IN THE SUPREME COURT OF THE STATE OF NEVADA

ASHLEY BENNETT,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 82495

RESPONDENT'S ANSWERING BRIEF

Appeal From Denial of Petition for Determination of Factual Innocence
Eighth Judicial District Court, Clark County

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ROUTING STATEMENT

This appeal is presumptively retained by the Supreme Court because it relates to a conviction for Category A felonies. NRAP 17(b)(3).

STATEMENT OF THE ISSUES

1. Whether the district court properly denied Appellant's Petition for Determination of Factual Innocence.

STATEMENT OF THE CASE

On June 7, 2001, ASHLEY WILLIAM BENNETT (hereinafter "Appellant"), along with his co-defendants, was charged by way of Information with one count

MURDER WITH USE OF A DEADLY WEAPON (OPEN MURDER) (Felony – NRS 200.010, 200.030, 193.165). 2 AA 140.

Jury trial commenced on January 22, 2002. Id. at 144. On February 4, 2002, the jury returned a verdict of Guilty of FIRST DEGREE MURDER WITH USE OF A DEADLY WEAPON. Id. at 145. On February 6, 2002, the parties filed a Stipulation Waiving Separate Penalty Hearing and Allowing Sentence to be Imposed by the Court. Id.

On February 11, 2002, Appellant filed a Motion for New Trial. Id. The State filed its Opposition on February 20, 2002. Id. On February 21, 2002, Appellant's Motion was denied. The Court filed its Order on March 1, 2002. Id.

On June 10, 2002, Appellant filed an additional Motion for New Trial. Id. at 147. The State filed its Opposition on June 17, 2002. Id. On June 18, 2002, Appellant's second Motion for New Trial was denied. Id.

On June 18, 2002, Appellant was sentenced to Life in the Nevada Department of Corrections without the possibility of parole plus an equal and consecutive term of Life without the possibility of parole for the use of a deadly weapon. Id. The Judgment of Conviction was filed on June 20, 2002. Id.

On June 28, 2002, Appellant filed a Notice of Appeal. Id. at 147. On October 5, 2004, the Nevada Supreme Court affirmed Appellant's conviction and remittitur issued on November 8, 2004. Id.

On January 3, 2005, Appellant filed a Petition for Writ of Habeas Corpus. Id. at 149. The State filed its Opposition on January 13, 2005. Id. On May 31, 2005, Appellant filed a Supplement to Petition for Writ of Habeas Corpus. Id. at 150. The State filed its Opposition on July 7, 2005. On July 11, 2005, Appellant filed his Reply to the State's Opposition. Id. On July 26, 2005, the State filed a Supplemental Response to Appellant's Petition for Writ of Habeas Corpus. Id. On August 16, 2005, Appellant filed an additional Supplement to his Petition for Writ of Habeas Corpus. Id. On November 1, 2005, the Court held an evidentiary hearing regarding Appellant's claims. Id. at 164. On November 4, 2005, the Court denied Appellant's Petition. Id. The Court filed its Findings of Fact, Conclusions of Law and Order on November 29, 2005. Id. at 168.

On November 18, 2005, Appellant filed a Notice of Appeal. Id. at 150. On August 29, 2006, the Nevada Supreme Court issued an order affirming the Court's decision and remittitur issued on September 28, 2006. Id. at 155-162.

On February 10, 2020, Defendant filed the instant Petition for Determination of Factual Innocence. 1 AA 1. The State filed its Response on July 15, 2020. 2 AA 190-202. On July 23, 2020, Defendant filed his Reply. Id. at 203-209.

On November 30, 2020, in preparing for the upcoming hearing on Defendant's Petition, the State became aware of a clerical error wherein an incomplete draft of the State's Response was filed. 2 AA 212.

Argument was heard on December 7, 2020. An Order denying the petition was filed on January 18, 2021. This timely appeal follows.

STATEMENT OF THE FACTS

For the purposes of this appeal, the facts can be condensed to some of the pertinent testimony that was adduced at trial. On March 3, 2001, Joseph Williams (hereinafter "Mr. Williams") was shot and killed at the Buena Vista Springs Apartment Complex, located in Las Vegas, Nevada.

