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3 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

4
5 THOMAS CASH

6 Appellant,

7
8 vs.

9 THE STATE OF NEVADA,

10 Respondent.
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Supreme Court Case No.: 82060

13 **APPELLANT'S REPLY BRIEF**
14

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13 **ARGUMENT**

14 **I. THE STATE’S RELIANCE ON RENTERIA-NOVOA IS**
15 **MISPLACED AND IT HAS MADE INCORRECT AND**
16 **CONCLUSORY ASSERTIONS REGARDING THE NEED FOR**
17 **DISCOVERY**

18 The State cites to Renteria-Novoa to support the argument that the district court
19 did not err in denying Cash’s request for appointed counsel. (Answering Brief
20 “AB” 10). The State appears to only take issue with the following three factors:
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- 23 1. Whether or not Cash understood the proceedings. (AB
24 10).
 - 25 2. Whether or not Cash raised difficult issues or issues
26 requiring discovery. (AB16-17).
 - 27 3. The severity of Cash’s sentence. (AB 17-18).
- 28

1 **a. The Lack of Language Barrier is in No Way Dispositive of the**
2 **Issue of Whether or Not Cash Understood the Proceedings**

3 The State attempts to distinguish the instant case from Renteria-Novoa by
4 stating that while this Court found that Renteria-Novoa's language barrier was a
5 major indication he may have had difficulty understanding the proceedings, here
6 "Appellant does not have a language barrier, thus there is a strong indication he is
7 able to understand the proceedings." (AB 10). The State does not cite to any case
8 law to support this wholly fabricated legal conclusion. Therefore, the State's
9 argument should not be addressed by this Court. . State v. Haberstroh, 119 Nev.
10 173, 187, 69 P.3d 676, 685-86 (2003), *citing* Mazzan v. Warden, 116 Nev. 48, 75,
11 993 P.2d 25, 42 (2000)("[c]ontentions unsupported by specific argument or
12 authority should be summarily rejected on appeal."); *see* Maresca v. State, 103
13 Nev. 669, 673, 748 P.2d 3, 6 (1987)(noting that issues not cogently argued or
14 supported by relevant authority "need not be addressed by this court").
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20 Furthermore, as argued fully in his Opening Brief, in addition to a language
21 barrier, there **are numerous other inherent difficulties for prisoners in**
22 **presenting claims** of trial error without the assistance of counsel that could hinder
23 their ability to accomplish a fair and thorough presentation of their claims, all of
24 which Cash suffered from. Id. at 77-78 *citing* Marinez v. Ryan, 566 U.S. 1, 11-12,
25 132 S.Ct. 1309 (2012); Opening Brief ("OB") 11-12. In its Answering Brief, the
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1 State fails to respond to the argument that Cash suffered from these inherent
2 difficulties, which hindered his ability to accomplish a fair and thorough
3 presentation of his claims without an attorney. (AB, *generally*.) This constitutes
4 confession of error.¹ Polk v. State, 126 Nev. Adv. Op. 19, ___, 233 P.3d 357, 361
5 (2010); see also NRS 49.005(3).
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8 The State goes on to also assert, "...it is clear Appellant can comprehend the
9 instant proceedings based upon the filing of his Petition." (AB 10). The State
10 makes a conclusory argument consisting of one sentence without citing to any
11 authority to support to absurd notion that the filing alone of a *pro per* petition by
12 an inmate indicates in any way that the inmate understands the proceedings well
13 enough to not need an attorney so as to offer a fair an thorough presentation of his
14 claims for collateral relief. Therefore, the State's argument should not be addressed
15 by this Court. Haberstroh, 119 Nev. at 187, 69 P.3d 676, 685-86, *citing* Mazzan,
16 116 Nev. at 75, 993 P.2d at 42 ("[c]ontentions unsupported by specific argument or
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21 ¹ *See* Bates v. Chronister, 100 Nev. 675, 681–82, 691 P.2d 865, 870 (1984)
22 (treating the respondent's failure to respond to the appellant's argument as a
23 confession of error); *see also* A Minor v. Mineral Co. Juv. Dep't, 95 Nev. 248, 249,
24 592 P.2d 172, 173 (1979) (determining that the answering brief was silent on the
25 issue in question, resulting in a confession of error); *see also* Moore v. State, 93
26 Nev. 645, 647, 572 P.2d 216, 217 (1977) (concluding that even though the State
27 acknowledged the issue on appeal, it failed to supply any analysis, legal or
28 otherwise, to support its position and "effect[ively] filed no brief at all," which
constituted confession of error), overruled on other grounds by Miller v. State, 121
Nev. 92, 95–96, 110 P.3d 53, 56 (2005).

