IN THE SUPREME COURT OF THE STATE OF NEVADA

ASHLEY W. BENNETT Appellant, vs. STATE OF NEVADA Respondent.	No. 82495

APPELLANT'S REPLY BRIEF

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

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TABLE OF CONTENTS

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. Bindrup 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.

INTRODUCTION

In this case, the district court determined that the newly discovered evidence in Mr. Bennett's Petition for a Determination of Factual Innocence (the "Petition") was not credible and failed to meet the requirements of NRS 34.960 and 34.970 without an evidentiary hearing. That was plain error. At the initial pleading stage, the district court was required to assume the newly discovered evidence was

credible. Here, the newly discovered evidence, if credible, together with all other evidence in the case clearly establishes Mr. Bennett's factual innocence. As explained more fully herein, and as set forth in the Opening Brief, Mr. Bennett respectfully requests that this Court reverse the district court and remand the Petition for an evidentiary hearing pursuant to NRS 34.970.

ARGUMENT

I. MR. BENNETT'S PETITION MET THE REQUIREMENTS OF NRS 34.960

A. Mr. Bennett Has Presented Newly Discovered Evidence That, If Credible, Establishes a Bona Fide Issue of Factual Innocence

1. Calvin Walker

The State first argues that the Affidavit of Calvin Walker (the "Walker Affidavit") is mere impeachment evidence because he wrote the affidavit two months after entering prison and almost ten years after the incident, and because "[t]he affidavit attempted to cast doubt on the other witnesses that testified Appellant was the shooter (Neal and Gantt)." Ans. Brief at p. 10. This Court has previously held that evidence is "merely impeachment" evidence if its sole purpose is to discredit a witness. *O'Neill v. State*, 124 Nev. 1497, 238 P.3d 843 (Nev. 2008). The Walker Affidavit makes no mention of Neal or Gantt and makes no attempt to discredit them. Instead, the purpose of the Walker Affidavit is to provide a new eyewitness and first-hand account to the murder for which Mr. Bennett has

been convicted. While the Walker Affidavit certainly contradicts the testimony given by Neal and Gantt at trial, it makes no attempt to specifically attack their credibility as witnesses and it is consistent with their post-trial recantations. As such, it cannot be said that the sole purpose of the Walker Affidavit is to discredit Neal and Gantt as witnesses.

However, the State argues that it was proper for the district court to hold that the Walker Affidavit was mere impeachment evidence because: "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 argument is incorrect and misleading. First, the Walker Affidavit was more than just a witness statement; it was signed by Mr. Walker under penalty of perjury. Second, the Walker Affidavit did more than simply call for the exoneration of Mr. Bennett; Mr. Walker stated that Mr. Bennett was innocent because he witnessed the murder of Mr. Williams and knew that Mr. Bennett was not one of the shooters. Third, the Walker Affidavit and the evidence in the Petition alone do not entitle to Mr. Bennett to full relief under the statute, which is an order of factual innocence. To the contrary, if the Petition is granted pursuant to Nevada's factual innocence statute, Mr. Bennett is only entitled to an evidentiary "hearing to establish the

factual innocence of the person based on newly discovered evidence." *See* NRS 34.960(1). This hearing is held pursuant to NRS 34.970.

Moreover, the State's argument that any evidence that contradicts a State witness's testimony at trial is mere impeachment and cannot support a petition for determination of factual innocence is problematic. Based on this broad interpretation of "mere impeachment", it is hard to conceive of any evidence that could permissibly support a petition.

Next, the State argues that it was proper for the district court to hold that Walker's affidavit was not credible. Ans. Brief at p. 10. However, based on a plain reading of NRS 34.960, the credibility of the supporting witnesses or evidence is not assessed at this preliminary stage:

> A petition filed pursuant to [NRS 34.960] … 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[.]

NRS 34.960(2)(a) (emphasis added). Nevada's factual innocence statute is modeled after, and is thus substantially similar to, Utah's factual innocence statute. The Utah Supreme Court has held that this subsection "limits the court to the content of the petition and requires to assume the new evidence is credible." *Brown v. State*, 2013 UT 42, ¶ 47, 308 P.3d 486 (Utah 2013). The Court explains:

> We note that at the petition stage, the court is in no position to assess credibility. Section 402 requires the petition to assert factual innocence under oath and to include 'supporting affidavits or other credible

> documents,' but beyond this requirement, the petitioner need only allege newly discovered evidence that—"if credible"—"establishes that the petitioner is factually innocent."

