

IN THE SUPREME COURT OF THE STATE OF NEVADA

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ASHLEY W. BENNETT

Appellant,

vs.

STATE OF NEVADA

Respondent.

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**APPELLANT'S OPENING BRIEF**

**Appeal from Dismissal of Petition for Determination of Factual Innocence  
Eighth Judicial District Court, Clark County**

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## **NRAP RULE 26.1 DISCLOSURE**

The undersigned counsel of record certifies that the following are persons and entities as described in Nev. R. App. P. 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Appellant Ashley W. Bennett ("Mr. Bennett") has been represented by the following attorneys and entities in this proceeding: Neil A. Kaplan and Katherine E. Pepin of Clyde Snow & Sessions; Jennifer Springer of the Rocky Mountain Innocence Center; and D. Loren Washburn of Armstrong Teasdale and formerly of Smith & Washburn.

2. Scott L. Brindrup and Melinda Simpkins represented Mr. Bennett at his original criminal trial.

3. Cynthia L. Dustin, Steven B. Wolfson, and Christopher R. Oram represented Mr. Bennett during his subsequent state appeals.

## **JURISDICTIONAL STATEMENT**

Nev. Rev. Stat. 34.970(9) provides for an appeal from an order of the district court denying a hearing on a petition to establish factual innocence.

On January 18, 2021, the district court entered its Order denying Appellant Ashley W. Bennett's Petition for Determination of Factual Innocence (the "Petition"). This appeal is from that order.

## **ROUTING STATEMENT**

This appeal is presumptively retained by the Supreme Court because it relates to a conviction for a Category A felony. Nev. R. App. P. 12(b)(2).

## **STATEMENT OF THE ISSUES**

1. Whether the district court erred when it dismissed Mr. Bennett's Innocence Petition without conducting an evidentiary hearing.
  - a. Whether the district court erroneously classified Calvin Walker's eyewitness statement as merely impeachment evidence.
  - b. Whether the district court erroneously classified Pamela Neal's recantation of her trial testimony as solely recantation evidence.
2. Whether the district court erred in considering the State's arguments on the issues of recantation and impeachment when the State failed to file its response to those issues until more than 290 days after the Petition was filed and in violation of Nev. Rev. Stat. § 34.970 (2020).

## **STATEMENT OF THE CASE**

In 2002, Appellant Ashley W. Bennett ("Mr. Bennett") was convicted of murdering Joseph Williams.<sup>1</sup> He was sentenced to life in prison without the possibility of parole.<sup>2</sup>

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<sup>1</sup> App. Vol.2 145.

<sup>2</sup> *Id.*

Mr. Bennett directly appealed to the Nevada Supreme Court, and his sentence and conviction were affirmed on October 5, 2004.<sup>3</sup> On November 10, 2004, Mr. Bennett filed his first Petition for Post-conviction Relief.<sup>4</sup> An evidentiary hearing was conducted beginning on November 1, 2005, and concluding November 4, 2005.<sup>5</sup> On November 29, 2005, Judge Michelle Leavitt denied Mr. Bennett's Petition for Post-conviction Relief.<sup>6</sup> Mr. Bennett filed a Notice of Appeal with the appellate court on November 18, 2005.<sup>7</sup> On December 15, 2005, Mr. Bennett filed a Motion to Appoint Appellate Counsel, which was denied on October 10, 2006, and no appellate decision was issued.<sup>8</sup>

On March 19, 2007, Mr. Bennett filed a pro se Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §2254.<sup>9</sup> On May 18, 2010, the United States District Court denied Mr. Bennett's petition.<sup>10</sup> The court also denied Mr. Bennett's Certificate of Appealability.<sup>11</sup> Through counsel, Mr. Bennett filed a Motion for Certificate of Appealability directly with the United States Court of Appeals for

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<sup>3</sup> App. Vol.2 154–62.

<sup>4</sup> App. Vol.2 163–68.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> App. Vol.2 150.

<sup>8</sup> *Id.*

<sup>9</sup> App. Vol.2 169–81.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

the Ninth Circuit on June 18, 2010.<sup>12</sup> On July 18, 2011, the court denied the motion.<sup>13</sup>

On February 10, 2020, Mr. Bennett filed a Petition for Determination of Factual Innocence (the "Petition") under the then-newly enacted Nev. Rev. Stat. § 34.960 (2020) (also referred to as the "Innocence Statute").<sup>14</sup> He argued that newly-discovered evidence, including an affidavit from the State's star witness recanting her trial testimony against Mr. Bennett and claiming that she was coerced by police into testifying at trial, and an affidavit from an eyewitness to the crime who stated that Mr. Bennett was not involved in the murder, established his factual innocence for the crime for which he was convicted.<sup>15</sup> He also emphasized that evidence already in the record, evidence that the court is statutorily required to consider, points to his innocence, including an affidavit from actual perpetrator Anthony Gantt admitting to the crime and unequivocally stating that Mr. Bennett was not involved in the murder. On June 16, 2020, the district court ordered the State to respond to the Petition by July 15, 2020, and set a hearing on July 30, 2020, to determine whether the Petition met the statutory requirements outlined in Nev. Rev. Stat. § 34.960.<sup>16</sup>

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<sup>12</sup> App. Vol.2 182–83.

<sup>13</sup> *Id.*

<sup>14</sup> App. Vol.1 1.

<sup>15</sup> App. Vol.1 1–31.

<sup>16</sup> App. Vol.2 189.



The State filed its first Response to the Petition on July 15, 2020 (the "First Response"), arguing only that Mr. Bennett failed to prove that he is factually innocent because: (1) the affidavit of co-defendant Anthony Gantt ("Mr. Gantt") cannot constitute newly discovered evidence and that the Nevada Supreme Court has already ruled that it is not probable that a different result would have occurred at trial if Mr. Gantt had not testified as he did; (2) Mr. Bennett's claims regarding Calvin Walker ("Mr. Walker") are precluded based on Mr. Bennett's failure to raise the issue sooner; and (3) Mr. Bennett's claims regarding Pamela Neal ("Ms. Neal") are precluded based on Mr. Bennett's failure to raise the issue sooner.<sup>17</sup> While the First Response included headings for arguments regarding recantation and impeachment, the State failed to include any substantive argument, legal support, or text under these headings.<sup>18</sup> On July 23, 2020, Mr. Bennett filed a timely Reply in Support of the Petition that included arguments based on the issues raised by the State in its First Response and emphasizing that the State had waived all its other arguments by failing to provide any substantive text.<sup>19</sup>

Due to circumstances beyond Mr. Bennett's control, the district court continued the hearing on the Petition numerous times. The hearing was eventually set for December 7, 2020 (the "Hearing").

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<sup>17</sup> App. Vol.2 190–202.

<sup>18</sup> App. Vol.2 201.

<sup>19</sup> App. Vol.2 203.

