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3 **IN THE COURT OF APPEALS FOR THE STATE OF NEVADA**

4
5 THOMAS CASH
6 Appellant,

7 vs.

8 THE STATE OF NEVADA,
9
10 Respondent.

S.Ct. No. 82060

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Elizabeth A. Brown
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12 **APPELLANT'S PETITION FOR REHEARING**

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1 **ARGUMENT**

2 **I. N.R.A.P. 40 ALLOWS THE REHEARING OF A COURT OF**
3 **APPEAL ORDER**

4 Rule 40 of the Nevada Rules of Appellate Procedure provides that a party in
5 an appellate case before the Court of Appeals for the State of Nevada may move
6 for rehearing if the Court has overlooked or misapprehended a material fact or
7 matter of law. In the discussion that follows, Cash argues that this Court has
8 overlooked or misapprehended both matters of fact and questions of law. Cash
9 respectfully submits that these misapprehensions are material, and that a correction
10 of the factual and legal errors that follow warrants reversal of the denial of his
11 Petition for Writ of Habeas Corpus (Post-Conviction), remanding of his case to
12 district court with an order directing the district court to appoint him counsel and
13 hold an evidentiary hearing.

14 **II. The Holding in Mann is Has Been Misapprehended and Cash Has**
15 **Alleged Facts Outside of the Record That are Not Belied by the**
16 **Record**

17 This Court stated in its Order of Affirmance that Cash's either failed to
18 specifically allege what witnesses would have set to help his case (neighbors,
19 pathologist and Angel Turner) or that the proffered witness testimony was belied
20 by the record (Sandi Cash). Order of Affirmance ("OA") 2-5.

1 The holding in Mann v. State¹ requires that a district court settle factual
2 disputes with an evidentiary hearing so as to properly assess credibility of
3 witnesses through *testimony* as opposed to affidavits or pleadings. 118 Nev. at 356,
4 46 P.3d at 1231. Opening Brief (“OB”) 20-21, 24-26; Reply Brief (“RB”) 7-9.
5 Here, the factual disputes that the district court has settled in Cash’s case
6 necessitate testimony. OB 20-24; RB 7-10. The requirement set forth in Mann that
7 credibility determinations and factual disputes must be made after hearing
8 testimony was subverted when the district court determined that anything Angel
9 Turner, Sandi Cash, the neighbors or pathologist would have to say would not be
10 beneficial to Cash’s case.
11

12 Cash asserted that neighbors should have been canvass to determine if they
13 saw the altercation. OB 20; RB 7-8. Although it was not plead articulately (because
14 Cash is not an attorney), it is clear that he is asserting that had any neighbors
15 witnessed the alternation, they would have testified consistently with his defense,
16 which was that he was acting in defense of others (Brittany) and/or defense of
17 himself. OB 20-21; RB 7-8. This is not belied by the record and, if true, would
18 entitle him to relief. Mann, *supra*. Therefore, he is entitled to an evidentiary
19 hearing on this. Id.; RB 20-21.
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26 Case asserted that Sandi Cash knew of prior violence of Davis against

27 ¹ 118 Nev. 351, 46 P.3d 1228 (2002).
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1 Brittany, that she witnesses the altercation and would have testified that he was
2 acting in self defense. OB 22-24; RB 9. While this Court pointed out that two other
3 witnesses testified that Sandi did not see the altercation, this is a factual dispute
4 that cannot be settled without testimony from Sandi. OA 4; OB 22-23; RB 9. This
5 is not belied by the record and, if true, would entitle him to relief. Mann, *supra*.
6 Therefore, he is entitled to an evidentiary hearing on this. OB 22-24; RB 9-10.
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8
9 Cash asserted that a pathologist should have been consulted with and that
10 this pathologist would have rendered a report that would have helped him prove he
11 stabbed the victim in self defense. OBN 21-22; RB 8-9. This Court ruled that he
12 failed to demonstrate what the testimony was. OA3. This is difficult to do when the
13 district court refused to give him appointed counsel so as to proffer more detailed
14 testimony. Taking the limited proffer as is, it is not belied by the record and is a
15 factual dispute that cannot be settled without testimony. OB 21-22; RB 8-9.
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18
19 Respectfully, this Court has overlooked and misapprehended material facts
20 and the holding in Mann when it concluded that Cash did not explain how proffer
21 testimony would have helped his case and offered factual assertions belied by the
22 record and therefore held he was not entitled to an evidentiary hearing. Cash
23 respectfully requests that this Court review reconsider its affirmance of the district
24 court's denial of his Petition for Writ of Habeas Corpus.
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2 **III. The holding in Renteria-Novoa Has Been Misapprehended and**
3 **Cash's Needs to Conduct Discovery Through Appointed Counsel Has**
4 **Been Overlooked**