Id. This procedural mechanism makes sense given that the credibility of a witness is usually proven or attacked during the preliminary and cross-examination of the witness. For example, the State has expressed concern that Mr. Walker "makes no mention of who was involved with the shooting, if not the Appellant." Ans. Brief at p. 10. This is additional information that could be asked of Mr. Walker at an evidentiary hearing when he is called as a witness. However, in a Petition for Factual Innocence, the convicted individual is not obligated to solve the crime; he is only required to present newly discovered evidence that establishes his factual innocence. Thus, the fact that Mr. Walker did not identify the actual perpetrators is not be enough to deprive Mr. Bennett of a full evidentiary hearing on the matter.

Based on the foregoing, the Walker Affidavit is newly discovered evidence that establishes a bona fide issue of factual innocence and the district court erred in concluding that it was not credible, mere impeachment evidence.

2. Pamela Neal

The State argues that "the district court correctly ruled that Neal's affidavit was not newly discovered evidence because it was a mere recantation of her prior testimony." Ans. Brief at p. 11. Specifically, the State claims that "the direct language of NRS 34.960(2)(b) … does not consider a recantation of testimony by a

witness to be newly discovered." *Id*. This is incorrect. Instead, the statute only requires that "[t]he newly discovered evidence identified by the petitioner … is not reliant ***solely*** upon recantation of testimony by a witness against the petitioner[.]" NRS 34.960(2)(b)(2) (emphasis added). Therefore, the inclusion of a recantation in the Petition does not permit dismissal of the Petition, as argued by the State. Instead, the plain language of the statute requires Mr. Bennett to provide more than just the recantation of a witness's testimony to support his Petition. He has met this burden through the Walker Affidavit.

Moreover, the affidavit of Pamela Neal (the "Neal Affidavit") does more than recant Neal's testimony at trial. She also states that she was coerced into testifying against Mr. Bennett by law enforcement. The State argues that this new information is not important because Neal was cross-examined on this point at trial. Ans. Brief at p. 11. However, this is another credibility argument, which can be addressed by the district court at the evidentiary hearing. At this initial pleading stage, the credibility of the new evidence is assumed by the district court pursuant to NRS 34.960(2)(a).

Based on the foregoing, the Neal Affidavit was sufficient to grant Mr. Bennett an evidentiary hearing based on this newly discovered evidence. As such, the district court erred in denying the Petition based, in part, on its erroneous determination that the Neal Affidavit was merely recantation evidence. Certainly,

if Neal is credible at the evidentiary hearing, her testimony and the additional evidence provided in the Petition establish Mr. Bennett is factually innocent.

3. Anthony Gantt

The State incorrectly asserts that Petitioner argued that the district court should consider the affidavit of Anthony Gantt (the "Gantt Affidavit")[1] because it bolsters the Neal Affidavit and the Walker Affidavit. Ans. Brief at pp. 14–15. Mr. Bennett included the Gantt Affidavit in the Petition because NRS 34.960(2)(d) expressly allows the district court to consider all evidence, even evidence that was admitted at trial:

> The newly discovered evidence identified by the petitioner … ***[w]hen viewed with all other evidence in the case, regardless of whether such evidence was admitted during trial***, the newly discovered evidence demonstrates the factual innocence of the petitioner.

NRS 34.960(2)(d) (emphasis added). As the Utah Supreme Court explained in Brown, the factual innocence statute "directs the court to view the petitioner's averment of newly discovered evidence 'with all the other evidence' to determine whether the petitioner has met the threshold requirements for a hearing.'" 308 P.3d at 495.

[1] The State spent significant time in its Answering Brief arguing that the Gantt Affidavit cannot be considered newly discovered evidence. *See* Ans. Brief at pp. 12–14. However, the State's argument is irrelevant because Mr. Bennett did not present the Gantt Affidavit as newly discovered evidence pursuant to NRS 34.960.