On November 30, 2020, only a week before the hearing, approximately 138 days after the district court ordered the State to respond to the Petition, and without the district court's permission, the State filed a Supplemental Response to the Petition (the "Second Response").<sup>20</sup> The Second Response was the first time the State articulated its arguments that: (1) Ms. Neal's affidavit constituted solely recantation evidence; and (2) Mr. Walker's affidavit was merely impeachment evidence.<sup>21</sup> The State raised these arguments again during the Hearing.<sup>22</sup>

On January 18, 2021, the district court issued its order denying the Petition (the "Order"), ruling that Mr. Bennett failed to meet the requirements of subsection (2) of Nev. Rev. Stat. § 34.960 because: (1) Ms. Neal's affidavit constitutes solely recantation evidence; and (2) Mr. Walker's affidavit constitutes merely impeachment evidence.<sup>23</sup>

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<sup>20</sup> App. Vol.2 210–25.

<sup>21</sup> *Id.*

<sup>22</sup> App. Vol.2 239–42.

<sup>23</sup> App. Vol.2 245–47.

## **STATEMENT OF FACTS**

### **A. The Murder of Joseph Williams**

On Saturday, March 3, 2001, police responded to reports of shots fired and a man down outside an apartment building in the Buena Vista Springs Apartments in North Las Vegas, Nevada.<sup>24</sup> When police arrived at the scene, they found Joseph Williams ("Mr. Williams") lying face down on the ground in the apartment courtyard with numerous gunshot wounds and approximately 25 to 50 people gathered around him.<sup>25</sup> Mr. Williams later died as a result of his injuries.<sup>26</sup>

### **B. The Initial Police Investigation**

Detective Michael Bodnar ("Detective Bodnar") was the lead detective assigned to investigate Mr. Williams' murder.<sup>27</sup> Officers went door to door at the apartment buildings in the surrounding courtyard to obtain witness statements; however, none of the occupants admitted to knowing anything about the shooting.<sup>28</sup> By the evening of March 3, 2001, police had not spoken to any individuals who admitted to seeing the shooting.<sup>29</sup>

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<sup>24</sup> App. Vol.1 85.

<sup>25</sup> App. Vol.1 86–88.

<sup>26</sup> App. Vol.1 108–09.

<sup>27</sup> App. Vol.1 114.

<sup>28</sup> App. Vol.1 88.

<sup>29</sup> App. Vol.1 116.

Although the police did not interview anyone who admitted to witnessing the shooting, they did speak to James Golden ("Mr. Golden"), a security guard at Buena Vista Springs Apartments, who heard the gunshots.<sup>30</sup> As Mr. Golden ran toward the scene, he witnessed three "suspicious" individuals from approximately 20 yards away.<sup>31</sup> Mr. Golden recognized one of the suspicious individuals as Mr. Gantt.<sup>32</sup> Mr. Golden described all three suspicious individuals as black, under the age of 18, and wearing black pants and white shirts.<sup>33</sup>

On March 7, 2001, Detective Bodnar received an anonymous phone call from a woman who refused to identify herself but claimed that she had information regarding Mr. Williams' murder.<sup>34</sup> After the phone call, Detective Bodnar decided to speak with Mr. Gantt and Mr. Bennett.<sup>35</sup> On March 21, 2001, Detective Bodnar interviewed Mr. Gantt, who was at juvenile hall for an unrelated incident.<sup>36</sup> Mr. Gantt lied about being involved with or knowing anything about Mr. Williams' murder.<sup>37</sup>

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<sup>30</sup> App. Vol.1 77–78.

<sup>31</sup> App. Vol.1 80.

<sup>32</sup> App. Vol.1 82.

<sup>33</sup> App. Vol.1 84.

<sup>34</sup> App. Vol.1 117.

<sup>35</sup> App. Vol.1 117–19.

<sup>36</sup> App. Vol.1 117–18.

<sup>37</sup> App. Vol.1 118.

On March 24, 2001, Detective Bodnar and gang officers first interviewed Mr. Bennett.<sup>38</sup> Detective Bodnar pointedly asked Mr. Bennett why he killed Mr. Williams.<sup>39</sup> Mr. Bennett responded with surprise and emphasized that he could never kill anyone.<sup>40</sup> Throughout the rest of the interview, Mr. Bennett repeatedly denied being involved in Mr. Williams' murder.<sup>41</sup>

### **C. Pamela Neal**

Ms. Neal was charged with conspiracy to commit murder, burglary while in possession of a deadly weapon with substantial bodily harm, discharging a firearm at or into a structure, and coercion with use of a deadly weapon for a shooting that occurred at an apartment on April 15, 2001, where a six-year-old girl was shot in the face.<sup>42</sup> The victim's grandmother and an eyewitness to the crime identified Ms. Neal as the shooter and, after being questioned by police, Ms. Neal ultimately confessed to forcing her way into the apartment.<sup>43</sup>

On May 1, 2001, two weeks after she was charged, Ms. Neal accompanied Tammy Hannibal ("Ms. Hannibal") to the police station to speak with Detective Rodrigues about the unrelated murder of Eric Bass ("Mr. Bass"), Ms. Neal's

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<sup>38</sup> App. Vol.1 119.

<sup>39</sup> App. Vol.1 120.

<sup>40</sup> App. Vol.1 139.

<sup>41</sup> *Id.*

<sup>42</sup> App. Vol.1 129.

<sup>43</sup> App. Vol.1 49–50.

cousin.<sup>44</sup> At this time, Ms. Neal erroneously believed that Mr. Bennett was involved in Mr. Bass's murder. While they were at the police station, Detective Bodnar met with Ms. Neal, who claimed that she was standing outside her apartment door when Mr. Williams was murdered, although she could not remember either the date or time of the shooting.<sup>45</sup> When Detective Bodnar first spoke with Ms. Neal, he was aware Ms. Neal was facing serious felony charges.<sup>46</sup>

Ms. Neal alleged that Mr. Bennett (whom Ms. Neal knew as "Face"), Mr. Gantt, and Lailoni Morrison ("Mr. Morrison"), as well as "three to four other Gersons"<sup>47</sup> were responsible for Mr. Williams' murder.<sup>48</sup> Ms. Neal later identified Louis Matthews ("Mr. Matthews") and Jermaine Webb ("Mr. Webb") as also involved in Mr. Williams' murder.<sup>49</sup>

#### **D. Mr. Gantt**

On May 7, 2001, Detective Bodnar interviewed Mr. Gantt a second time at juvenile hall.<sup>50</sup> During this interview, Mr. Gantt lied again and maintained that he was not involved in Mr. Williams' murder. However, in direct contradiction of his

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<sup>44</sup> App. Vol.1 131.

<sup>45</sup> App. Vol.1 51.

<sup>46</sup> App. Vol.1 129.

<sup>47</sup> "Gersons" refers to the Gerson Park Kingsmen ("GPK"), a local gang. Mr. Bennett was not a member of GPK or any other gang. App. Vol.1 8.

<sup>48</sup> App. Vol.1 121.

<sup>49</sup> App. Vol.1 133.