At Appellant's trial, two witnesses provided direct testimony that Appellant was one of the shooters. First there was Pamela Neal (hereinafter "Neal"), a resident at the apartment complex that testified that she recognized Appellant as one of the shooters. On the day in question, Neal testified that she saw a group of men surrounding Mr. Williams prior to him being shot. Among the individuals that she recognized were Appellant and a person named Anthony Gantt (hereinafter "Gantt").

Gantt also provided direct testimony that Appellant was one of the people that killed Mr. Williams. Gantt was a co-defendant to Appellant, and Gantt had been identified by security guard James Golden as on of the individuals running away from the apartment complex after the shooting. Gantt was a juvenile at the time of the shooting, but he agreed to testify against Appellant regarding the events that took place on March 3, 2001.

Gantt testified that he was with other individuals that were members of the Gerson Park Kingsman Gang, and that on the day of the shooting it was their intention to shoot an apartment of a rival Rolling 60 Crips members. However on the way to the apartment, they came across Mr. Williams, who was a member of the Rolling 60 Crips gang. His group, which included Appellant, started shooting at Mr. Williams and killed him.

ARGUMENT

I. THE DISTRICT COURT DID NOT ERR IN DENYING APPELLANT'S PETITION BECAUSE IT DID NOT MEET HT REQUIREMENTS OF NRS 34.960

a. The district court did not improperly consider the State's Supplemental Response

As an initial matter, Appellant argues that the supplemental response filed by the State was improper. According to Appellant, the State untimely filed a response which raised new issues. However, the State made it clear to Appellant and the district court below that it had mistakenly filed only a draft response to the full petition. 2 AA 212.

Although Appellant now complains of the State's supplemental response, Appellant through his counsel never objected at the district court level or requested a continuance to file a reply. Failure to object at the time of the argument generally

precludes appellate review. Ringle v. Burton, 120 Nev. 82, 94, 86 P.3d 1032, 1040 (2004).

At the oral argument for Appellant's petition in district court, the district court asked Appellant if he had received the State's supplemental response and had an opportunity to review it. 2 AA 229. Appellant specifically stated, "Yes. We are aware that it was filed. Mr. Chen (for the State) sent me an email and let me know." Id. Appellant then continued with his argument.

Moreover, the issues raised by the State in its supplemental response were not any arguments that could not have been anticipated, given the direct wording of the statute. The issue for the district court was always whether or not the newly presented evidence was enough to grant an evidentiary hearing or relief. Therefore, the prejudice seems very little considering that Appellant would have prepared to argue that its evidence qualified for relief under the statute.

b. Appellant has failed to present newly discovered evidence exists that, if credible, establishes a bona fide issue of factual innocence.

Separate from a post-conviction petition for writ of habeas corpus, an individual may file a petition to establish factual innocence. NRS 34.900 – 34.990. Such a petition must establish that the petitioner is factually innocent based upon newly discovered evidence. NRS 34.920 – NRS 34.930. Evidence that is "newly discovered" evidence must be evidence "that was not available to petitioner at trial

or during the resolution by the trial court of any motion to withdraw a guilty plea or motion for new trial and which is material to the determination of the issue of factual innocence." NRS 34.930.

The bulk of the considerations that a district court must make with regards to a petition to establish factual innocence are enumerated in NRS 34.960.

NRS 34.960 states in relevant part:

> 1. At any time after the expiration of the period during which a motion for a new trial based on newly discovered evidence may be made pursuant to NRS 176.515, a person who has been convicted of a felony may petition the district court in the county in which the person was convicted for a hearing to establish the factual innocence of the person based on newly discovered evidence. A person who files a petition pursuant to this subsection shall serve notice and a copy of the petition upon the district attorney of the county in which the conviction was obtained and the Attorney General.
> 2. A petition filed pursuant to subsection 1 must contain an assertion of factual innocence under oath by the petitioner and must aver, with supporting affidavits or other credible documents, that:
> (a) Newly discovered evidence exists that is specifically identified and, **if credible**, establishes a bona fide issue of factual innocence;
> **(b) The newly discovered evidence identified by the petitioner:**
> **(1) Establishes innocence and is material to the case and the determination of factual innocence;**
> **(2) Is not merely cumulative of evidence that was known, is not reliant solely upon recantation of testimony by a witness against the petitioner and is not merely impeachment evidence; and**

(3) Is distinguishable from any claims made in any previous petitions;

3. In addition to the requirements set forth in subsection 2, a petition filed pursuant to subsection 1 must also assert that:

(a) Neither the petitioner nor the petitioner's counsel knew of the newly discovered evidence at the time of trial or sentencing or in time to include the evidence in any previously filed post-trial motion or postconviction petition, and the evidence could not have been discovered by the petitioner or the petitioner's counsel through the exercise of reasonable diligence; or

(b) A court has found ineffective assistance of counsel for failing to exercise reasonable diligence in uncovering the newly discovered evidence.

