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3 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

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8 THOMAS CASH
9 Appellant,

S.Ct. No. 82060

10 vs.

11 THE STATE OF NEVADA,
12 Respondent.

13 **APPELLANT'S PETITION FOR SUPREME COURT REVIEW**
14 **PURSUANT TO N.R.A.P. 40B**

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ARGUMENT

I. QUESTIONS FOR REVIEW

1. May the district court resolve factual disputes raised a post-conviction petition for writ of habeas corpus without holding an evidentiary hearing when a petitioner has alleged facts in the form of proffered testimony, which, if true and not belied by the record, would entitled him to relief? Nev. Rev. Stat. §34.770; Mann v. State, 118 Nev. 351, 46 P.3d 1228 (2002).
2. May the district court refuse to consider a petitioner’s need to conduct discovery and investigation when determining if said petitioner is entitled to appointed counsel to litigate his petition for writ of habeas corpus? Nev. Rev. Stat. §34.750(1); Renteria-Novoa v. State, 133 Nev. 75, 76, 391 P.3d 760, 761 (2017).

II. SUPREME COURT REVIEW OF THE COURT OF APPEALS DECISION IS WARRANTED IN THIS CASE

In the discussion that follows, Cash argues that the decision of the Court of Appeals regarding the denial of his request for appointed counsel so as to conduct discovery and investigation as well as the denial of his request for an evidentiary hearing to present testimony in support of his factual assertions, which were in dispute, conflicts with prior decisions of the this Court regarding post-conviction litigation. Specifically, the decision of the Court of Appeals is inconsistent with the

1 decision of this Court in Mann, 118 Nev. 351, 46 P.3d 1228, which interprets Nev.
2 Rev. Stat. §34.770; and the decision of this Court in Renteria-Novoa, 133 Nev. at
3 76, 391 P.3d at 761, which interprets Nev. Rev. Stat. §34.750(1).
4

5 Finally, this issue is one of fundamental statewide importance because it
6 affects the ability to litigate a claim of denial of the right to effective counsel
7 afforded to all defendants pursuant to the Sixth Amendment to the United States
8 Constitution. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 205 (1984).
9

10 Therefore, Cash respectfully requests that this Court review and reverse the
11 Court of Appeals Order and remand his case back to the district court for
12 appointment of counsel and an evidentiary hearing on his petition for habeas
13 corpus.
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16 **III. THE DECISION OF THE COURT OF APPEALS CONFLICTS**
17 **WITH PRIOR DECISIONS OF THE SUPREME COURT OF**
18 **NEVADA**

19 **a. The Finding That Cash Was Not Entitled to an Evidentiary**
20 **Hearing Conflicts with the Holding in Mann v. State**

21 The Court of Appeal stated in its Order of Affirmance that Cash either failed
22 to specifically allege what witnesses would have said to help his case (neighbors,
23 pathologist and Angel Turner) or that the proffered witness testimony was belied
24 by the record (Sandi Cash). **Order of Affirmance (“OA”) 2-5.**
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2 Nev. Rev. Stat. §34.770 addresses evidentiary hearings on a petition for writ
3
4 of habeas corpus:

- 5
- 6 1. The judge or justice, upon review of the return,
7 answer and all supporting documents which are
8 filed, shall determine whether an evidentiary
9 hearing is required. A petitioner must not be
10 discharged or committed to the custody of a person
11 other than the respondent *unless an evidentiary
12 hearing is held.*
 - 13 2. If the judge or justice determines that the petitioner
14 is not entitled to relief and an evidentiary hearing is
15 not required, he shall dismiss the petition without a
16 hearing.
 - 17 3. If the judge or justice determines that an evidentiary
18 hearing is required, he shall grant the writ and shall
19 set a date for the hearing.
- 20

21 Nev. Rev. Stat. §34.770 (1991).

22 Pursuant to this Court’s decision in Mann, the district court cannot rely on
23 affidavits submitted with a response or answer in determining whether the factual
24 allegations are belied by the record. Id. at 354-56, 46 P.3d at 1230-31.
25 Additionally, the district court cannot make credibility decisions without an
26 evidentiary hearing. See Id. at 356, 46 P.3d at 1231 (rejecting suggestion that
27 district court can resolve factual dispute without an evidentiary hearing and noting
28 than “by observing the witnesses’ demeanors during an evidentiary hearing, the
district court will be better able to judge credibility”). The holding in Mann

1 *requires* that a district court settle said factual disputes with an evidentiary hearing
2 so as to properly assess credibility of witnesses through *testimony* as opposed to
3 affidavits or pleadings. 118 Nev. at 356, 46 P.3d at 1231. **Opening Brief (“OB”)**
4 **20-21, 24-26; Reply Brief (“RB”) 7-9.**

5
6 Here, the factual disputes in Cash’s case necessitate testimony and the
7 district court settled these disputes without such testimony in error. **OB 20-24; RB**
8 **7-10.** The requirement set forth in Mann, which is that credibility determinations
9 and factual disputes must be made after hearing testimony, was subverted when the
10 district court determined that anything Angel Turner, Sandi Cash, the neighbors or
11 pathologist *would* have to say would not be beneficial to Cash’s case. 118 Nev.
12 351, 46 P.3d 1228.