<sup>50</sup> App. Vol.1 125.

original statement, Mr. Gantt claimed he knew who was involved.<sup>51</sup> Mr. Gantt claimed that Mr. Bennett, Mr. Matthews, Frederick Schneider ("Mr. Schneider"), Antwan Graves ("Mr. Graves"), and Mr. Morrison were responsible for Mr. Williams' murder.<sup>52</sup> Mr. Gantt contended this group was walking toward the Hunt house (a gang hangout for the Rolling 60s, another local gang and a rival of GPK) when they encountered Mr. Williams.<sup>53</sup> After almost an hour of questioning, Mr. Gantt changed his statement again and admitted to shooting Mr. Williams.<sup>54</sup> According to Mr. Gantt, Mr. Bennett, Mr. Matthews, Mr. Graves, Mr. Schneider, and Mr. Morrison surrounded Mr. Williams and began shooting.<sup>55</sup>

#### **E. Mr. Bennett's Arrest and Second Interrogation**

On May 17, 2001, Detective Bodnar drafted and submitted an affidavit requesting arrest warrants for certain individuals, including Mr. Bennett, in large part based on Ms. Neal's statement.<sup>56</sup> Detective Bodnar did not inform the issuing court about the serious felony charges pending against Ms. Neal in his affidavit.<sup>57</sup>

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<sup>51</sup> App. Vol.1 126.

<sup>52</sup> App. Vol.1 125.

<sup>53</sup> App. Vol.1 128.

<sup>54</sup> App. Vol.1 135–37.

<sup>55</sup> *Id.*

<sup>56</sup> App. Vol.1 130, 132.

<sup>57</sup> *Id.*

On May 18, 2001, Detective Bodnar arrested and interviewed Mr. Bennett.<sup>58</sup> Mr. Bennett again denied any involvement in Mr. Williams' murder.<sup>59</sup>

#### **F. Preliminary Hearing**

Mr. Bennett, Mr. Morrison, Mr. Matthews, Mr. Gantt, and Mr. Webb appeared as co-defendants in Mr. Williams' murder at the preliminary hearing on June 5, 2001.<sup>60</sup> Before Ms. Neal was called to the stand, the Court noted that at the conclusion of the preliminary hearing, Ms. Neal would be arraigned on charges of conspiracy to commit murder, burglary, and possession.<sup>61</sup> The prosecution informed the court that they wanted to dismiss the charges against Ms. Neal "right now" because they "[could not] prove the case" against her.<sup>62</sup> After an exchange with the court, Ms. Neal was granted full immunity by the prosecutor for all charges after being pressed on this issue.<sup>63</sup>

Ms. Neal testified that she witnessed Williams' murder from her balcony as she was leaving to pick up her neighbor, Michelle Wilson ("Ms. Wilson"), at 3:35

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<sup>58</sup> App. Vol.1 138.

<sup>59</sup> *Id.*

<sup>60</sup> App. Vol.1 167.

<sup>61</sup> App. Vol.1 228.

<sup>62</sup> App. Vol.1 228–29.

<sup>63</sup> App. Vol.1 230.



p.m.<sup>64</sup> While Ms. Neal claimed that she witnessed the entire shooting, she repeatedly claimed that she "wasn't looking" when she was unable to give details.<sup>65</sup>

When asked to identify those involved, Ms. Neal identified one of the shooters as Mr. Morrison, whom she had known for approximately five to six years, Mr. Gantt, and Mr. Bennett.<sup>66</sup> Ms. Neal testified that although she did not see Mr. Bennett's gun, she "knew" he was holding one.<sup>67</sup> Ms. Neal also said she could identify Mr. Bennett and Mr. Morrison even though they were standing with their backs towards her.<sup>68</sup>

When she was initially interviewed by police, Ms. Neal identified Mr. Webb and Mr. Matthews as shooters.<sup>69</sup> However, at the preliminary hearing, Ms. Neal explained she identified Mr. Webb and Mr. Matthews as shooters originally because she recognized them from around the neighborhood and saw them on the day of the shooting but could no longer say whether they were involved.<sup>70</sup> She excused her inconsistent identifications in several ways: first, she claimed that because there were so many people, she did not focus on Mr. Webb or Mr. Matthews; second, she decided that either she could not see their hands or was not

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<sup>64</sup> App. Vol.1 234–37.

<sup>65</sup> App. Vol.2 34, 58, 87.

<sup>66</sup> App. Vol.1 235, 242, 248; App. Vol.2 5.

<sup>67</sup> App. Vol.2 4.

<sup>68</sup> App. Vol.2 58.

<sup>69</sup> App. Vol.1 71–73.

<sup>70</sup> App. Vol.2 10, 22–23.

certain whether they had guns; third, she insisted she simply could not remember who was there that day; and finally, she claimed that she knew Mr. Webb and Mr. Matthews were there, but she may have been mixed up about their involvement.<sup>71</sup> After Ms. Neal was asked to identify the people she saw who witnessed the shooting, she stopped responding to questions and refused to testify further.<sup>72</sup> Ms. Neal refused to provide names even after the court instructed her to answer, so the court threatened to arrest Ms. Neal and hold her in contempt.<sup>73</sup> Ms. Neal then told the court that Ms. Wilson and another neighbor witnessed the shooting.<sup>74</sup> At the conclusion of her preliminary hearing testimony, Ms. Neal asserted that officers had driven her to the hearing at her request and denied receiving any funds from the District Attorney's office or police department.<sup>75</sup>

At the end of the preliminary hearing, the court determined there was probable cause that Mr. Bennett, Mr. Morrison, and Mr. Gantt committed the offense of murder with a deadly weapon.<sup>76</sup> The charges against Mr. Webb and Mr. Matthews were dismissed.<sup>77</sup>

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<sup>71</sup> App. Vol.2 22–24, 34–36, 95.

<sup>72</sup> App. Vol.2 63.

<sup>73</sup> App. Vol.2 74.

<sup>74</sup> App. Vol.2 75.

<sup>75</sup> App. Vol.2 99.

<sup>76</sup> App. Vol.2 134–35.

<sup>77</sup> App. Vol.2 135.

On June 7, 2001, the State of Nevada filed a one-count information charging Mr. Bennett and co-defendants Mr. Morrison and Mr. Gantt with murder with the use of a deadly weapon.<sup>78</sup>

## **G. Trial and Direct Appeal**

Mr. Bennett's trial began on January 22, 2002, in Las Vegas, Nevada.<sup>79</sup> After the testimony was presented, the jury found him guilty of all charges.<sup>80</sup>

### **1. Ms. Neal's Trial Testimony**

- a. Ms. Neal's testimony regarding witnessing the crime was inconsistent with her prior statements and the evidence.*

Ms. Neal's trial testimony not only introduced new inconsistencies but also reiterated her prior inconsistencies, both with her own statements and with the uncontroverted evidence. The following highlighted inconsistencies corroborate Ms. Neal's affidavit recanting her trial testimony and make it clear that she did not witness the shooting of Mr. Williams:

- i. Timing: Ms. Neal told the jury she left her apartment around 3:30 p.m. to take her friend, Ms. Wilson, to work around four when she witnessed the shooting.<sup>81</sup> She also indicated that she was certain she left her apartment at 3:30 p.m. because she picked her son up at school at 3:20 p.m.*

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<sup>78</sup> App. Vol.2 140.

<sup>79</sup> App. Vol.2 144.

<sup>80</sup> App. Vol.2 145.