4. The court shall review the petition and determine whether the petition satisfies the requirements of subsection 2. **If the court determines that the petition:**

(a) Does not meet the requirements of subsection 2, the court shall dismiss the petition without prejudice, state the basis for the dismissal and send notice of the dismissal to the petitioner, the district attorney and the Attorney General.

(b) Meets the requirements of subsection 2, the court shall determine whether the petition satisfies the requirements of subsection 3. **If the court determines that the petition does not meet the requirements of subsection 3, the court may:**

(1) Dismiss the petition without prejudice, state the basis for the dismissal and send notice of the dismissal to the petitioner, the district attorney and the Attorney General; or

(2) Waive the requirements of subsection 3 if the court finds the petition should proceed to a hearing and that there is other evidence that could have been discovered through the exercise of reasonable diligence by the petitioner or the petitioner's counsel at trial, and the other evidence:

(I) Was not discovered by the petitioner or the petitioner's counsel;

(II) Is material upon the issue of factual innocence; and

(III) Has never been presented to a court.

(emphasis added).

In his petition below, Appellant presented three (3) affidavits from three (3) separate witnesses, two (2) of which testified at trial and one (1) who did not, to support his claim that he is factually innocent of the murder of Mr. Williams. Appellant's claim that the district court erred in denying his petition is meritless because Appellant failed to satisfy his burden under the statute. As NRS 34.960 clearly states, if the court determines that the petitioner has not met the statutory thresholds, then it is required to dismiss the petition. NRS 34.960 makes it incredibly clear that the newly discovered evidence must be specially identified, credible, and bona fide proof of factual innocence. The district court in this case held that the evidence presented did not meet this standard.

1. Calvin Walker

Appellant presented to the district court an affidavit from an individual named Calvin Walker, who did not testify at trial. In April of 2012, Walker issued an affidavit from High Desert State Prison claiming that Appellant was not involved with the murder of Williams. 1 AA 39-40. Upon entering prison, Walker says that he learned of Appellant's incarceration and decided to write his affidavit. Walker's affidavit stated that he was present the day of the shooting and that he did not see

Appellant shoot at Mr. Williams. He explains that "everybody knows he [Appellant] did not do it," but he provides no reference of who "everybody" is. Walker's affidavit makes no mention of who was involved with the shooting, if not the Appellant.

In considering Mr. Walker's affidavit, the district court noted that he wrote his affidavit two months after entering prison and almost ten years after the incident. 2 AA 246. The affidavit attempted to cast doubt on the other witnesses that testified Appellant was the shooter (Neal and Gantt). As such, the district court indicated that Mr. Walker's affidavit amounted to mere impeachment testimony of Neal and Gantt.

Given Walker's situation as an inmate, and nothing to corroborate his affidavit, it was proper for the district court to hold that Walker's affidavit was not credible, and to treat his affidavit as mere impeachment evidence. Had Walker now taken the stand, his testimony would have simply refuted Neal and Gantt's testimony. If the standard were that any individual could write an affidavit calling for the exoneration of a convicted person, the mere acquiring of a statement contradicting the witnesses at trial would entitle every inmate to relief under the statute. This is why the court's determination of credibility is a pre-requisite under the statute. Here, the district court properly reviewed Walker's affidavit, and found it to be nothing more than impeachment evidence of two eye witnesses that testified

at trial. Therefore, the district court did not abuse its discretion in denying his petition.

2. Pam Neal

Furthermore, the district court correctly ruled that Neal's affidavit was not newly discovered evidence because it was a mere recantation of her prior testimony. The district court applied the direct language of NRS 34.960(2)(b) which does not consider a recantation of testimony by a witness to be considered newly discovered.

