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[Application for pro hac pending]
KATHERINE E. PEPIN (Utah Bar No. 16925)
[Application for pro hac pending]
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Elizabeth A. Brown
Clerk of Supreme Court

IN THE SUPREME COURT OF THE STATE OF NEVADA

ASHLEY BENNETT

Petitioner,

vs.

Case No.: 82495

STATE OF NEVADA

Respondent.

CASE APPEAL STATEMENT

1. **Name of appellant filing this case appeal statement:**

Petitioner Ashley Bennett

2. **Identify the judge issuing the decision, judgment, or order appealed from:**

The Honorable Michelle Leavitt, Eighth Judicial District Court of the State of Nevada in
and for Clark County.

3. Identify each appellant and the name and address of counsel for each appellant:

Appellant: Ashley Bennett.

Counsel for Appellant:

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**4. Identify each respondent and the name and address of appellate counsel, if known, for
each respondent (if the name of a respondent's appellate counsel is unknown, indicate as
much and provide the name and address of that respondent's trial counsel.)**

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
ALEXANDER G. CHEN
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Office of the Attorney General (served but not appearing)
State of Nevada

100 N. Carson Street
Carson City, NV 89701

5. Indicate whether any attorney identified above in response to question 3 or 4 is not licensed to practice law in Nevada and, if so, whether the district court granted that attorney permission to appear under SCR 42 (attach a copy of any district court order granting such permission.

Counsel Neil A. Kaplan and Katherine E. Pepin are not licensed to practice law in Nevada and applications for pro hac permission were pending at the time of the district court's order.

6. Indicate whether appellant was represented by appointed or retained counsel in the district court:

Appellant was represented by retained pro bono counsel in the district court.

7. Indicate whether appellant is represented by appointed or retained counsel on appeal:

Appellant is represented by retained pro bono counsel on appeal.

8. Indicate whether appellant was granted leave to proceed in forma pauperis, and the date of entry of the district court order granting such leave:

Appellant was not granted leave to proceed in forma pauperis.

9. Indicate the date the proceedings commenced in the district court (e.g., date complaint, indictment, information, or petition was filed):

Defendant/Petitioner Ashley Bennett's Petition for Determination of Factual Innocence was filed on February 10, 2020.

10. Provide a brief description of the nature of the action and result in the district court, including the type of judgment or order being appealed and the relief granted by the district court:

1 **Brief Nature of the Action:**

2 Petitioner Ashley Bennett, filed a Petition for Determination of Factual Innocence
3 pursuant to Nev. Rev. Stat. 34.960. Specifically, Mr. Bennett requested the district court order a
4 hearing to examine the newly discovered evidence, along with other reliable evidence,
5 establishing Mr. Bennett's factual innocence.

6 Mr. Bennett asserted that the newly discovered evidence, when considered with all the
7 other evidence, raised a bona fide and compelling claim of Mr. Bennett's Factual Innocence.
8 Under Nev. Rev. Stat. 34.960, newly discovered evidence must be "material" and must not rely
9 "solely on the recantation of the testimony of a witness against the petitioner." Specifically, new
10 evidence includes: 1) a 2017 declaration recanting the only eyewitness's trial testimony where
11 Mr. Bennet was identified as one of the shooters; and 2) a 2012 declaration from a wholly new
12 eyewitness, Mr. Walker, to the shooting stating Mr. Bennett was not involved in the crime.
13 Importantly, Nev. Rev. Stat. 34.960 does not preclude evidence of recantation, but simply states
14 the recantation of a single witness is not alone sufficient to create a bona fide issue of factual
15 innocence.

16 Another requirement for newly discovered evidence is that it must not "merely be
17 cumulative of evidence that was known" at the time of trial. *See* Nev. Rev. Stat. 34.930. First,
18 recantations by their very nature cannot be cumulative. Further, Mr. Bennett was convicted
19 solely on witness testimony that falsely framed him for murder. Second, the 2012 declaration is
20 from a new eyewitness, unavailable at the time of trial. This newly discovered evidence is of a
21 completely different nature than anything presented at trial, and directly refutes the only
22 evidence against Mr. Bennett.