<sup>81</sup> App. Vol.1 51.

and had just arrived back home when the shooting occurred.<sup>82</sup> However, police responded to the scene at 3:09 p.m. after the shooting had already taken place.<sup>83</sup> Further, the shooting took place on a Saturday when her son would not have been in school.<sup>84</sup>

ii. Mr. Bennett's alleged weapon: At trial, Ms. Neal testified that Mr. Bennett used a silver gun during the shooting.<sup>85</sup> However, at the preliminary hearing, Ms. Neal testified that she did not see Mr. Bennett's gun.<sup>86</sup>

*b. Ms. Neal's criminal charges were dropped.*

Ms. Neal told the jury that the charges pending against her on the day of Mr. Bennett's preliminary hearing were dropped due to "lack of evidence."<sup>87</sup> However, outside the presence of the jury, defense counsel informed the court that there was significant, material evidence that implicated Ms. Neal in that crime.<sup>88</sup> The court found that it was the District Attorney's decision to determine whether charges should be brought against particular defendants and therefore never inquired into what evidence the police had gathered against Ms. Neal, which included Ms. Neal's

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<sup>82</sup> App. Vol.1 65.

<sup>83</sup> App. Vol.1 85.

<sup>84</sup> App. Vol.1 66.

<sup>85</sup> App. Vol.1 58.

<sup>86</sup> App. Vol.2 4.

<sup>87</sup> App. Vol.1 62.

<sup>88</sup> App. Vol.1 63.

confession that she forced her way into the apartment where the young girl was shot.<sup>89</sup>

## 2. Mr. Golden's Trial Testimony

Mr. Golden testified he saw three suspicious individuals about 20 yards away from the crime scene.<sup>90</sup> Mr. Golden identified Mr. Gantt as one of the suspicious individuals.<sup>91</sup> Mr. Golden estimated that all three suspicious individuals were under the age of 18.<sup>92</sup> Despite being called as a witness to the immediate aftermath of the shooting at Mr. Bennett's trial, Mr. Golden did not identify Mr. Bennett and was never asked whether he even saw Mr. Bennett on the day of the shooting.

## 3. Mr. Gantt's Trial Testimony

On November 26, 2001, Mr. Gantt entered into a plea agreement with the State to testify against his co-defendants, including Mr. Bennett, in exchange for a lesser sentence of ten years to life on a reduced second-degree murder charge.<sup>93</sup> Before the agreement, Mr. Gantt was facing a potential sentence of life without the possibility of parole for first-degree murder with use of a deadly weapon.<sup>94</sup> Shortly

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<sup>89</sup> App. Vol.1 64.

<sup>90</sup> App. Vol.1 80.

<sup>91</sup> App. Vol.1 82.

<sup>92</sup> App. Vol.1 84.

<sup>93</sup> App. Vol.1 96.

<sup>94</sup> App. Vol.1 104.

after he was sworn in, Mr. Gantt refused to testify against Mr. Bennett.<sup>95</sup> The court took a recess and gave Mr. Gantt the opportunity to speak privately with his counsel.<sup>96</sup> After the recess, Mr. Gantt agreed to testify against Mr. Bennett.<sup>97</sup>

Mr. Gantt stated that on the day of the shooting, Gantt was at a gathering to mourn the death of Mark Doyle, who was murdered the day before.<sup>98</sup> After they arrived at L-Wak's house, Mr. Gantt claimed Mr. Bennett suggested that they should shoot up the Hunt house in retaliation for Mark Doyle's murder.<sup>99</sup>

According to Mr. Gantt, as the group walked through the parking lot, Mr. Williams exited an apartment.<sup>100</sup> Mr. Bennett, Mr. Gantt, Mr. Graves, Mr. Morrison, and Mr. Matthews spread out and shot at Mr. Williams.<sup>101</sup> Mr. Gantt denied Ms. Neal's testimony that he fired the last shot into Mr. Williams and testified that, after the group shot off approximately 20 rounds, Mr. Matthews took the final shot, and the group ran away in separate directions.<sup>102</sup>

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<sup>95</sup> App. Vol.1 93.

<sup>96</sup> App. Vol.1 94–95.

<sup>97</sup> *Id.*

<sup>98</sup> App. Vol.1 97–98.

<sup>99</sup> App. Vol.1 98–99.

<sup>100</sup> App. Vol.1 100.

<sup>101</sup> App. Vol.1 101.

<sup>102</sup> App. Vol.1 102–03.

#### 4. Ms. Wilson's Trial Testimony

Ms. Wilson, the woman who Ms. Neal testified she was driving to work on the day of the shooting, testified as a witness for the defense.<sup>103</sup> Ms. Wilson testified that Ms. Neal frequently drove her to work, and they would typically leave the apartment complex at 3:45 p.m.<sup>104</sup>

Ms. Wilson testified that on March 3, 2001, she heard gunshots as she was getting ready for work.<sup>105</sup> About a minute after the shots ended, Ms. Wilson saw Ms. Neal in the hallway of Ms. Wilson's apartment.<sup>106</sup> Ms. Wilson testified that she and Ms. Neal walked to the courtyard and saw Mr. Williams had been shot.<sup>107</sup> Ms. Wilson testified that a police officer asked her and Ms. Neal if they witnessed the shooting, and they both said "no."<sup>108</sup> Instead of driving to Ms. Wilson's work as planned, the women returned to Ms. Wilson's apartment and stayed there until approximately 7:30 p.m.<sup>109</sup> During this time, Ms. Neal never told Ms. Wilson she witnessed the shooting.<sup>110</sup>

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<sup>103</sup> App. Vol.1 148.

<sup>104</sup> App. Vol.1 151.

<sup>105</sup> App. Vol.1 149–50.

<sup>106</sup> App. Vol.1 153.

<sup>107</sup> App. Vol.1 154.

<sup>108</sup> App. Vol.1 155.

<sup>109</sup> *Id.*

<sup>110</sup> App. Vol.1 156.

## **H. Post Trial**

On February 11, 2002, Mr. Bennett's counsel filed a Motion for a New Trial, which the Court denied on March 1, 2002.<sup>111</sup> Through new counsel, Mr. Bennett filed a second Motion for a New Trial on June 10, 2002, and that motion was also denied.<sup>112</sup> On June 18, 2002, the court sentenced Mr. Bennett to life without parole, plus an equal and consecutive term of life without parole for the weapon enhancement.<sup>113</sup> The court also ordered Mr. Bennett to pay restitution in the amount of \$30,432.06, jointly and severally with co-defendants Mr. Morrison and Mr. Gantt.<sup>114</sup>

Mr. Bennett directly appealed to the Nevada Supreme Court, and his sentence and conviction were affirmed on October 5, 2004.<sup>115</sup>

## **I. Post-Conviction Investigation**

The Rocky Mountain Innocence Center's investigation began in 2010. Over the almost ten years the case has been under investigation, attorneys, investigators, and student interns have repeatedly sought materials from the police, the court, trial counsel, and other sources. The available materials led to the investigation and

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<sup>111</sup> App. Vol.2 145.

<sup>112</sup> App. Vol.2 147.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> App. Vol.2 154–62.



interviews of witnesses and other individuals with information about the case, some of whom had been ignored in the past.

