

IN THE SUPREME COURT OF THE STATE OF NEVADA

CASIMIRO VENEGAS,

Appellant,

vs.

STATE OF NEVADA,

Respondent.

Supreme Court No. 83964

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APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record, on behalf of Appellant CASIMIRO VENEGAS, certifies there are no corporations, entities, or additional law firms described in NRAP 26.1(a) which must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

DATED this 2nd day of May 2022.



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II. JURISDICTIONAL STATEMENT

This Honorable Court has jurisdiction under Nev. Const. art. 6, § 4(1), and NRS 1.030. Petitioner filed a Petition for Writ of Habeas Corpus, on March 18, 2019, which was supplemented on October 7, 2020. See AA0134 & AA0200. On December 1, 2021, the District Court made an erroneous ruling denying Petitioner's Petition without the benefit of an evidentiary hearing. See AA0235. On June 1, 2021, Appellant filed his Notice of Appeal. See AA0247.

III. ROUTING STATEMENT

Pursuant to NRAP 17(b)(3), this case is presumptively assigned to the Court of Appeals because it entails a postconviction appeal that involves a challenge to a judgment of conviction or sentence for offenses that are not category A felonies.

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IV. STATEMENT OF ISSUES

A. THE DISTRICT COURT ERRED WHEN IT DENIED APPELLANT'S PETITION FOR WRIT OF HABEAS CORPUS FOR AN ALLEGED LACK SPECIFICITY IN HIS PLEADING.

a. Appellant Made Specific Factual Allegations Regarding Witnesses That Would Entitle Him to Relief.

V. STATEMENT OF THE CASE

On March 15, 2017, a jury found Petitioner guilty of: 1) Conspiracy to Commit Robbery, to which Mr. Venegas was sentenced to a minimum of twenty-four months and a maximum of sixty months; 2) Burglary While in Possession of a Firearm to which Mr. Venegas was sentenced to, under the Mandatory Habitual Felon Enhancement Statute, to a minimum of ten years and a maximum of twenty-five to run concurrent with Count 1; 3) Robbery with Use of a Deadly Weapon to which Mr. Venegas was sentenced to, under the Mandatory Habitual Felon Enhancement Statute, to a minimum of ten years and a maximum of twenty-five years to run concurrent with Counts 1 and 2; 4) Burglary While in Possession of a Firearm to which Mr. Venegas was sentenced to, under the Mandatory Habitual Felon Enhancement Statute, to a minimum of ten years and a maximum of twenty-five years to run consecutive with Counts 1, 2, and 3; 5) Robbery with Use of a Deadly

Weapon to which Mr. Venegas was sentenced to, under the Mandatory Habitual Felon Enhancement Statute, to a minimum of ten years and a maximum of twenty-five years to run consecutive with Counts 1, 2, and 3 and concurrent with Count 4; 6) Battery with Use of a Deadly Weapon Resulting in Substantial Bodily Harm to which Mr. Venegas was sentenced to a minimum of twenty-four months and a maximum of 120 months concurrent with Counts 1, 2, 3, 4, and 5; 7) Attempt Murder with Use of a Deadly Weapon to which Mr. Venegas was sentenced to, under the Mandatory Habitual Felon Enhancement Statute, to a minimum of ten years and a maximum of twenty-five years to run consecutive to Counts 1, 2, and 3 and concurrent with 4, 5, and 6; 8) Battery with Use of a Deadly Weapon Resulting in Substantial Bodily Harm to which Mr. Venegas was sentenced to a minimum of twenty-four months and a maximum of 120 months, concurrent with Counts 1, 2, 3, 4, 5, 6, and 7; 9) Battery with Use of a Deadly Weapon to which Mr. Venegas was sentenced to a minimum of twenty-four months and a maximum of sixty months, concurrent with Counts 1, 2, 3, 4, 5, 6, 7, and 8; 10) Battery with Use of a Deadly Weapon to which Mr. Venegas was sentenced to a minimum of twenty-four months and a maximum of sixty months,

concurrent with Counts 1, 2, 3, 4, 5, 6, 7, 8, and 9; 11) Aiming a Firearm at a Human Being to which Mr. Venegas was sentenced to 364 days, concurrent with Counts 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10; 12) Coercion with Use of a Deadly Weapon to which Mr. Venegas was sentenced to a minimum of twenty-four months and a maximum of sixty months, consecutive to Counts 1, 2, 3, 4, 5, and 7, and concurrent with Counts 6, 8, 9, 10, and 11; 13) Battery with Intent to Commit a Crime to which Mr. Venegas was sentenced to a minimum of twenty-four months and a maximum of sixty months, concurrent to Count 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12. See AA0069 & AA0117.

The sentences, ordered on September 7, 2017, gave an aggregate total of a minimum of 264 months and a maximum of 660 months, with 476 days credit for time served. Id.

During the trial, Petitioner's trial counsel failed to present contradictory and exculpatory evidence. This created an ineffective assistance of counsel situation on the part of defense counsel.