Appellant submitted a hand-written affidavit from Neal dated February 11, 2017. I AA 36-37. According to Neal's affidavit, she did not want to testify because she was not totally sure of the people that shot Mr. Williams. Neal goes on to say that she felt she was pressured to testify by the authorities, and that she told the authorities later after Appellant was convicted that she did not think he was one of the shooters.

Appellant argues that Neal's affidavit should provide him relief, in at least the granting of an evidentiary hearing, because it lays out that she was coerced by law enforcement to testify against Appellant. However, Neal was cross-examined at trial, and her testimony was the opposite of the alleged coercion that she now alleges in her affidavit. Defense was cross examining Neal on the fact that she was testifying to curry favor with prosecutors even though she had not actually received immunity or any benefits. RA 120-123. She adamantly denied that she was testifying against

Appellant because of any fear that she might be retaliated against by law enforcement.

Neal's affidavit is the definition of recanting testimony. Even if believed, her affidavit simply says at the time she was not totally sure he was one of the shooters or that now she does not think he was involved. In any light, Neal's affidavit was properly deemed as a mere recantation, and pursuant to the statute, the district court was proper to rule that this affidavit was insufficient to grant Appellant relief. Her affidavit did nothing to prove that Appellant was factually innocent of the charges.

3. Anthony Gantt

Appellant did not present Gantt's affidavit as newly discovered evidence because Appellant had previously raised Gantt's recantation as new evidence and failed to gain any relief**.** Gantt's recanting affidavit was signed on July 3, 2002, merely one month after Appellant had been sentenced having been found guilty at the trial which Gantt testified. Appellant admitted in his district court petition that the affidavit by Gantt was previously considered by this Court in Appellant's Petition for Writ of Habeas Corpus, which was denied on November 4, 2005, and affirmed on August 29, 2006.

Clearly, Gantt's affidavit cannot be considered as newly discovered evidence. "'Newly discovered evidence' means evidence that was not available to a petitioner at trial or during the resolution by the trial court of any motion to withdraw a guilty

plea or motion for new trial and which is material to the determination of the issue of factual innocence." NRS 34.930. Therefore, this evidence was previously available to Appellant and presented to the courts and cannot be used as "newly discovered evidence" to form the basis of Appellant's petition.

Moreover, NRS 34.960(2)(b)(3) indicates that any newly discovered evidence must be distinguishable from any claims made in previous petitions. In Appellant's case, statements related to Anthony Gantt have been heavily litigated already. Thus, claims regarding the Gantt affidavit are barred by the law of the case doctrine and/or res judicata. "The law of a first appeal is law of the case on all subsequent appeals in which the facts are substantially the same." Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (quoting Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969)). "The doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." Id. at 316, 535 P.2d at 799. Under the law of the case doctrine, issues previously decided on direct appeal may not be reargued in a habeas petition. Pellegrini v. State, 117 Nev. 860, 879, 34 P.3d 519, 532 (2001) (citing McNelton v. State, 115 Nev. 396, 414-15, 990 P.2d 1263, 1275 (1999)). Furthermore, this Court cannot overrule the Nevada Supreme Court. NEV. CONST. Art. VI § 6.

This Court has ruled previously that Gantt's testimony was not newly discovered evidence and that it was not probable that a different result would have occurred at trial if Gantt had not testified as he did. RA 1-3. Additionally, this Court noted on Appellant's direct appeal that, if any witness intimidation occurred, Appellant was the one threatening and attempting to intimidate Gantt. ("Additionally, the State presented substantial credible evidence that Bennett was the source of intimidation.") 2 AA 155-156. Moreover, the district court had determined that Appellant failed to raise the Gantt affidavit in a timely manner. 2 AA 166. Therefore, Appellant's claims regarding Gantt are also barred by res judicata. See Mason v. State, 206 S.W.3d 869, 875 (Ark. 2005) (recognizing the doctrine's applicability in the criminal context); see also York v. State, 342 S.W. 528, 553 (Tex. Crim. Appl. 2011). Accordingly, by simply continuing to file motions with the same arguments, his motion is barred by the doctrines of the law of the case and res judicata. Id.; Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975). Therefore, Appellant's claims regarding Gantt are barred both by the law of the case and res judicata and the new affidavit of Gantt should not change the outcome of Appellant's case or entitle him to relief under his petition.