1.     The Anthony Gantt Affidavit

On July 3, 2002, Mr. Gantt signed a sworn affidavit that Mr. Bennett "is innocent of his homicide charge he is imprisoned for."<sup>116</sup> Mr. Gantt admitted that he did not know Mr. Bennett at the time of the murder, nor did he see Mr. Bennett on the day of the crime.<sup>117</sup> He also admitted that he falsely testified against Mr. Bennett, which led the jury to believe Mr. Bennett took part in Mr. Williams' murder.<sup>118</sup> In the affidavit, Mr. Gantt asserted that investigating detectives threatened him with the death penalty, even though he was a minor, if he did not say the individuals Ms. Neal also implicated were involved in Mr. Williams' murder.<sup>119</sup> Mr. Gantt further asserted that investigating detectives threatened him with additional charges in unrelated murder cases if he did not testify against Mr. Bennett.<sup>120</sup>

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<sup>116</sup> App. Vol.1 42–43.

<sup>117</sup> App. Vol.1 43.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

2. The Calvin Walker Declaration (the "Walker Declaration")

On April 1, 2012, Mr. Walker signed a declaration under penalty of perjury stating he witnessed Mr. Williams' murder.<sup>121</sup> Mr. Walker was a member of the Rolling 60s when his fellow gang member, Mr. Williams, was murdered.<sup>122</sup> On the afternoon of March 3, 2001, Mr. Walker was visiting his mother at the Buena Vista Springs Apartments when he saw Mr. Williams and another friend in the courtyard.<sup>123</sup> Mr. Walker then witnessed four young men start shooting at Mr. Williams.<sup>124</sup> Mr. Walker did not know any of the individuals who murdered Mr. Williams but described them to be between 16 and 20 years old.<sup>125</sup> At the time he signed this declaration, Mr. Walker had known Mr. Bennett for about 20 years and knew Mr. Bennett was not involved in the shooting.<sup>126</sup> Police did not interview Mr. Walker, and he did not come forward at the time because he feared his fellow gang members would retaliate if he volunteered any information about the shooting.<sup>127</sup>

3. The Pamela Neal Declaration (the "Neal Declaration")

On February 11, 2017, Ms. Neal signed a sworn declaration recanting her statements to police, her preliminary hearing testimony, and her trial testimony

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<sup>121</sup> App. Vol.1 38–41.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

implicating Mr. Bennett in Mr. Williams' murder.<sup>128</sup> Ms. Neal admitted that she was never sure of who shot Mr. Williams, but Detectives Bodnar and Rodriguez, District Attorney Coot and Investigator Reg pressured her to testify anyway.<sup>129</sup> In so doing, detectives "threatened to bring the attempted murder charges back and take [Ms. Neal's] kids."<sup>130</sup> In her declaration, Ms. Neal also admitted that the police and prosecutor gave her money to help with her move from the Carey Arms apartments to another complex. Ms. Neal repeatedly told the detectives Mr. Bennett was not involved in Mr. Williams' murder even after Mr. Bennett's conviction, but no action was ever taken.<sup>131</sup> Nonetheless, detectives showed up at her home twice -- once to follow her to the district attorney's office for trial preparation and once to pick her up and take her to the courthouse for the trial.<sup>132</sup>

#### **J. Petition for Determination of Factual Innocence**

On February 10, 2020, Mr. Bennett filed a Petition for Determination of Factual Innocence (the "Petition") under the Innocence Statute.<sup>133</sup> He provided the district court with newly-discovered evidence, including the Walker Declaration and the Neal Declaration. He also emphasized that evidence already in the record

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<sup>128</sup> App. Vol.1 33–37.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> App. Vol.1 1.

points to his innocence, including the Gantt Affidavit, Ms. Wilson's and Mr. Golden's trial testimony, and the inconsistencies in Ms. Neal's original testimony.

### **SUMMARY OF THE ARGUMENT**

The district court erred in dismissing the Petition without allowing Mr. Bennett to present his newly discovered evidence of innocence at an evidentiary hearing. The Petition met the requirements of Nevada's Innocence Statute and should therefore be set for an evidentiary hearing because the newly discovered evidence is not reliant solely upon recantation of testimony by a witness against Mr. Bennett and is not merely impeachment evidence. The Petition identified two affidavits as newly discovered evidence – the Neal Declaration and the Walker Declaration.

The district court first erred when it dismissed the Petition because it erroneously found that the Neal Declaration was solely recantation evidence, and the Walker Declaration was merely impeachment evidence. However, the Innocence Statute does not require that newly discovered evidence not consist of *any* recantation evidence or impeachment evidence but instead states that the newly discovered evidence cannot be reliant *solely* upon recantation of testimony by a witness and not *merely* impeachment evidence. Even with the district court's erroneously classification of one declaration as recantation evidence and the

second declaration as impeachment evidence, the two affidavits together are sufficient to meet the requirements of the Innocence Statute.

The district court next erred by finding that the Neal Declaration was solely recantation testimony. While Ms. Neal does recant her trial testimony identifying Mr. Bennett as one of the shooters, it holds independent evidentiary value from her recantation. Her declaration is factually specific and gives details about her court appearances and other instances where she tried to recant her testimony to the police detectives. Moreover, it details how she was coerced into testifying by the district attorney and police detectives, including their threats to take away her children if she did not testify against Mr. Bennett.

The district court also erred by finding that the Walker Declaration was impeachment evidence solely because it contradicted Ms. Neal's trial testimony. Impeachment evidence is evidence that is offered to discredit a witness. In his declaration, Mr. Walker does not attempt to disparage, discredit, or otherwise dispute the veracity of Ms. Neal and does not even mention her name. Instead, he describes his first-hand eyewitness account of the murder for which Mr. Bennett has been convicted.

Lastly, the district court erred in even considering the State's belated arguments regarding recantation and impeachment. The State failed to raise and articulate its arguments regarding "solely recantation" and "merely impeachment"

evidence until 138 days after the district court ordered the State to respond to the Petition and deprived Mr. Bennett of any meaningful opportunity to respond to these arguments in briefing.

### **ARGUMENT**

The district court erred in denying the Petition without holding an evidentiary hearing because the newly discovered evidence: (1) is not reliant *solely* upon recantation of testimony by a witness against the petitioner; and (2) is not *merely* impeachment evidence. To the contrary, the Petition clearly satisfies the requirements of subsections (2) and (3) of the Innocence Statute and establishes a bona fide issue of factual innocence. Therefore, the district court should have denied the State's Motion to Dismiss and ordered an evidentiary hearing on the Petition.

#### **I. THE DISTRICT COURT ERRED IN DISMISSING THE PETITION WITHOUT ALLOWING MR. BENNETT TO PRESENT HIS NEWLY DISCOVERED EVIDENCE OF INNOCENCE AT AN EVIDENTIARY HEARING.**

Under subsection (2) of the Innocence Statute, a petition to determine factual innocence must aver "[n]ewly discovered evidence exists that is specifically identified and, if credible, establishes a bona fide issue of factual innocence." *See* Nev. Rev. Stat. § 34.960(2)(a) (2002). In addition, the "newly discovered evidence" must: (a) "[e]stablish[ ] innocence and [be] material to the case and the determination of factual innocence"; (b) be "not merely cumulative of evidence

that was known, [ ] not reliant **solely** upon recantation of testimony by a witness against the petitioner and [ ] not **merely** impeachment evidence[.]” *See id.* at § 34.960(2)(b)(1)–(3) (emphasis added). Lastly, a petition must be “distinguishable from any claims made in any previous petitions.” *See id.* at § 34.960(2)(d).