Mr. Venegas filed a direct appeal which was affirmed by the Nevada Supreme Court on November 20, 2018. Thereafter, Petitioner filed a Motion to Modify his sentence on February 1, 2019. See AA0121. Said

motion was denied on March 7, 2020. See AA0129. An original Writ of Habeas Corpus was filed on March 18, 2019. See AA0134. A supplemental Writ of Habeas Corpus was filed on October 7, 2020. See AA0200. The Honorable Linda K. Bell denied Appellant's Petition for Writ of Habeas Corpus on December 1, 2021. See AA0235. This Appeal follows. See AA0247.

VI. STATEMENT OF FACTS

On January 12, 2016, officers responded to a 7-11 in reference to a robbery. See AA0026 – 28, AA0039, AA0049, and AA0059. They contacted the store employee (victim #1) who reported two males entered the store wearing dark masks and dark clothing carrying guns. Id. Suspect #1, later identified as Casimiro Venegas, and Jose Fernando Monay-Pina grabbed approximately \$139 from the cash registers. Id. The victim was told to lie down on the floor and both suspects left the store. Id.

Approximately 30 minutes later, victim #2 contacted 911 and reported two males pushed his bedroom door open, pistol whipped him and beat him. Id. He was also attacked with an ax. Id. The officer looked over the wall and observed two subjects in the backyard; they recovered

three BB guns, several sets of gloves, two large 12"-15" knife holsters, the victim's wallet and \$138.00, in the backyard. Monay-Pina spontaneously stated "You don't understand, we reported as victims that our tires were slashed, and you guys didn't do anything; we were retaliating because he slashed our tires (referring to victim #2). Id. The victim was transported to the hospital. Id. Officers observed a bloody ax just inside the victim's carport. Id.

Officers contacted the victim at the hospital. Id. He reported that Venegas hit him with an ax, and Monay-Pina hit him with the pistol on his head and body. Id.

Allegedly the defendants aimed a weapon loaded or unloaded at victims 3, 4, 5, and 6. Id. Again, allegedly they used physical force, or the immediate threat of force against victims 3, 4, 5, and 6, and kept them from leaving or coming to the aid of victim 2. Id.

Monay-Pina and Venegas were arrested and transported to CCDC and booked accordingly. Id.

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VII. ARGUMENT

STANDARD OF REVIEW

The appellate courts review questions of law under a de novo standard. SIIS v. United Exposition Servs. Co., 109 Nev. 28, 30, 846 P.2d 294, 295 (1993). Under de novo review, the appellate court uses the district court's record but reviews the evidence and law without deference to the district court's legal conclusions. Lioce v. Cohen, 124 Nev. 1, 20, 174 P.3d 970, 982 (2008).

A. THE DISTRICT COURT ERRED WHEN IT DENIED APPELLANT'S PETITION FOR WRIT OF HABEAS CORPUS FOR AN ALLEGED LACK SPECIFICITY IN HIS PLEADING.

The District Court erred when it denied Appellant's petition for Writ of Habeas Corpus for an alleged lack specificity in his pleading. The District Court denied Appellant's Writ for failing to plead with specificity facts that would entitle him to relief. See AA0240 - 0244. The District Court further stated that claims of ineffective assistance of counsel asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. Id. at AA0240. The District Court also claims that Petitioner failed to explain what witnesses should have been interviewed, what

their statements would have been, or how any additional testimony would have been beneficial to his case, and that Petitioner also failed to allege what specific investigation should have been undertaken. Id.

The reasons for the District Court's error follow.

a. Appellant Made Specific Factual Allegations Regarding Witnesses That Would Entitle Him to Relief.

Appellant made specific factual allegations regarding witnesses in his Writ Petition that would entitle him to relief. In his Petition, Appellant noted,

Here, Mr. Venegas' counsel failed to investigate, interview, and/or introduce evidence witnesses. An attorney must reasonably investigate in preparing for trial or reasonably decide not to. Strickland, 466 U.S. at 691; Kirksey v. State, 112 Nev. 980, 992, 923 P.2d 1102, 1110 (1996). In this case the investigation and introduction of these individual's statements would have been critical in Petitioner's defense yet were completely ignored by trial counsel. The introduction of these witness statements would have led to a reasonable probability of a different outcome, showing both good cause and actual prejudice.

In this case, Mr. Venegas' counsel made errors which fell below minimum standards of representation, undermined confidence in the adversarial outcome, and deprived Mr. Venegas of fundamentally fair proceedings.

See Appellant's Supplemental Petition, AA0209.

Further, Appellant alleged the following in his pleadings:

Here, Mr. Venegas' counsel failed to fully investigate and prosecute Petitioner's appeal. An attorney must reasonably investigate in preparing for trial or reasonably decide not to. Strickland, 466 U.S. at 691; Kirksey v. State, 112 Nev. 980, 992, 923 P.2d 1102, 1110 (1996). Here, Appellate Counsel's representation of Mr. Venegas during his appeal was inadequate.

See Id. at AA0211.