Because Appellant could not present Gantt's already discounted affidavit as newly discovered evidence, Appellant argued that the district court should now consider Gantt's affidavit to bolster Neal and Walker's affidavits. However, Gantt's

affidavit does not in any way support the other affidavits. Gantt testified at trial and was subject to extensive cross-examination. At trial, Gantt testified that Appellant was one of the shooters of Mr. Williams. However, during his testimony, he made several statements that Neal either was wrong or not being truthful. For example, Gantt said that Neal was not telling the truth about Gantt being the last person to shoot Mr. Williams. 2 RA 255. Another examine was when Gantt said Neal was not a witness to the shooting. 2 RA 266.

The jury got to consider the fact that two of the State's witnesses not only had conflicting testimony, but that Gantt was even going so far as to discredit Neal's testimony. Yet despite Neal and Gantt both testifying, the jury still found beyond a reasonable doubt that Appellant was one of the individuals responsible for the murder.

When considering the evidence that was adduced at trial to the affidavits that Appellant presented, the district court correctly decided that the Neal affidavit was solely a recantation of her previous testimony, and that Walker's affidavit was simply impeachment evidence of Neal and Gantt's trial testimony. Given that the statute is clearly that the newly discovered evidence must be more, the district court properly decided to deny Appellant's petition.

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/ / /

c. Recantation of a witness does not qualify as newly discovered evidence under NRS 34.960.

It was proper for the district court to deny Appellant's petition because the new affidavits were merely recantations of prior testimony. NRS 34.960 specifically states that the newly discovered evidence presented in a Petition to Establish Factual Innocence cannot rely solely on the recantation of a witness. NRS 34.960(2)(b)(2). Appellant attempts to circumvent this requirement by claiming that he has instead provided the recantation testimony of two (2) witnesses. However, Appellant's claim clearly contradicts the purpose of the statute. NRS 34.960(2)(b)(2) does not state that a petition cannot be based on the recantation testimony of a *single* witness. Instead, the statute specifically precludes recantation testimony generally as "newly discovered evidence." Therefore, the affidavits of Neal and Gantt cannot constitute newly discovered evidence under the statue and Appellant's claim that the district court erred fails.

d. The evidence presented by Appellant is not "material."

Pursuant to NRS 34.940, evidence is material only if "the evidence establishes a reasonable probability of a different outcome." Here, Appellant failed to demonstrate that affidavits presented to the district court were material. Of course Appellant wants the affidavits to change the outcome, but when considered with the rest of the evidence and testimony that was adduced at trial, there is little likelihood

of a different result. Thus, Appellant's reliance upon his own self-serving statements that the outcome would likely have been different is not sufficient to meet his burden under the statute. As demonstrated, *infra*, the evidence provided by Appellant is merely impeachment evidence that could have been easily rebutted by the State. When considering the affidavits with the trial testimony, it is clear that these affidavits were not material or likely to change the outcome. Therefore, the affidavits submitted by Appellant are not material and Appellant's petition was properly denied.

e. The evidence presented by Appellant constitutes cumulative and/or impeachment evidence.

NRS 34.960(2)(b)(2) also requires that any "newly discovered" evidence not be cumulative of evidence that was known. NRS 34.960(2)(b)(2) also precludes a petitioner from using impeachment evidence as the basis for a Petition to Establish Factual Innocence. Here, the affidavits presented by Appellant are merely impeachment evidence and, thus, Appellant's petition must be denied.

Appellant first presents a 2017 affidavit from Pam Neal in support of his Petition. 1 AA 33-37. In her affidavit, Neal states that she was pressured by the police to identify Appellant as one of the shooters in order to receive a favorable negotiation in an unrelated case. However, this amounts to impeachment evidence

which could have been used on cross-examination to cast doubt on Neal's statement to police and identification of Appellant.