1 authority should be summarily rejected on appeal.”); see Maresca, 103 Nev. at 673,
2 748 P.2d at 6 (noting that issues not cogently argued or supported by relevant
3 authority “need not be addressed by this court”).²
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5 **b. The State Makes a Circular Argument Regarding Cash’s Need to**
6 **Conduct Discovery**

7 The State asserts that “there is no need for counsel to proceed with discovery
8 because Cash’s claims are procedurally barred or have already been found
9 meritless.” (AB 17). Cash needed to conduct discovery with respect to
10 interviewing the neighbors, Sandi Cash. Angel Turner and Antoinette White (and
11 subsequently present their testimony at trial). Cash also needed to consult with an
12 expert. The district court denied Cash’s claims of ineffective assistance of counsel
13 for failure to investigate certain witnesses and consult with an expert because he
14 failed to demonstrate how a better investigation or how expert testimony would
15 have changed the outcome. AA 1581. The district court made this ruling without
16 ever giving Cash an opportunity to do so through appointed counsel. Now, on
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22 ² The State spends quite some time addressing what it believes to be Cash’s
23 argument that the “district court penalized him for making certain mistakes in his
24 petition,” which demonstrates his difficult in understanding the proceedings. (AB
25 10-16). This is a misrepresentation of Cash’s argument. Cash argued that the
26 numerous mistakes made in his Petition, *which were recognized as errors by the*
27 *district court in its Findings of Fact Conclusions of Law and Order* (cited in his
28 Opening Brief on pages 14-15), demonstrate that Cash did not understand the
proceedings. Cash did not argue that the district court penalized him *because of the*
errors.

1 appeal, the State argues that Cash was properly denied appointed counsel because
2 his claims lacked merit or were procedurally denied. In short, the State is arguing
3 in circular fashion that Cash should not have received appointed counsel to
4 conduct investigation because the district court ruled that he failed to show the
5 fruits of an investigation after the district court refused to permit him to conduct
6 said investigation through appointed counsel. Therefore, the State's argument
7 should not be addressed by this Court. Haberstroh, 119 Nev. at 187, 69 P.3d 676,
8 685-86, *citing* Mazzan, 116 Nev. at 75, 993 P.2d at 42 (“[c]ontentions unsupported
9 by specific argument or authority should be summarily rejected on appeal.”); see
10 Maresca, 103 Nev. at 673, 748 P.2d at 6 (noting that issues not cogently argued or
11 supported by relevant authority “need not be addressed by this court”).

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13 Interestingly, the State cites to Renteria-Novoa and states that in that case,
14 unlike this one, this Court found that the petitioner’s “ineffective assistance of
15 counsel claims may have required additional discovery and investigation beyond
16 the record.” (AB 10). It should be noted that in his pro per petition, Renteria-
17 Novoa claimed that his attorney failed to contact “my witnesses and friends to
18 investigate claims against me.” (See Volume 7 of Record on
19 Appeal 1490-1504 in Renteria-Novoa v. State, Case No. 68239). This was the only
20 assertion related to discovery that Renteria-Novoa made in his pro per petition.
21 Cash’s pro per claim with respect to needing to conduct discovery and
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1 investigation, while inarticulate and incomplete due to the fact he could not
2 actually conduct the investigation, names specific witnesses and experts as well as
3 how he thinks these individuals would have helped his case to change the outcome.
4 Therefore, Cash was in greater need of an appointed attorney so as to conduct
5 investigation than Renteria-Novoa was.
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9 **c. The Severity of Consequences Factor is not Weakened Because**
10 **Cash Chose to go to Trial**

11 While it admitted that Cash's consequences are severe, the State attempted
12 to minimize the importance by asking this Court to note that Cash was aware of the
13 consequences of not taking the offer made by the State and choosing to proceed to
14 trial, including what he could be found guilty of and that he was facing the habitual
15 criminal sentencing range. Yet again, the State fails to cite to any authority
16 supporting that this awareness on Cash's part has any bearing on the severity of
17 consequences factor regarding appointment of counsel. This Court has stated that
18 "[c]ontentions unsupported by specific argument or authority should be summarily
19 rejected on appeal." State v. Haberstroh, 119 Nev. 173, 187, 69 P.3d 676, 685-86
20 (2003), *citing* Mazzan v. Warden, 116 Nev. 48, 75, 993 P.2d 25, 42 (2000).
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II. EVIDENTIARY HEARING

The State argues that there was no need for an evidentiary hearing because, in part, the district court properly denied Cash's claims as they were belied under Molina³ (AB 21-25). The State bases this argument upon speculation, which is why an evidentiary hearing is necessary. Mann v. State, 118 Nev. 351, 354-56, 46 P.3d 1228, 1230-31 (2002); NRS 34.770.

a. Neighbors

The State claims Cash's argument regarding needing an attorney to interview the neighbors fails because he cannot show how such testimony would have changed the outcome of his trial let alone identify what neighbor should have been interviewed. (AB 21). An investigator can go to the apartment complex, knock on doors, ask if anyone lived there at the time of the incident, if they saw it or if they know anyone who saw what happened. Cash does not have to know their names to establish that investigation needs to be done. Furthermore, it is clear that Cash believes that these neighbors will make statements in support of his self-defense claim. Cash cannot gather the evidentiary support for his claim without an attorney. Moreover, neither the State nor the district court know what these witnesses will say. This claim involves evidence outside of the record that refutes

³ Molina v. State, 120 Nev. 185, 87 P.3d 533 (2004).

