the evidentiary hearing did Mr.
2 Colucci even assert his own ineffectiveness during any stage of proceedings.

3 The Sixth Amendment guarantees a criminal defendant the right to conflict-free
4 representation. *Coleman v. State*, 109 Nev. 1, 3, 846 P.2d 276, 277 (1993) (citing
5 *Clark v. State*, 108 Nev. 324, 831 P.2d 1374 (1992)).

7 Where counsel faces a conflict of interest, a defendant may continue to be
8 represented by that attorney if he makes a voluntary, knowing, and understanding
9 waiver of conflict-free representation. *Kabase v. Dist. Court*, 96 Nev. 471, 473, 611
10 P.2d 194, 195 (1980). The United States Supreme Court has stated that a valid waiver
11 of a fundamental constitutional right ordinarily requires “an intentional
12 relinquishment or abandonment of a known right or privilege.” *Gallego v. State*, 117
13 Nev. 348, 368, 23 P.3d 227, 241 (2001), *overruled on other grounds by Nunnery v.*
14 *State*, 127 Nev. Adv. Rep. 69, *45-*46 n.12, 263 P.3d 235 (2011) (quoting *Johnson v.*
15 *Zerbst*, 304 U.S. 458, 464 (1938)).

16 In the State’s Response Brief, it is argued that Mr. Centofanti did knowingly
17 waive any conflict with the district court asked him two “yes or no” questions
18 regarding the conflict. However, if the canvass had been more thorough, the district
19 court would have easily discovered that Mr. Centofanti had discussed the conflict and
20 that Mr. Centofanti had been wrongly informed that he would be allowed to file a
21 successive habeas petition with the district court at a later time to address any
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1 ineffective claims of Mr. Colucci. However, because the district court did not conduct
2 a more thorough canvass, and because Mr. Colucci never provided a written waiver of
3 conflict, there was never an opportunity for this fact to be brought to light.
4

5 The State further argues that Mr. Centofanti was a barred attorney and was
6 “well-aware of the ‘ramifications’ of Colucci’s representation and therefore, an
7 explanation from the court was not warranted.” RRB 8. There is nothing in the
8 district court record that discusses or addresses Mr. Centofanti’s education and
9 licensure. Additionally, there is no case law that suggests that licensed attorneys are
10 not afforded the same constitutional protections as non-attorneys. In fact, most
11 attorneys are well aware of the old proverb, “a lawyer who represents himself has a
12 fool for a client.” The State suggests that because Mr. Centofanti was a licensed
13 attorney that he had no right to competent and effective counsel.
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17 In *Middleton v. Warden*, the Nevada Supreme Court considered whether a
18 district court erred in denying a defendant’s post-conviction petition for a writ of
19 habeas corpus. 120 Nev. 664, 664, 98 P.3d 694, 695 (2004). In remanding the case to
20 the district court, the Nevada Supreme Court noted, “[b]ecause the [public defender]
21 represented [the defendant] in his direct appeal and because post-conviction claims
22 respecting that representation may again be presented below, the [public defender]
23 should not be appointed as [the defendant’s] new post-conviction counsel.” *Id.* at 665
24 n.3, 98 P.3d at 695 n.3.
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1 Mr. Centofanti's case is similar to *Middleton*. Specifically, attorney Colucci
2 represented Mr. Centofanti during all post-jury verdict proceedings in the District
3 Court (sentencing and motion for a new trial), the direct appellate level and post-
4 conviction stages of the instant case. As this Court is well aware, the appropriate
5 vehicle for reviewing claims of ineffective assistance of counsel is a timely post-
6 conviction petition for writ of habeas corpus. A Petition for Writ of Habeas Corpus is
7 the only means of assigning error to the ineffective assistance of both trial and
8 appellate counsel. However, in this case, Mr. Colucci actively represented a
9 conflicting interest, because he represented Mr. Centofanti at both of these stages of
10 the case. It is ridiculous to assume that Mr. Colucci brought claims of his own
11 ineffectiveness to the attention of the district court for the purposes of Mr. Centofanti's
12 post-conviction petition for writ of habeas corpus. More importantly, however, even a
13 cursory inspection of Mr. Centofanti's post-conviction petition reveals that Mr.
14 Colucci failed to assign any error resulting from his ineffective representation of Mr.
15 Centofanti at the post-jury verdict (sentencing and motion for a new trial) and
16 appellate stage.