In fact, this information was presented to the jury on cross-examination of Neal. Trial counsel asked Neal whether she had given police false information in order to have the case against her dismissed, which Neal answered that she did not. RA 122-123. Gantt also testified that he believed Neal had previously lied in her testimony "to get her case dropped." 2 RA 255. Thus, the Neal affidavit is also cumulative because this information was already presented to the jury and cannot be the basis for Appellant's Petition pursuant to NRS 34.960(2)(b)(2). The Neal affidavit merely provides impeachment evidence and cannot form the basis for Appellant's claim pursuant to NRS 34.960(2)(b)(2). Therefore, Appellant's claim must be denied.

Appellant presented the district court with a 2012 affidavit from Calvin Walker, an individual that did not testify in Appellant's trial, in support of his petition. 1 AA 39-41. Walker merely stated that he did not know any of the shooters but that he did know Appellant at the time of the shooting. However, Walker's testimony would amount to impeachment evidence to cast doubt on the eyewitness testimony and identification of Appellant as one of the shooters. Thus, the Walker affidavit merely provides impeachment evidence and cannot form the basis for

Appellant's claim pursuant to NRS 34.960(2)(b) (2). This was yet another reason for the district court to dismiss his petition.

Appellant also presented the 2002 affidavit from Anthony Gantt stating that he was coerced by police into identifying Appellant as one of the shooters. 1 AA 43. However, this amounted to impeachment evidence which could have been used on cross-examination to cast doubt on Gantt's statement to police and identification of Appellant. In fact, this information was presented to the jury on cross-examination.

On cross-examination Gantt was asked whether he had given police false information in order to receive a favorable negotiation and "not die in prison," which Gantt answered that he did not. 2 RA 259. Trial counsel also asked Gantt if he had tried to remove his attorney from representing him because he had been coerced into taking the negotiations. 2 RA 268. Gantt was also questioned as to a letter he wrote to Appellant where Gantt said he would not testify against Appellant because he had been pressured into lying. 2 RA 270. Thus, the Gantt affidavit was also cumulative and should not have been a basis to grant Appellant's petition pursuant to NRS 34.960(2)(b)(2). Further, Gantt's affidavit does not cast doubt on his previous trial testimony as it was noted on the record that the co-defendant and other GPK gang members attended Appellant's trial and attempted to intimidate Gantt into not testifying**.** Thus, the Gantt affidavit merely provides impeachment evidence of his

former testimony and cannot form the basis for Appellant's claim pursuant to NRS 34.960(2)(b)(2). Therefore, Appellant's claim must be denied.

f. Appellant has failed to prove that he is factually innocent.

NRS 34.960(2) states that a petition must "contain an assertion of factual innocence under oath by the petition and must aver, with supporting affidavits or other credible documents" credible newly discovered evidence.

According to NRS 34.920

> "Factual innocence" means that a person did not:
>
> 1. Engage in the conduct for which he or she was convicted;
> 2. Engage in conduct constituting a lesser included or inchoate offense of the crime for which he or she was convicted;
> 3. Commit any other crime arising out of or reasonably connected to the facts supporting the indictment or information upon which he or she was convicted; and
> 4. Commit the conduct charged by the State under any theory of criminal liability alleged in the indictment or information.

First, Appellant's affidavit of innocence pursuant to NRS 34.960 is insufficient. Appellant merely writes that he concurs with everything written in his petition and that the contents are true and correct. 1 AA 31. During oral argument, the district court expressed concern about the deficiency of the affidavit of innocence. The district court pondered during argument:

> I mean, and the—you know, the statute says he has to specifically assert, under oath, that he did not engage in the conduct for which he is convicted, that he didn't commit anything that would be construed as a lesser included offense or commit any other crime arising out of or reasonably connected to the facts and didn't commit any conduct alleged by the State under any theory of criminal liability. I mean, I thought you might say page 29 was the assertion, but since 34.920 contains such a specific definition, I mean, do you believe that meets this definition?

Therefore, Appellant's petition and affidavit itself was insufficient because it does not specifically state that he meets the definition set forth by NRS 34.920.

Here, Appellant provides no newly discovered evidence to this Court affirmatively demonstrating that he did not commit the crimes charged. Rather, Appellant provided the district court with affidavits from individuals who were unable to affirmatively state who was involved in the crime or that Appellant was not involved in the shooting. Affidavits by individuals who cannot identify the shooter do not satisfy Appellant's burden under the statute. As Appellant has failed to provide newly discovered evidence demonstrating that he is factually innocent of the crimes he was convicted of, Appellant has failed to meet his burden under NRS 34.960 and the denial of his petition should be affirmed.