In support of his Petition, Mr. Bennett identified two distinct pieces of newly discovered evidence: (1) the Neal Declaration – a declaration from Ms. Neal, the State's star witness against Mr. Bennett at trial, recanting her trial testimony where she identified Mr. Bennett as a shooter, stating that she could not identify the shooters, and admitting that she was coerced into testifying against Mr. Bennett by the police detectives investigating the case; and (2) the Walker Declaration – a declaration from Calvin Walker, a new eyewitness who, like others, did not come forward at the time of the crime, who states that he saw the shooters and that Mr. Bennett was not involved in the murder of Mr. Williams. After a hearing on the State's Motion to Dismiss the Petition, the district court erroneously found that: (a) the Neal Declaration was solely recantation evidence; and (b) the Walker Declaration was merely impeachment evidence. Based on this mistaken interpretation of the law, the district court concluded that the Petition did not meet the requirements of subsection (2) of the Innocence Statute and dismissed the Petition.

Even assuming, for purposes of this initial argument, that the Neal Declaration is solely recantation evidence, and the Walker Declaration is merely impeachment evidence, this alone is insufficient to dismiss the Petition for failing to meet the requirements of the Innocence Statute. Under a plain language analysis, subsection (2) of the Innocence Statute does not require that the newly discovered evidence not consist of *any* recantation or impeachment evidence. Instead, it states that the newly discovered evidence cannot be "reliant *solely* upon recantation of testimony by a witness" and "not *merely* impeachment evidence[.]" *See Nev. Rev. Stat. § 34.960(2)(b)(2) (2020) (emphasis added)*. The Innocence Statute also allows the court to consider not only the newly discovered evidence but also other evidence showing innocence -- here that includes Mr. Gantt's affidavit stating unequivocally that Mr. Bennett was not involved in the murder; Mr. Golden's trial testimony describing the shooters as three young men, none of whom were Mr. Bennett; and the testimony of Ms. Wilson corroborating Ms. Neal's recantation.

Importantly, the newly discovered evidence in the Petition, for purposes of the Innocence Statute, consists of both the Neal Declaration and the Walker Declaration. Even if the Neal Declaration's sole evidentiary value is the recantation of Ms. Neal's trial testimony, the newly discovered evidence in the Petition is not reliant solely on the recantation because it also includes the Walker Declaration. Similarly, even if the Walker Declaration is merely impeachment evidence, the



newly discovered evidence also includes the Neal Declaration, which is not. Together, the Neal Declaration and the Walker Declaration are sufficient to meet the requirements of Innocence Statute. However, here the newly discovered evidence is not solely reliant upon the recantation of a witness or merely impeachment evidence. Specifically, under Nevada law, the Neal Declaration does not solely recant the prior testimony of a witness, and the Walker Declaration is not merely impeachment evidence.

**A. The Neal Declaration Is Not Solely Recantation Testimony.**

Under subsection (2) of the Innocence Statute, newly discovered evidence in a petition for determination of factual innocence cannot be "reliant solely upon recantation of testimony by a witness against the petitioner[.]" *See Nev. Rev. Stat § 34.960(2)(b)(2)* (2002). Black's Law Dictionary defines "recant" as "[t]o withdraw or renounce (prior statements or testimony) formally or publicly[.]" Black's Law Dictionary (11th ed. 2019). "Solely" is defined as "not involving anyone or anything else; only." Oxford Languages (<https://languages.oup.com/google-dictionary-en>, last visited June 1, 2021). While Ms. Neal does recant her trial testimony identifying Mr. Bennett as one of the shooters, Mr. Bennett's Petition does not rely "solely" on Ms. Neal's recantation; rather, it relies on her recantation, along with evidence, specific facts, and motive supporting that recantation.

Further, the Neal Declaration holds independent evidentiary value from her recantation.

First, under Nevada law, while it is true that a newly discovered recantation that contains no specific details and has no evidentiary support is considered inherently unreliable, this Court has never held that detailed recantations supported by evidence can be wholly discounted. *See generally, Berry v. State*, 131 Nev. 957, 971, 363 P.3d 1148, 1157 (2015); *Callier v. Warden, Nevada Women's Correctional Center*, 111 Nev. 976, 901 P.2d 619 (1995). Rather, this Court states that if the recantation is a "naked allegation," then the post-conviction court can discount it. *Berry*, 131 Nev. at 971 (citing *Hargrove v. State*, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984)). In post-conviction innocence cases, this Court has found that a recantation cannot be "completely discredited without an evidentiary hearing" when the recantation has evidentiary and factual support, and the testifying witness has no motive to recant. *Id.* at 972. In other words, when the recantation "involves anyone or anything else" and is not solely a "naked allegation," justice requires that it must be considered at an evidentiary hearing on the petitioner's innocence and not dismissed outright at the pleading stage. This Court has not had the opportunity to define when a petition for determination of factual innocence is premised "solely" on a recantation under the Innocence

Statute.<sup>134</sup> However, this Court has previously analyzed how to assess the reliability of recantations in other post-conviction contexts, and applying that analysis would be wholly reasonable here.

For example, in *Berry*, this Court found that a jailhouse informant's recantation was not "belied by the record" because the recantation was supported by evidence adduced at trial and that the informant had no motive to recant. *Id.* at 972. The informant testified at trial that the defendant had confessed to him while they were in a holding cell together. *Id.* at 971. However, in admitting that he had lied at trial, the informant gave specific factual details, including information about the police and prosecutors who had coerced his trial testimony. *Id.* Further, the actual perpetrator had since confessed to the crime, and other evidence supported the actual perpetrator's confession, thus making the defendant's purported confession to the informant incredible. *Id.* Finally, nothing in the record indicated that the informant had reason to lie when recanting. *Id.* Accordingly, this Court reversed the dismissal of the defendant's post-conviction petition and held that the informant's recantation, and thus the defendant's innocence, needed to be vetted at an evidentiary hearing.<sup>135</sup> *Id.*

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<sup>134</sup> NRS § 34.960(2)(b)(2)

<sup>135</sup> The State ultimately stipulated to Mr. Berry's innocence without a full evidentiary hearing on his innocence.

Conversely, in *Hargrove*, this Court rejected an innocence claim when petitioner's allegations that certain witnesses could establish his innocence "was not accompanied by the witness[es]' names or descriptions of their intended testimony" and thus were only naked assertions without any specific factual assertions. 100 Nev. at 502. Similarly, in *Callier*, this Court upheld the district court's finding that witnesses' recantations of trial testimony could not support an innocence claim. 111 Nev. at 992. Specifically, the district court found the evidence was consistent with the witnesses' trial testimony, not their recantations; the witnesses gave multiple inconsistent recantations; and the allegations of prosecutorial misconduct were not specific but were simply "bald allegations." *Id.* at 991. Finally, the district court found that one of the recanting witnesses had motive to lie because her family had placed her under a "great deal of pressure" to recant. *Id.* Notably, the trial court's decision to discount the recantations and to deny the defendant's motion for a new trial was made, not at the pleading stage, but only after an evidentiary hearing on the defendant's possible innocence. *Id.*