An evidentiary hearing is required if, the claims are supported by specific factual allegations, the factual allegations are not belied by the record, and the factual allegations, if true, would entitle the petitioner to relief. Berry v. State, 131 Nev. 957, 967, 363 P.3d 1148, 1154-57 (2015) (actual-innocence gateway claim); Hathaway v. State, 119 Nev. 248, 255, 71 P.3d 503, 508 (2003) (good cause); Mann v. State, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002) (substantive claims); Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984) (substantive claims). As a general matter, the district court should not make credibility determinations without an evidentiary hearing. See Mann at 356, 46 P.3d at 1231 (*rejecting* suggestion that district court can resolve factual dispute without an evidentiary hearing and noting that "by observing the witnesses' demeanors during an evidentiary hearing, the district court will be better able to judge credibility").

The last requirement - that the factual allegations, if true, would entitle the petitioner to relief - goes to the legal underpinnings of the claims. For purposes of this requirement, the district court must accept as true the factual allegations in the petition. See Berry v. State, 131 Nev. 957, 968, 363 P.3d 1148, 1155 (2015) (*explaining* that when deciding whether to conduct an evidentiary hearing on an actual-innocence gateway claim, “the district court must assume the new evidence is true”). Thus, the district court should ask the following question: Assuming that the facts are as the petitioner states, would the application of the law to those facts require relief? Nevada Postconviction Proceedings: A Guide for District Court Judges at 20-21 (2019). If, as in this case, the answer is yes, an evidentiary hearing is required. Id. If the court has any doubt about whether to grant an evidentiary hearing, it should err in favor of granting a hearing. Id. Although it may save some time to deny a hearing, doing so may serve to delay resolution of the case. Error in failing to grant an evidentiary hearing likely will not be considered harmless by a reviewing court. See Mann, 118 Nev. at 356, 46 P.3d at 1231 (*requiring* the district court to conduct further proceedings on remand).

Thus, because Appellant made specific factual allegations in his Writ Petition that would entitle him to relief, the District Court erred in denying his Petition for Writ of Habeas Corpus. As a result, Mr. Venegas' conviction and sentence are invalid under the 6th and 14th Federal Constitutional Amendment guarantees of Due Process and Equal Protection and under the law of Article 1 of the Nevada Constitution because prior counsel's performance fell below an objective standard of reasonableness as is mandated by Strickland, 466 U.S. 668, 104 S. Ct. 2052 (1984), by failing to investigate, interview, and/or introduce evidence witnesses, as well as Venegas' Appellate Counsel failing to fully investigate and prosecute Petitioner's appeal. See AA0209 & AA0211.

The Sixth Amendment of the U.S. Constitution guarantees the accused "the Assistance of Counsel for his defense." "That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command." Strickland v. Washington, 466 U.S. 668, 685, 104 S. Ct. 2052, 2063 (1984). "[T]he right to counsel is the right to the effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771, 90 S. Ct. 1441, n. 14 (1970).

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Under Strickland v. Washington, a conviction must be reversed due to ineffective counsel if first, “counsel’s performance was deficient,” and second, “the deficient performance prejudiced the defense.” Strickland v. Washington, 466 U.S. at 687. The deficient performance prejudiced the defense if “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Strickland, 466 U.S. at 698. “The ultimate focus of the inquiry must be on the fundamental fairness of the proceeding. . . .” Id. at 696. Nevada adopts the Strickland standards for the effective assistance of counsel. See Hurd v. State, 114 Nev. 182, 188, 953 P.2d 270, 274 (1998).

Again, Mr. Venegas’ counsel failed to investigate, interview, and/or introduce evidence witnesses, as well as Venegas’ Appellate Counsel failing to fully investigate and prosecute Petitioner’s appeal. See AA0209 An attorney must reasonably investigate in preparing for trial or reasonably decide not to. Strickland, 466 U.S. at 691; Kirksey v. State, 112 Nev. 980, 992, 923 P.2d 1102, 1110 (1996). The introduction of these contradictory statements would have led to a reasonable probability of a

different outcome, showing both good cause and actual prejudice. And the fact that the District Court denied Petitioner's Writ out-of-hand regarding these issues demonstrates error.

As a result, the District Court erred in failing to grant an evidentiary hearing. This error is likely not to be considered harmless by a reviewing court, see Mann, 118 Nev. at 356, 46 P.3d at 1231 (*requiring* the district court to conduct further proceedings on remand).

Thus, Mr. Venegas' counsel made errors which fell below minimum standards of representation, undermined confidence in the adversarial outcome, and deprived Mr. Venegas of fundamentally fair proceedings.

VIII. CONCLUSION

WHEREFORE, this Petitioner prays that this Court grant his Appeal, and issue an Order directing the District Court to reinstate his case so that his Petition for Writ of Habeas Corpus may be heard.

Dated this 2nd day of May 2022.



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IX. ATTORNEY'S CERTIFICATE OF COMPLIANCE

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 Word 365, Century Schoolbook.

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 or more, and contains **3341** words.

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 2nd day of May 2022.



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X. CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **APPELANT'S OPENING BRIEF** with the Clerk of the Court by using the electronic filing system on the 2nd day of May 2022.

The following participants in this case are registered electronic filing system users and will be served electronically:

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