Therefore, the district court should have considered the Gantt Affidavit in conjunction with the Neal Affidavit and the Walker Affidavit when deciding whether to grant an evidentiary hearing. Both Gantt and Neal have recanted the false testimony they gave at Mr. Bennett's trial and said they were coerced into testifying by law enforcement. Moreover, all three witnesses now state that either that they know Mr. Bennett was not involved in the shooting or that they can no longer identify Mr. Bennett as a shooter. Together, the three affidavits create a bona fide issue of factual innocence.

Finally, the State encourages the court to look at each piece of newly discovered evidence individually and to ignore any exculpatory evidence tending to prove Mr. Bennett's innocence. This position is untenable. A petition for factual innocence is a search for the truth and all evidence that proves or otherwise tends to show innocence must be considered alone with any evidence pointing to guilt—a holistic approach rather than a piecemeal approach as the State contends. "[T]he court, in order to grant the petition for an evidentiary hearing, must determine that the newly discovered evidence, ***when viewed with all the other Innocence***, demonstrates factual innocence." *Brown*, 308 P.3d at 495 (emphasis added). Here, there is no longer any evidence that establishes Mr. Bennett's guilt. The State's case against Mr. Bennett is destroyed by the Gantt Affidavit and the Neal

Affidavit. The district court's decision to deny Mr. Bennett any chance at proving his innocence at an evidentiary hearing is plain error.

B. Recantation of a Witness Qualifies as Newly Discovered Evidence Under NRS 34.960

The State argues that the recantation of a witness cannot qualify as newly discovered evidence under NRS 34.960. Ans. Brief at p. 16. This is incorrect. Instead, the statute requires only that: "The newly discovered evidence identified by the petitioner … is not reliant ***solely*** upon recantation of testimony by a witness against the petitioner[.]" NRS 34.960(2)(b)(2) (emphasis added). While the Petition cannot only be supported by the recantation of the State's witness, it does not, and should not, require exclusion of the court's consideration of any recantation evidence. Neal and Gantt have recanted their trial testimony in their respective affidavits and assert under oath that they were coerced into testifying by law enforcement. This is more than simply recantation evidence. As such, the newly discovered evidence cited by Mr. Bennett in the Petition is not based ***solely*** on recantation evidence.

C. The Evidence Presented by Mr. Bennett Is Material

The State argues that the newly discovered evidence in the Petition is not material and does not demonstrate the reasonable probability of a different outcome. Ans. Brief at p. 16–17. Specifically, the State argues that the Neal Affidavit, Gantt Affidavit, and Walker Affidavit can be easily rebutted by the

State. *Id*. However, this is not the only evidence that should be considered by the district court.

The factual innocence statute directs the district court "to view the petitioner's averment of newly discovered evidence 'with all the other evidence' to determine whether the petitioner has met the threshold requirements for a hearing." *Brown v. State*, 308 P.3d 486, 495 (Utah 2013). In addition, "[n]owhere does [the statute] state that the newly discovered evidence alone must be determinative." *Id*. Instead, the statute "contemplates that it will require a combination of new and old evidence to establish factual innocence." *Id*.

However, the newly discovered evidence in the Petition and the old evidence presented at trial demonstrate that Mr. Bennett is factually innocent. Mr. Bennett was convicted solely upon the testimony of Neal and Gantt, who have both recanted their trial testimony and stated, under oath, that they were coerced into testifying against Mr. Bennett by law enforcement. The statements made in these affidavits now corroborate the other evidence presented at Mr. Bennett's trial and prove Mr. Bennett's innocence. Specifically, none of the physical evidence collected by law enforcement and presented at Mr. Bennett's trial, including the guns used, could connect Mr. Bennett to the crime. Additionally, an eyewitness who saw the shooters running away from the scene of the murder testified that they were all under the age of eighteen, when Mr. Bennett was twenty-six at the time of

the crime. 1 AA 84. Lastly, Mr. Walker, a new eyewitness to the murder, has stated that Mr. Bennett was not one of the shooters. Mr. Walker was a friend of the victim, arguably biased in the victim's favor, and would be motivated to ensure that his killers are punished for the crime. Therefore, the affidavits in the Petition, when considered with all the evidence in the case, establish a reasonable probability of a different outcome. As such, the district court erred in denying the Petition.

D. The Evidence Presented by Mr. Bennett Is Not Cumulative or Impeachment Evidence

The State repeats its argument that the newly discovered evidence in the Petition is cumulative, in addition to merely impeachment evidence, and cannot support a petition to establish factual innocence. Ans. Brief at pp. 17–20.