1 **II. MR. CENTOFANTI WAS DENIED HIS FEDERAL CONSTITUTIONAL**
2 **RIGHTS TO DUE PROCESS AND A FAIR TRIAL AS GUARANTEED**
3 **BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS OF**
4 **THE UNITED STATES CONSTITUTION BY THE INEFFECTIVE**
5 **ASSISTANCE OF COUNSEL THAT HE RECEIVED DURING THE**
6 **COURSE OF HIS CASE**

7 The district court issued a five page written Order Denying Petition for Writ of
8 Habeas Corpus. XII AA 119-124. This Order was filed in the district court on May 9,
9 2011. In that Order, the district court addressed only four (4) issues with any
10 specificity. This is particularly important because Mr. Centofanti raised and addressed
11 more than thirty-six (36) specific instances of ineffective assistance of counsel in his
12 post-conviction petition for writ of habeas corpus, which itself was three hundred and
13 thirty-one (331) pages in length. X AA 1-250; XII AA 1-143. The district court
14 simply stated at the end of the Order Denying the Petition that it had reviewed all
15 other arguments and similarly found that the required prejudice had not been
16 demonstrated. XII AA 119-124. The district court did not provide a single finding of
17 fact with respect to these other instances of ineffective assistance of counsel.
18 Moreover, the district court did not provide any reasoned conclusion of law for each
19 specific alleged instance.
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23 The State cites *Arizona v. Washington*, 434 U.S. 497 (1978), in support of its
24 contention that the district court does not have to submit a complete finding of facts, if
25 the record is replete with justifications for the district court's decision . Unfortunately,
26 however, the State misrepresents the relevancy of this case to the instant case. The
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1 facts of the *Arizona* case are entirely dissimilar to the facts of the instant case.

2 Specifically, in *Arizona*, the United States Supreme Court considered whether, after a
3 trial court granted a prosecutor's motion for a mistrial, the record reflected the kind of
4 necessity for the mistrial ruling that avoided a valid plea of double jeopardy in a
5 subsequent prosecution. *Id.* at 498. Moreover, in *Arizona*, there was no statute that
6 mandated the trial court make specific findings of fact and conclusions of law.
7

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9 In Nevada, NRS 34.380(1) specifically addresses the requirements of the
10 district court in disposing of a petition for writ of habeas corpus (post-conviction). In
11 this case, the district court abused its discretion in dismissing Mr. Centofanti's
12 petition for writ of habeas corpus (post-conviction), because the order dismissing the
13 petition was deficient under NRS 34.830(1). The specific Nevada statute provides:
14 "Any order that finally disposes of a petition, whether or not an evidentiary hearing
15 was held, must contain specific findings of fact and conclusions of law supporting the
16 decision of the court." *Nika v. State*, 120 Nev. 600, 605, 97 P.3d 1140, 1144 (2004).
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20 A district court's failure to make factual findings about the matter in question
21 prevents this Court from reviewing its decision. *Somee v. State*, 124 Nev. 434, 443,
22 187 P.3d 152, 158 (2008). Therefore, "[a] district court's decision to grant or deny a
23 writ petition is reviewed by this court under an abuse of discretion standard." *City of*
24 *Reno v. Reno Gazette-Journal*, 119 Nev. 55, 58, 63 P.3d 1147, 1148 (2003) (citing *DR*
25 *Partners v. Bd. of County Comm'rs*, 116 Nev. 616, 621, 6 P.3d 465, 468 (2000)).
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Pursuant to Nevada Revised Statutes and Nevada Supreme Court case precedent, the district court failed to address and specifically resolve in its written judgment each and every claim presented in Mr. Centofanti's petition. It is not for the appellant or the respondent to subjectively interpret what the district court intended. Consequently, the district court's Order dismissing Mr. Centofanti's petition for writ of habeas corpus (post-conviction) was deficient, because it left both Mr. Centofanti and this Court unable to determine the basis for the district court's decision. Therefore, this Court should reverse the district court's dismissal of Mr. Centofanti's claims and remand.