II. THE DISTRICT COURT CORRECTLY HELD THAT APPELLANT WAS NOT ENTITLED TO AN EVIDENTIARY HEARING

Appellant alleges the district court erred in not grating him an evidentiary hearing based on the affidavits that he provided. NRS 34.960(1) explains that a

person may petition for a hearing to establish factual innocence based upon newly discovered evidence. However, all of the subsections that follow explain the specific requirements and considerations for the district court to make when deciding if a hearing is even necessary. This Court generally reviews a district court's decision to deny an evidentiary hearing under an abuse of discretion standard. Rubio v. State, 124 Nev. 1032, 1047, 194 P.3d 1224, 1234 (2008).

Appellant cites Hargrove v. State and Berry v. State for the proposition that he is entitled to an evidentiary hearing. 100 Nev. 498, 686 P.2d 222 (1984); 131 Nev. 957, 363 P.3d 1148 (2015). Hargrove and Berry are distinguishable from this case because the denial of an evidentiary hearing in those cases related to the application of NRS 34.770, which governs evidentiary hearings pertaining to a petition for a writ of habeas corpus. NRS 34.960, regarding a petition for factual innocence, has separate requirements and considerations from NRS 34.770. In this case, it is clear that the district court in denying the evidentiary hearing felt that the information provided by Appellant was not sufficient under the statute to entitle him to a separate hearing.

However, if this Court were to hold that the standard for an evidentiary hearing under NRS 34.770 is the same as NRS 34.960, the district court still was proper to deny an evidentiary hearing. This Court has held that if a petition can be resolved without expanding the record, then no evidentiary hearing is necessary.

Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002); Marshall v. State, 110 Nev. 1328, 885 P.2d 603 (1994). A petitioner is entitled to an evidentiary hearing if his petition is supported by specific factual allegations, which, if true, would entitle him to relief unless the factual allegations are repelled by the record. Marshall, 110 Nev. at 1331, 885 P.2d at 605; see also Hargrove, 100 Nev. at 503, 686 P.2d at 225 (holding that "[a] Appellant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record"). "A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." Mann, 118 Nev. at 354, 46 P.3d at 1230 (2002). It is improper to hold an evidentiary hearing simply to make a complete record. See State v. Eighth Judicial Dist. Court, 121 Nev. 225, 234, 112 P.3d 1070, 1076 (2005) ("The district court considered itself the 'equivalent of . . . the trial judge' and consequently wanted 'to make as complete a record as possible.' This is an incorrect basis for an evidentiary hearing.").

Contrary to Berry, specific factual allegations of innocence presented by the defendant were not belied by the record. The newly discovered evidence in that case consisted of a person confessing to the crime among other specific and new evidence. 131 Nev. 973, 363 P.3d 1148. The same is not here because the only evidence is recantation and impeachment evidence. Even Walker's affidavit does not indicate who any of the shooters were. This case is incredibly different from

Berry where there was credible and new evidence for the district court to require a separate hearing.

Here, there is no reason to expand the record because Appellant fails to present specific factual allegations that would entitle him to relief. Marshall, 110 Nev. at 1331, 885 P.2d at 605. Both Neal and Gantt testified at trial, and both were subject to lengthy cross-examination that sought to discredit both of their testimony. As mentioned above, Gantt even went so far as to discredit Neal's testimony at the time of trial. Yet, when considering all of the evidence, the jury found beyond a reasonable doubt that Appellant was legally culpable for the death of Mr. Williams. Conducting an evidentiary hearing would not have changed the outcome here.

CONCLUSION

Wherefore, the State respectfully requests that the district court's denial of Appellant's petition be AFFIRMED.

Dated this 13th day of August, 2021.

Respectfully submitted,

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Clark County District Attorney
Nevada Bar #001565

BY */s/ Alexander Chen*
ALEXANDER CHEN
Chief Deputy District Attorney
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Office of the Clark County District Attorney

CERTIFICATE OF COMPLIANCE

1. **I hereby 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)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points of more, contains 5,450 words and 24 pages.
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 NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 13th day of August, 2021.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 13th day of August, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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I further certify that I served a copy of this document by electronic transmission to:

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AC//jg