Here, like in *Berry*, the record gives no indication that Ms. Neal had motive to lie in recanting her false trial testimony, her declaration contains specific facts, and her recantation has more than sufficient evidentiary support. First, Ms. Neal has absolutely nothing to gain by recanting her trial testimony, and indeed, could place herself in danger of a perjury charge by so doing. Actually, the police

pressure and her interest to protect herself led her to lie in the first instance, not currently. When Ms. Neal implicated Mr. Bennett, she was facing serious felony charges, which were completely dropped in exchange for her trial testimony. She was threatened with additional charges as well as loss of her children. And, she was provided with moving expenses by police and prosecutors in exchange for her testimony pointing to Mr. Bennett. Currently, there is absolutely nothing in the record which would indicate that Ms. Neal has a motive to recant. Second, Ms. Neal's declaration is factually specific -- it names names, it gives details about her court appearances, and it outlines other instances where she tried to recant. Her declaration is very similar to the one the informant provided in *Berry* and contains no "bald allegations," permitting the district court to discount it out of hand. *See* 111 Nev. at 990. Third, and perhaps most importantly, is the evidence that supports Ms. Neal's recantation, evidence that takes it out of the purview of "solely" a recantation with only bald allegations. Evidence supporting Ms. Neal's recantation includes Mr. Bennett's testimony that he did not shoot Mr. Williams; Mr. Golden's testimony that he saw three young men, all under the age of 18, running from the scene with guns and that none of them were 28-year-old Mr. Bennett; Mr. Walker's declaration that he saw the shooting, that he knew Mr. Bennett, and that Mr. Bennett was not involved; and Mr. Gantt's recantation admitting that he had committed the murder and that his trial testimony implicating Mr. Bennett was a

fabrication. Under this Court's prior precedent analyzing recantation evidence, Ms. Neal's declaration simply cannot be considered "solely" recantation evidence. It involves specific facts and evidence and is corroborated by the testimony of other witnesses. The district court erred in rejecting it as violative of the recantation provision of the Innocence Statute and, as such, Mr. Bennett's innocence claim should be remanded for a hearing on his innocence.

Second, even if this Court were to interpret the statutory requirement that the petition for determination of factual innocence not be based "solely" on recantation evidence differently than its prior precedent, Ms. Neal's declaration provides evidence in addition to her actual recantation that cannot be ignored in a newly-discovered evidence analysis. In addition to explaining she had lied at trial, she provides the reason for those lies -- reasons that are directly relevant to Mr. Bennett's claim of actual innocence.

In the Neal Declaration, Ms. Neal states that she "felt pressured" by the district attorneys and police detectives to testify against Mr. Bennett. She further states that they threatened to bring back the serious felony charges from which she had been granted immunity during Mr. Bennett's preliminary hearing and threatened to take away her kids if she did not testify. Indeed, she indicates that one of the police detectives followed her from her home to her children's school and then to the district attorney's office to make sure she showed up for trial

preparation. She also indicates that police came to her home after she said she did not want to testify and drove her to the courthouse. Lastly, Ms. Neal states that she repeatedly told these individuals that she did not know whether or not Mr. Bennett was involved in the murder of Mr. Williams.

Ms. Neal's statements in her declaration do much more than simply recant, *i.e.* "withdraw or renounce," her testimony at Mr. Bennett's trial. Ms. Neal was the State's star witness. No physical evidence linked Mr. Bennett to the murder. Thus, his conviction was based solely upon the testimony of Ms. Neal and Mr. Gantt, a co-defendant who has also recanted his testimony and accused the detectives of misconduct after Mr. Bennett's trial. In the Neal Declaration, Ms. Neal has now come forward and admitted that she was coerced by the district attorney and police into providing perjured testimony against Mr. Bennett through improper threats. Therefore, the Neal Declaration, as one part of the Petition's newly discovered evidence, is not reliant solely upon the recantation of her testimony and is sufficient to support Mr. Bennett's Petition under the Innocence Statute.

**B. The Walker Declaration Is Not Impeachment Evidence.**

Under subsection (2) of the Innocence Statute, newly discovered evidence in a petition for determination of factual innocence cannot be "merely impeachment" evidence. *See Nev. Rev. Stat. § 34.960(2)(b)(2) (2002)*. This Court has held that evidence is "merely impeachment" if its sole purpose is to discredit a witness.

*O'Neill v. State*, 124 Nev. 1497, 238 P.3d 843 (Nev. 2008). Importantly, however, this Court has waived the requirement that newly discovered evidence cannot be merely impeachment evidence and therefore may be enough to justify granting a new trial if the witness impeached is so important that impeachment would necessitate a different verdict. *King v. State*, 125 Nev. 1053, 596 P.2d 501, 503 (Nev. 1979); *see also State v. Crockett*, 84 Nev. 516, 519, 444 P.2d 896, 897 (1968)(holding that evidence that "goes to the essence of [defendant's] guilt or innocence" should not be considered "mere" impeachment).

In *Crockett*, a witness testified that he had seen the defendant running from the scene of a murder. 84 Nev. at 518. After the defendant was convicted and sentenced to death, another individual admitted that he, not the defendant, was the person leaving the crime scene. *Id.* The State argued that the individual's admission was merely impeachment evidence and should not form the basis for a new trial. *Id.* Both the district court and this Court firmly rejected the State's arguments, holding that particularly in a case where identity is a crucial issue, evidence "impeaching" an eyewitness could well determine the guilt or innocence of the defendant and should therefore be considered newly-discovered. *Id.*

Similarly, in *Hennie v. State*, the newly discovered evidence implicated two key prosecution witnesses in an unrelated murder conspiracy and proved that one of the two witnesses had lied on the stand during trial. 114 Nev. 1285, 1286-87,



968 P.2d 761, 762 (Nev. 1998). Although the State argued that the new evidence was merely impeachment evidence because the defense had attacked their credibility at trial, this Court rejected the State's argument holding that because the jury did not hear this "crucial impeachment testimony" and it was "extremely material" to the defense, a new trial was warranted. *Id.* at 764. This result was mandated even though the impeachment evidence directly contradicted the witnesses' trial testimony. *Id.*

Here, the district court erroneously held that the Walker Declaration was "merely impeachment" evidence simply because it contradicted Ms. Neal's trial testimony, testimony that she has now recanted. In his declaration, Mr. Walker states under penalty of perjury that he was walking through the Carey Arms apartments property when he saw Mr. Williams, his friend and fellow gang member, exit an apartment. Mr. Walker then saw four young men walk toward Mr. Williams and start shooting. Mr. Walker identified the four shooters as "youngsters about 16-20 years old." He then affirmatively states that Mr. Bennett, who he had known for more than ten years at the time of the shooting, was not one of the shooters. Mr. Walker's testimony is particularly compelling because he was a friend of Mr. Williams and associated with Mr. Williams' gang. He would have no reason to lie and protect Mr. Bennett, who, according to the State's theory of the case, is a member of the rival gang who murdered his friend.

In short, the Walker Declaration is not impeachment evidence, let alone "merely impeachment" evidence disallowed under the Innocence Statute. Importantly, the Walker Declaration is the only eyewitness identification in the case. The only two witnesses who implicated Mr. Bennett at trial have now recanted, and even if they had not recanted, Mr. Walker makes no attempt to discredit them as witnesses. Instead, the Walker Declaration constitutes a first-hand, eyewitness account of the crime for which Mr. Bennett has been convicted. In this case, where identity was unquestionably at issue, the Walker Declaration is "crucial," "extremely material," and it is the evidence upon which Mr. Bennett's guilt or innocence could turn.