1 one of the charges and cannot be resolved only affidavits, reports, or pleadings.
2 Mann, 118 Nev. at 354-56, 46 P.3d at 1230-31; NRS 34.770. Therefore, Cash
3 needs appointed counsel and is entitled to an evidentiary hearing.
4

5
6 **b. Expert Pathologist**

7 The State claims Cash's argument regarding needing an attorney to consult
8 with a pathologist fails because he cannot show how such testimony would have
9 changed the outcome of his trial. (AB 21-22). Additionally, the State argues that
10 any inquiry as to the angle of the knife or what that could mean as far as positions
11 of the parties was already answered by the unbiased pathologist who testified at
12 trial. Id.
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15 Reasonable, educated, expert and unbiased minds can differ. Simply
16 because one expert opines in favor of the State does not end the inquiry. A
17 different expert may give a different opinion, one that could have favored the
18 theory of self-defense. It is pure speculation for the state to argue that the
19 pathologist who testified at trial is the final and only word on the matter.
20
21

22 Cash cannot gather the evidentiary support for his claim without an attorney
23 or consulting with an expert. Moreover, neither the State nor the district court
24 know what a different expert will say. This claim involves evidence outside of the
25 record that refutes one of the charges and cannot be resolved only affidavits,
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1 reports, or pleadings. Mann, 118 Nev. at 354-56, 46 P.3d at 1230-31; NRS 34.770.
2 Moreover, while calling witnesses is the responsibility of counsel, this decision
3 still must be executed effectively. Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167
4 (2002); Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2068 (1984).
5 Therefore, Cash needs appointed counsel and is entitled to an evidentiary hearing.
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8 **c. Sandi Cash & Antoinette White**

9 The State argues that it can be inferred that the district court would have
10 made a ruling precluding either Sandi or Antoinette from testifying as to the prior
11 domestic violence between Brittany and Davis and that Sandi did not witness
12 anything per two other witnesses. (AB 22-25).
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15 First, the State cannot speculate as to what the district court would have
16 ruled during trial on matters that were never presented to the district court.
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18 Second, the State cannot speculate as to what Sandi or Antoinette know
19 about or whom they told about the prior incidents between Brittany and Davis as
20 well as the prior incidents between Davis and Cash, all of which factor into Cash's
21 state of mind during the homicide.
22

23 Cash cannot gather the evidentiary support for his claim without an attorney.
24 Moreover, neither the State nor the district court know what these witnesses will
25 say. This claim involves evidence outside of the record and cannot be resolved
26 only affidavits, reports, or pleadings. Mann, 118 Nev. at 354-56, 46 P.3d at 1230-
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1 31; NRS 34.770. Therefore, Cash needs appointed counsel and is entitled to an
2 evidentiary hearing.
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4 Therefore, the district court erred in denying Appellant's Petition, request
5 for appointed counsel and request for an evidentiary hearing and Appellant was
6 prejudiced by this error.
7

8
9 **CONCLUSION**

10 Based upon the arguments herein, *supra*, the denial of THOMAS CASH'S
11 Petition for Writ of Habeas Corpus (Post-Conviction) should be REVERSED and
12 his case should be REMANDED for appointment of counsel.
13

14 Dated this 8th day of December, 2021.
15

16
17 Respectfully submitted,

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1 **CERTIFICATE OF COMPLIANCE**

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3 NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style
4 requirements of NRAP 32(a)(6) because:
5

6 [] This brief has been prepared in a proportionally spaced typeface using
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24 3. Finally, I hereby certify that I have read this appellate brief, and to the best
25 of my knowledge, information, and belief, it is not frivolous or interposed for any
26 improper purpose. I further certify that this brief complies with all applicable
27
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1 Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires
2 every assertion in the brief regarding matters in the record to be supported by a
3 reference to the page and volume number, if any, of the transcript or appendix
4 where the matter relied on is to be found. I understand that I may be subject to
5 sanctions in the event that the accompanying brief is not in conformity with the
6 requirements of the Nevada Rules of Appellate Procedure.
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8
9 DATED this 8th day of December, 2021.
10
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