First, the State argues that the Neal Affidavit is merely impeachment and cumulative of evidence that was presented at trial because Neal was asked during cross-examination whether she had given false information to police to have the case against her dismissed. *Id*. at 18. However, the jury was never presented with testimony from Neal herself that she was coerced into testifying by the police. Moreover, Neal now directly contradicts the testimony that she gave on cross-examination. This evidence is not merely cumulative and instead directly attacks the evidence presented by the State through Neal at trial. In addition, the Neal

Affidavit is not the sole basis to support the Petition and, therefore, the newly discovered evidence is not merely cumulative or impeachment evidence.

Second, the State repeats its argument that the Walker Affidavit is merely impeachment evidence and cannot support the Petition. However, for the reasons previously stated above, the Walker Affidavit is not merely impeachment evidence and can properly support the Petition pursuant to NRS 34.960(2)(b)(2).

Lastly, the State argues that the Gantt Affidavit is merely impeachment evidence and cannot form the basis for Appellant's claim pursuant to NRS 34.960(2)(b)(2). However, as already discussed at length in both of Petitioner's briefs, the fact that one piece of evidence may be impeachment evidence does not preclude consideration of this evidence under NRS 34.960. Instead, the statute only requires that the newly discovered evidence, as a whole, cannot merely be impeachment evidence. In addition, the State argues that the Gantt Affidavit is merely cumulative because he was questioned during trial whether he had been coerced into testifying against Mr. Bennett. However, similar to Neal, the jury was never presented with testimony from Gantt himself that he had been coerced into testifying by the police. Moreover, Gantt now directly contradicts the testimony he gave on cross-examination and states that he was threatened with the death penalty as a minor. This evidence was never presented to the jury and, as such, cannot be

considered cumulative. Therefore, the Gantt affidavit is not merely cumulative or impeachment evidence.

E. Mr. Bennett Has Proven That He Is Factually Innocent

The State argues that the assertion provided by Mr. Bennett is not sufficient to meet the requirements of NRS 34.960(2). The statute requires the Petition to "contain an assertion of factual innocence under oath by the petitioner[,]" which is supported by the Petition and other supporting affidavits and credible documents. *See* NRS 34.960(2). Here, Petitioner signed an oath, under criminal penalty of perjury, that all information included in the Petition was true and correct. 1 AA 31. In the Petition, Mr. Bennett repeatedly states that he is factually innocent and did not engage in the conduct for which he has been convicted. *See, e.g.*, 1 AA 4, 5, 19. As such, Mr. Bennett's Oath and Petition meet the requirements of NRS 34.960(2).

Based on the foregoing, Mr. Bennett has presented newly discovered evidence that is not cumulative, solely recantation or merely impeachment evidence and, if credible, establish his factual innocence. As such, the district court erred in denying the Petition.

F. The District Court Improperly Considered the State's Untimely and Prejudicial Supplemental Response

The State argues that Mr. Bennett failed to object to its untimely Supplemental Response, filed 138 days after it was ordered by the district court to respond and without seeking court permission for the late filing. However, in his Reply to the State's original response, Mr. Bennett addresses that the State's original response only included a list of statutory requirements. Specifically, Mr. Bennett emphasized that the State "provides no argument, authority or analysis rebutting Mr. Bennett's fully supported assertions in his petition showing that he, in fact, complies with each of the statutory requirements." 2 AA 208. Moreover, Mr. Bennett argued that: "[t]he State's failure to complete any cognizable legal argument could be viewed as concession of all the rest of the required elements of the Innocence Statute." *Id*. As such, Mr. Bennett has preserved his argument that the Supplemental Response is untimely and should not be considered.

Second, the State argues that Mr. Bennett was not prejudiced by its supplemental response because "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." Ans. Brief. at p. 6. However, the State's original response only included what amounted to a mere recitation of the requirements of NRS 34.960. It provided no supporting argument or legal authority. No court would expect a party to "anticipate" their opponent's arguments when the opponent filed a court ordered response without those arguments. Nor should a party be expected to anticipate

that their opponent would file a "draft" response and then, only a week before the scheduled hearing, file something entirely different without court permission. Mr. Bennett was not given fair notice of the State's arguments and, as a result, was prejudiced when the district court considered those arguments. That prejudice was manifest because Mr. Bennett was not provided with the actual authority and arguments the State would use to rebut his arguments until only a week before the hearing and approximately 138 days after the district court had ordered the State to respond to the Petition. Based on the foregoing, the district court erred in considering the arguments raised in the State's supplemental response.