III. THE CUMULATIVE EFFECT OF THE ERRORS WHICH OCCURRED AT TRIAL BASED ON DIRECT APPEAL AND IN THIS PETITION VIOLATED MR. CENTOFANTI'S RIGHTS UNDER THE FEDERAL CONSTITUTION

Mr. Centofanti has clearly established that trial counsel committed numerous prejudicial errors through his failure to prepare adequately and during the trial. Therefore, these errors, both individually and in total, wholly denied Mr. Centofanti a fair trial. Since it cannot be said that the verdict would have been the same in the absence of error, Mr. Centofanti is entitled to a new trial.

IV. THE DISTRICT COURT ERRED IN FINDING TRIAL COUNSEL WAS EFFECTIVE IN NOT PRESENTING A DIMINISHED CAPACITY DEFENSE AT TRIAL

The denial of this Ground by the District Court violated Mr. Centofanti's Fifth, Sixth, and Fourteenth Amendment Rights to Effective Assistance of Counsel.

1 In her May 9, 2011 Order, the District Court stated, “there is no showing of
2 what evidence would have been relied on for this proposed [Diminished Capacity]
3 defense that would have a probability of a different outcome.” XII AA 121.

4 Additionally, the district court’s ruling that “this type of defense would have also
5 required defendant to testify as he did in his trial” was erroneous. XII AA 121.
6

7 The diminished capacity defense requires a showing of mental illness that is
8 partially responsible for a defendant’s conduct. It may be considered in evaluating
9 whether or not the prosecution has proven each element of an offense beyond a
10 reasonable doubt; for example, in determining whether a killing is first or second
11 degree murder or manslaughter or some other argument regarding diminished
12 capacity. *See Finger v. State*, 117 Nev. 548, 27 P.3d 66 (2001).
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16 **V. THE DISTRICT COURT ERRED IN FINDING NO PREJUDICE**
17 **REGARDING THE SELECTION OF THE DEFENSE OF SELF-**
18 **DEFENSE AND THE SELF-DEFENSE CANVASS THAT OCCURRED**
PRIOR TO TRIAL

19 The district court’s denial of this Ground violated Mr. Centofanti’s Fifth, Sixth,
20 and Fourteenth Amendment rights to Due Process, Effective Assistance of Counsel, a
21 Fair Trial, and Fundamental Fairness. Mr. Centofanti extensively proved prejudice at
22 the evidentiary hearing of on July 30, 2010. In its Order of May 9, 2011, the Court
23 found the following:
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26 While the Court agrees that it was very difficult to try to
27 establish self-defense under the applicable legal standard in
28 this case, counsel also argued for second degree murder or

manslaughter as well. XII AA 199-124.

This statement by the Court in denying the writ is clearly an unreasonable application of the facts and contrary to the U.S. Supreme Court's holding in *Strickland*. It was both ineffective and prejudicial to have proceeded to trial with the defense of self-defense in this case.

VI. THE DISTRICT COURT ERRED IN FINDING NO PREJUDICE REGARDING TRIAL COUNSEL LYING ABOUT LT. STEVE FRANKS

The denial of this Ground by the district court was a violation of Mr. Centofanti's Fifth, Sixth, and Fourteenth Amendment Rights to due process, a fair trial, effective assistance of counsel, and guarantees of fundamental fairness. In her Order of May 9, 2011, denying Mr. Centofanti's post-conviction petition, the district court found the following:

There is no showing of prejudice from failing to have [Lt. Franks] testify or from mentioning [Lt. Steve Franks'] anticipated testimony in the opening.

XII AA 122.

The district court failed to properly consider the impact of failing to have Lt. Franks testify had on Mr. Centofanti's decision to consent to the canvass at the March 12, 2004, hearing. Moreover, Mr. Centofanti testified to a version of facts prepared and presented by his counsel that were to be explained by Lt. Franks' testimony. However, as Lt. Franks himself testified, he was never an expert for the defense.

As defense expert John Lukens testified at the evidentiary hearing:

1 Q. Would it be a reasonable trial tactic and a reasonable
2 tactic under any circumstances to lie to a jury about a
3 witness you never had under subpoena and never had
4 spoken to and then give them a reason why he's not
5 there, would that be a reasonable tactic?