23 Under the Innocence Statute, new evidence cannot merely be impeachment evidence,
24 used to attack the credibility of a witness. In this case, Mr. Walker's statement asserts that he was

1 an eyewitness to the crime and that Mr. Bennett was not the perpetrator and is not merely
2 impeachment evidence.

3 Finally, Nev. Rev. Stat. 34.960 requires the petitioner show that when viewed with all
4 other evidence in the case, regardless of whether such evidence was admitted during trial, the
5 newly discovered evidence demonstrates factual innocence. The new evidence in this case,
6 standing alone, proves Mr. Bennett's innocence. When combined with all other relevant
7 evidence, the only reasonable conclusion is that Mr. Bennett was wrongfully convicted and
8 should be declared factually innocent or, at the very least, receive a hearing on his claim of
9 factual innocence.

10 **Type of Order Being Appealed:**

11 Order Denying Defendant's Petition for Determination of Factual Innocence.

12 **Relief Granted/Denied by District Court:**

13 The district court erroneously denied the Petition for Determination of Factual Innocence,
14 finding that Mr. Bennett did not meet two of the requirements outlined in Nev. Rev. Stat. 34.960.
15 Specifically, the district court erred in holding that Mr. Walker's declaration is impeachment
16 evidence and Ms. Neil's affidavit is recantation evidence. First, Mr. Walker's statement is not
17 impeachment evidence. Rather, he is a wholly new eyewitness who indicates definitively that
18 Mr. Bennett was not involved in the crime. Mr. Walker's statement does not qualify as
19 impeachment evidence because as of 2017 no eyewitness placed Mr. Bennett at the scene.

20 Second, although Ms. Neil's declaration is a recantation of her trial testimony, it is not
21 the *sole* evidence showing Mr. Bennett's innocence. Importantly, the district court overlooked
22 the clear language of Nev. Rev. Stat. 34.960 which does not preclude evidence of recantation,
23 but simply states the recantation of a single witness is not alone sufficient to create a bona fide
24 issue of factual innocence. Here, the new evidence includes Ms. Neil's recantation as well as

Mr. Walker's eyewitness account of the crime. Further, evidence presented after trial supports Mr. Bennett's claim of innocence. This includes the declaration of one of Mr. Bennett's co-defendants stating that Mr. Bennett was not involved in the crime.

11. Indicate whether the case has previously been the subject of an appeal to or original writ proceeding in the Supreme Court and, if so, the caption and Supreme Court docket number of the prior proceeding:

This case (Eighth Judicial District Court Case No. A-20-810154-W) has previously been the subject of the following appeals to the Supreme Court:

Ashley Bennett v. The State of Nevada, Case No. 40097

Ashley Bennett v. The State of Nevada, Case No. 39864

Ashley Bennett v. The State of Nevada, Case No. 44745

Ashley Bennett v. The State of Nevada, Case No. 46324

12. Indicate whether this appeal involves child custody or visitation:

No.

13. If this is a civil case, indicate whether this appeal involves the possibility of settlement:

N/A

The undersigned affirms pursuant to NRS 239B.030 that the preceding document does not contain the social security number of any person.

DATED: February 25, 2021

SMITH WASHBURN, LLP

/s/ D. Loren Washburn
D. Loren Washburn (NSB #14297)

Rocky Mountain Innocence Center
Jennifer Spring (NSB #13767)

Clyde Snow & Sessions, PC
Neil A. Kaplan
Utah Bar No. 3974 [*Pro hac application pending*]

Katherine E. Pepin
Utah Bar No. 16925 [*Pro hac application pending*]

Attorney for Petitioner Ashley Bennett