Moreover, under the district court's inconceivably broad definition of "merely impeachment" evidence, it is daunting to think of any hypothetical "newly discovered evidence" that would satisfy the requirements of the Innocence Statute because all new evidence presented to prove a defendant's innocence would necessarily have to contradict the State's evidence presented at trial.

While this Court has yet to address the specific interpretation or definition of "merely impeachment" evidence under the Innocence Statute,<sup>136</sup> numerous other jurisdictions have considered "mere impeachment" evidence and are in line with this Court's impeachment jurisprudence. The Utah Supreme Court has stated that

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<sup>136</sup> NRS § 34.960(2)(b)(2)

"it is 'the purpose for which the evidence is offered that determines whether certain evidence is 'merely impeachment evidence.'" *See Magallanes v. South Salt Lake City*, 353 P.3d 621, 623 (Utah Ct. App. 2015). Evidence is "merely impeachment" evidence when "the sole purpose of the evidence offered" is to impeach a witness and where the evidence "does not negate a specific element of the prosecution's case and is not directly related to charges against" the defendant. *See id.* (internal quotations and citations omitted); *see also Wickham v. Galetka*, 61 P.3d 987 (Utah 2002) (holding that evidence was "merely impeachment evidence" where the evidence "is not directly related to the charges against [the defendant]; it does not negative a specific element of the prosecution's case[,]" and instead "goes solely to the credibility of the victim and serves only to impeach her."). Other states have adopted similar definitions of "merely impeachment" evidence. *See, e.g., U.S. v. Barsoum*, 2013 WL 424434, at \*3 (M.D. Fla. Feb. 4, 2013) (holding that evidence was "merely impeachment" evidence where the defendant submits the evidence "as proof that [the State's witness] lied under oath, or had incentive to lie under oath[.]"); *Mavrick v. State*, 210 N.E.2d 426, 428 (Ind. 1965) (holding that evidence was "merely impeachment" evidence where the affidavits "only seek to disparage, discredit, and to prove unworthy of belief the veracity of [the State's witness]."

Similarly, the Alabama Court of Criminal Appeals has held that a medical test that directly controverted the State's evidence at trial was not "merely

impeachment evidence." *See Farris v. State*, 890 So.2d 188 (Ala. Crim. App. 2002). Therein, the court reasoned:

The evidence is not impeaching in that [the defendant] did not seek to discredit the veracity of any witnesses. Rather, the [medical test] served to controvert, that is, *disputed the State's witness's findings and opinions, not their credibility*.

*Id.* (emphasis added).

The Walker Declaration does not seek to disparage, discredit, or otherwise dispute the veracity of Ms. Neal or Mr. Gantt. To the contrary, the Walker Declaration makes no mention of any other witnesses or their testimony. Instead, Mr. Walker's testimony negates a specific element of the prosecution's case and is directly related to the charges against Mr. Bennett. Mr. Walker states that he was a witness to the murder of Mr. Williams and knows that Mr. Bennett was not one of the shooters involved. Thus, the Walker Declaration is not impeachment evidence at all, let alone the lesser prohibition of "merely impeachment" evidence of the Innocence Statute. Therefore, the district court erred when it denied the Petition on the basis that the Walker Declaration was "merely impeachment" evidence and the case should be remanded for an evidentiary innocence hearing.

## **II. THE DISTRICT COURT ERRED IN CONSIDERING THE STATE'S BELATED ARGUMENTS REGARDING RECANTATION AND IMPEACHMENT**

The district court erred in considering the State's arguments regarding "solely recantation" and "merely impeachment" evidence because they failed to

raise and articulate these arguments in the timeframe outlined in the district court order and in the Innocence Statute. In doing so, the State deprived Mr. Bennett of any meaningful opportunity to review and respond to these new arguments, resulting in substantial prejudice to Mr. Bennett.

After Mr. Bennett filed the Petition, the district court ordered the State to file its response by July 15, 2020 and set the hearing for July 30, 2020. The State's First Response filed by the court's deadline argued that Mr. Bennett failed to prove that he was factually innocent because: (1) the affidavit of Mr. Gantt is not newly discovered evidence; (2) Mr. Bennett's claims regarding the Walker Affidavit were precluded because he failed to raise the issue sooner; and (3) Mr. Bennett's claims regarding the Neal Declaration were precluded because he failed to raise the issue sooner.<sup>137</sup> While the First Response included bolded and numbered conclusory headings for arguments regarding recantation and impeachment, the State failed to include any argument, legal precedent, or even text under these headings. Mr. Bennett timely filed a reply that addressed the arguments raised in the First

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<sup>137</sup> Mr. Bennett did not claim that Mr. Gantt's affidavit was newly discovered but rather part of the underlying record showing innocence. Further, the Innocence Statute has no statute of limitations so the State's second and third arguments are without any merit. The State seemed to concede these arguments at the hearing on this matter and the district court apparently rejected them by not addressing them in its Order dismissing Mr. Bennett's Petition.

Response and expressly stated that any additional arguments were waived based on the State's failure to raise them in the time allotted by the district court.

Due to circumstances beyond Mr. Bennett's control, the hearing set for July 30, 2020, was continued numerous times by the district court but was eventually set for December 7, 2020 (the "Hearing"). On November 30, 2020, only a week before the Hearing and approximately 138 days after the district court ordered the State to respond to the Petition, the State filed its Second Response wherein it argued that the Petition should be dismissed because the newly discovered evidence was based solely on recantation of testimony and merely impeachment evidence. The district court then ultimately and erroneously dismissed the Petition based on the State's late arguments.

The filing of the Second Response and its consideration by the district court was highly prejudicial to Mr. Bennett, who had spent months addressing legal arguments and preparing for a hearing based on the arguments timely raised by the State in the First Response. The State's belated filing of the Second Response intentionally deprived Mr. Bennett of any meaningful opportunity to review, research, and articulate a response to the arguments raised therein. Therefore, it was improper and an abuse of the district court's discretion to allow these arguments to be raised by the State at the Hearing and used as the basis for the district court's dismissal of Mr. Bennett's Petition.

## **CONCLUSION**

The district court erred by dismissing the Petition because the newly discovered evidence contained therein was not based solely on the recantation of testimony by a witness and was not "merely impeachment" evidence. The Petition met the requirements of subsection (2) of the Innocence Statute, and this matter should therefore be set for an evidentiary hearing pursuant to Nev. Rev. Stat. § 34.970 (2020).

DATED this 15th day of June, 2021.

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## ATTORNEY'S CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of Nev. R. App. P. 32(a)(4), the typeface requirements of Nev. R. App. P. 32(a)(5), and the type style requirements of Nev. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word in 14 point Times New Roman type style.

2. I further certify that this brief complies with the page- or type-volume limitations of Nev. R. App. P. 32(a)(7) because, excluding the parts of the brief exempted by Nev. R. App. P. 32(a)(7)(C), it is proportionately space, has a typeface of 14 points or more, and contains **8840 words**.

3. Finally, 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 Nev. R. App. P. 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 in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.



DATED this 15th day of June, 2021.

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