6 A. That's just – that's absurd.

7 XIII AA 93.

8 He further testified, "I'm stumbling because I'm speechless that an attorney
9 would do that." XIII AA 93.

10 Lt. Franks was never called as a witness by the defense. No other expert
11 witness had the experience or expertise to testify in this area, or would have had the
12 impact on the jury of being an active member of the very same organization who
13 investigated the crime for which Mr. Centofanti was charged and subjected to trial.
14 This was not a question of merely cumulative testimony or an area that could be
15 covered by another expert. Instead, Lt. Franks' testimony was critical to the defense
16 on the issue of premeditation. By defense counsel's failure to secure testimony from
17 Lt. Franks, this information was not presented in any form to the jury.
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21 **VII. THE DISTRICT COURT ERRED IN FINDING NO PREJUDICE**
22 **REGARDING TRIAL COUNSEL LYING ABOUT DR. SCOTT**
23 **SESSIONS**

24 The denial of this Ground by the district court was a violation of Mr.
25 Centofanti's Fifth, Sixth, and Fourteenth Amendment rights to due process, a fair
26 trial, effective assistance of counsel, and a guarantee of fundamental fairness. In her
27
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1 May 9, 2011, Order, Judge Cadish found the following:

2 [T]his Court does not find a probability that the result would
3 have been different if not for this issue [these misleading
4 statements by counsel regarding corroboration in the
5 medical records].

6 XII AA 124.

7 One of the most egregious and prejudicial errors made by trial counsel involves
8 the facts and circumstances surrounding Virginia's 1999 plastic surgery. As the
9 district court found:

10 Defendant testified at trial that he had been told by the
11 victim's plastic surgeon, Dr. Sessions, that the victim had a
12 hole in her nose septum from drug use. At a pretrial
13 hearing, the State objected to this anticipated testimony
14 because there had been no medical records showing this
15 nose condition. At the hearing, counsel represented as an
16 officer of the Court, the Court said he would allow the
17 Defendant's testimony in this regard since there was a basis
18 for the allegation.

19 XII AA 122.

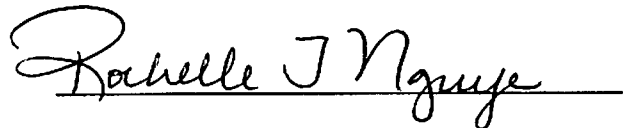
20 CONCLUSION

21 Under *Strickland*'s prejudice prong "[a] reasonable probability is one sufficient
22 to undermine the confidence in the outcome" but is "less than the preponderance
23 more-likely-than-not standard." *Lambright v. Schriro*, 490 F.3d 1103, 1121 (9th Cir.
24 2007) (internal citations omitted). Prejudice is clear from the record of the
25 proceedings.

26 Thus, the District Court Order Denying Petition for Writ of Habeas Corpus
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1 should be REVERSED and REMANDED for a new trial. Alternatively, at a very
2 minimum, the Court should remand this matter back to the District Court and allow
3 Mr. Centofanti to file a Supplemental Petition for Writ of Habeas Corpus where he is
4 able to assert ineffective assistance of counsel claims against counsel that represented
5 him post-jury verdict (Motion for New Trial and Sentencing) and during his direct
6 appeal.
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9 Dated this 25th day of June, 2012.

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12

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CERTIFICATE OF COMPLIANCE

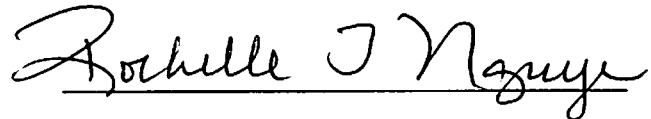
I hereby certify that I have read this appellate reply brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this reply brief complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page 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.

I further 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)(5). This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2011 in size 14 font Times New Roman.

///

1 This reply brief complies with the page- or type-volume limitation of NRAP
2 32(a)(7) as it is proportionally spaced, has a typeface of 14 points or more, and
3 contains fifteen (15) pages pursuant to NRAP 32(a)(7)(A).
4

5 Dated this 25th day of June, 2012.
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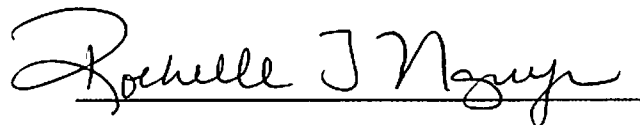
The undersigned hereby declares that on June 25, 2012, an electronic copy of the foregoing APPELLANT'S REPLY BRIEF was sent via the master transmission list with the Nevada Supreme Court to the following:

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I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid addressed to:

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