II. MR. BENNETT IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS PETITION

The State argues that Mr. Bennett is not entitled to an evidentiary hearing because a court's determination of whether a hearing is necessary is discretionary under *Rubio v. State*, 124 Nev. 1032, 1047, 194 P.3d 1224, 1234 (2008), and is subject to an "abuse of discretion standard." Ans. Brief. at pp. 21–22. The State incorrectly states that Mr. Bennett cited *Hargrove v. State* and *Berry v. State* for the proposition that he is entitled to an evidentiary hearing. *Id*. Instead, Mr. Bennett argues that he is entitled to a hearing because the Petition meets the requirements of NRS 34.960 subsection 2 and subsection 3, which provide the prerequisites for an evidentiary hearing under the factual innocence statute.

NRS 34.960 and 34.970 contemplate a two-stage process for establishing factual innocence. *See, e.g.*, *Brown v. State*, 308 P.3d 486, 494 (Utah 2013). Section 960 sets forth what a petition must do at the first stage—the petition stage—to receive an evidentiary hearing on a petition for factual innocence. If the petitioner meets the threshold burden under Section 960, a post-conviction court turns to the second stage of the process, which is outlined in Section 970. That provision sets forth how the evidentiary hearing is to proceed and gives direction to courts on how to determine factual innocence.

Here, the Petition was dismissed under Section 960, or the petition stage. The district court never considered whether the Petition met the requirements of subsection (3) and, instead, dismissed the petition because it erroneously held that the Petition did not meet the requirements of subsection (2) in Section 960. Thus, the court never issued an order pursuant to Section 970 and never properly determined whether the Petition establishes a bona fide issue of factual innocence.

As discussed in the Opening Brief and previously in this Reply Brief, the Petition meets the requirements of subsection (2). *See* NRS 34.960(2). Moreover, as argued in his Petition, Mr. Bennett has met the requirements of subsection (3), which require Mr. Bennett to 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 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.

NRS 34.960(3)(a)–(b). In addition, the district court can waive the requirements of subsection (3) if:

> [T]he 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 petition or the petitioner's counsel at trial, and the other evidence:
>
> (I) Was not discovered by the petitioner or petitioner's counsel;
>
> (II) Is material upon the issue of factual innocence; and
>
> (III) Has never been presented to a court.

NRS 34.960(4)(b)(2)(I)–(III). While the district court did not consider these issues, Mr. Bennett has established the requirements of subsection (3). Neither Mr. Bennett nor his trial counsel knew of the evidence discussed in this Petition, nor could they have discovered the evidence by exercising reasonable diligence. No one, including law enforcement, knew the names and identities of individuals who had witnessed the murder. Despite their best efforts, the police were stonewalled by individuals who were at the Buena Vista Springs Apartments that day. Thus, Mr. Walker's eyewitness account could not have been discovered until he was ready to come forward. In addition, Mr. Bennett and his counsel were prevented

from learning what Ms. Neal really knew because she not only lied but was coerced into providing the false testimony. Therefore, none of the newly discovered evidence was available to Mr. Bennett or his trial counsel, nor could they have discovered it in the exercise of reasonable diligence.

Based on the foregoing, Mr. Bennett is entitled to a hearing pursuant to NRS 34.970.

CONCLUSION

Based on the foregoing, Mr. Bennett respectfully requests that the district court's dismissal of the Petition be REVERSED.

DATED this 14th day of September, 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 spaced, has a typeface of 14 points or more, and contains **4118 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 14th day of September, 2021.

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PROOF OF SERVICE

I hereby certify and affirm that Appellant's Reply Brief was filed electronically with the Clerk of Court for the Supreme Court of Nevada by using the Supreme Court of Nevada's E-filing System and that service has been accomplished to the following individuals by the methods indicated below:

☒ Electronic: by submitting electronically for filing and/or service with the Nevada Supreme Court's e-filing system and served on counsel electronically in accordance with the E-Service list to the following listed below:

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DATED this 14th day of September, 2021.

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