5 This Court stated in its Order of Affirmance that while Cash met the
6 threshold requirements for the appointment of counsel, "the record reveals that the
7 issues in this matter were not difficult and Cash was able to comprehend the
8 proceedings." OA 7. However, this Court misapprehended a matter of law when it
9 did not consider the fact that Cash has discovery to conduct and cannot do without
10 an appointed attorney. OA 7. It appears the Court did not consider this factor
11 despite Cash arguing it in his appellate briefs. OB 15; RB 4-5. This factor
12 enunciated in Renteria-Novoa v. State² is not discussed at all with respect to the
13 witnesses Cash needs to investigate and the expert he needs to consult with,
14 discussed *supra* in section II of the instant Petition. OA 6-7 *generally*.
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18 **It is important to note that with respect to the ineffective assistance of**
19 **counsel claim asserted by Renteria-Novoa, he only claimed that his attorney**
20 **failed to "contact my witnesses and friends to investigate claims against me."**
21
22 Volume 7 of Record on Appeal 1490-1504 in Renteria-Novoa v. State, Case no.
23 68239; RB 5. **With respect to the discovery factor** when assessing whether a
24 defendant should be appointed counsel, **this Court determined that this assertion**
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² 133 Nev. 75, 76, 391 P.3d 760, 761 (2017).

1 alone was enough to warrant the need for investigation and discovery.

2 Renteria-Novoa, 133 Nev. at 77, 391 P.3d at 762; OB 10; RB 5.

3
4 Here, Cash has asserted that his attorney was ineffective for failing to
5 investigate specific witnesses (Sandi Cash, Angel Turner and Antoinette White)
6 and a group of witnesses (his neighbors) or consult with an expert (pathologist).
7
8 Cash has asserted that he believes these witnesses have statements to make that
9 would support his defense theory, which was that he was first defending Brittany
10 and then defending himself, discussed *supra* in section II of the instant pleading.
11
12 OB 20-24; RB 7-10. Cash has asserted that he believes that these witnesses are
13 either percipient witnesses of the incident or they have knowledge of the prior
14 violence of Davis and knowledge that Cash had knowledge of this prior violence as
15 well to support the argument that Cash also knew about this prior violence and
16 believed that he needed to defend Brittany, discussed *supra* in section II of the
17 instant pleading. OB 20-24; RB 7-10. Cash has asserted the need for investigation
18 with far more specificity that Renteria-Novoa did. Therefore, if Renteria Novoa is
19 the standard this Court is choosing to use, it has misapprehended the holding and
20 has misapplied it to Cash's case.
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24 Respectfully, this Court has overlooked and misapprehended material facts
25 when it concluded that Cash did not need appointed counsel so as to conduct
26 discovery and investigate. Cash respectfully requests that this Court reconsider its
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1 affirmance of the district court's denial of his Petition for Writ of Habeas Corpus
2 without appointing counsel or holding an evidentiary hearing or
3

4 **CONCLUSION**

5 Based upon the arguments contained herein, Cash respectfully requests that
6 this Court reconsider the affirmance of the denial of his Petition for Writ of Habeas
7 Corpus.
8

9 Dated this 1th day April of 2022.

10 Respectfully submitted,
11

12
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1 **CERTIFICATE OF COMPLIANCE**

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