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16 **1. Neighbors**

17 Cash asserted that neighbors should have been canvassed to determine if
18 they saw the altercation. **OB 20; RB 7-8.** Although it was not plead articulately
19 (because Cash is not an attorney and the district court denied his request for
20 appointed counsel), it is clear that he is asserting that had any neighbors witnessed
21 the alternation, they would have testified consistently with his defense, which was
22 that he was acting in defense of others (Brittany) and/or defense of himself. **OB**
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1 **20-21; RB 7-8.** ¹ Cash's assertion is not belied by the record and, if true, would
2 entitle him to relief. Therefore, he was entitled to an evidentiary hearing on this
3 issue. Mann, 118 Nev. 351, 46 P.3d 1228; Id.; **RB 20-21.**

5 **2. Sandi Cash**

6 Cash also asserted that Sandi Cash knew of prior violence of Davis against
7 Brittany, that she witnessed the altercation and would have testified that he was
8 acting in self-defense. **OB 22-24; RB 9.** While this Court pointed out that two
9 other witnesses testified that Sandi did not see the altercation, whether or not Sandi
10 witnesses the altercation is for *Sandi* to testify to. It is not a fact that another
11 witness should speculate about and certainly not a fact for the district court to
12 speculate about. Therefore, this is a factual dispute that cannot be settled without
13 testimony from Sandi. **OA 4; OB 22-23; RB 9.** This assertion is not belied by the
14 record and, if true, would entitle Cash to relief. Mann, 118 Nev. 351, 46 P.3d 1228.
15 Therefore, he was entitled to an evidentiary hearing on this issue pursuant to Mann.
16 **Id. OB 22-24; RB 9-10.**

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26 ¹ Although there is no requirement for a petitioner to present affidavits of proffered
27 testimony from witnesses to meet the requirements for an evidentiary hearing, the
28 only reason Cash was unable to do so was because he was not appointed counsel to
conduct discovery and investigation.

1 **3. Pathologist**

2 Cash asserted that a pathologist should have been consulted with and that
3
4 this pathologist would have rendered a report that would have helped him prove he
5 stabbed the victim in self defense. **OB 21-22; RB 8-9.** This Court ruled that he
6 failed to demonstrate what the testimony was. **OA3.** This is difficult to do when
7 the district court refused to give him appointed counsel so as to proffer more
8 detailed testimony. Taking the limited proffer as is, it is not belied by the record
9 and is a factual dispute that cannot be settled without testimony. **OB 21-22; RB 8-**
10
11 **9.**

12
13 The decision of the Court of Appeals affirming the district court’s denial of
14 Cash’s request for an evidentiary hearing on the issue of ineffective assistance of
15 counsel for failing to present testimony from Sandi Cash, the neighbors and a
16 pathologist, conflicts with the decision of this Court in Mann as well as Nev. Rev.
17 Stat. §34.770. Cash requests the Supreme Court review and reverse the decision of
18 Court of Appeals affirming the district court denial of his petition for writ of
19 habeas corpus without holding an evidentiary hearing.
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23 **b. The Finding That Cash Was Not Entitled to Appointed Counsel**
24 **Conflicts with the Holding in Renteria-Novoa v. State and the**
25 **Plain Language of Nev. Rev. Stat. §34.750**

26 The Court of Appeals stated in its Order of Affirmance that while Cash met
27 the threshold requirements for the appointment of counsel (he is indigent and his
28

1 petition is a timely first petition), “the record reveals that the issues in this matter
2 were not difficult and Cash was able to comprehend the proceedings.” **OA 7.**

3
4 Nev. Rev. Stat. §34.750(1) provides for the discretionary appointment of
5 post-conviction counsel the allegation of indigency is true and the petition is not
6 dismissed summarily and sets forth a non-exhaustive list of factors, which the court
7 may considered in exercising its discretion: the severity of the consequences of the
8 petitioner, the difficulty of the issues presented, whether the petitioner is unable to
9 comprehend the proceedings, and whether counsel is necessary to proceed with
10 discovery. Nev. Rev. Stat. §34.750(1); Renteria-Novoa, 133 Nev. at 76, 391 P.3d
11 at 760-61. **OB 9.**

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15 In Renteria-Novoa this Court went on to stress that “the decision whether to
16 appoint counsel under NRS 34.750(1) is not necessarily dependent upon whether a
17 pro se petitioner has raised claims that clearly have merit or would warrant an
18 evidentiary hearing.” Id. at 77, 391 P.3d at 762. This Court pointed out that the
19 decision to appoint counsel turns upon whether under the circumstances of a
20 particular case, the assistance of counsel is essential to accomplish a fair and
21 thorough presentation of defendant’s claims for collateral relief. Id., 133 Nev. at
22 77, 391 P.3d at 762 *citing* Woodward v. State, 992 So. 2d 391, 392 (Fla. Dist. Ct.
23 App. 2008).

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27 It is important to note that with respect to the ineffective assistance of
28

1 counsel claim asserted by Renteria-Novoa, he *only* claimed that his attorney failed
2 to “*contact my witnesses and friends to investigate claims against me.*” Volume 7
3 of Record on Appeal 1490-1504 in Renteria-Novoa v. State, Case no. 68239; **RB**
4 **5.** With respect to the discovery factor when assessing whether a defendant should
5 be appointed counsel, this Court determined that this assertion alone was enough to
6 warrant the need for investigation and discovery. ² Renteria-Novoa, 133 Nev. at 77,
7 391 P.3d at 762; **OB 10; RB 5.**

8
9
10 Here, Cash has asserted that his attorney was ineffective for failing to
11 investigate specific witnesses (Sandi Cash, Angel Turner and Antoinette White)
12 and a group of witnesses (his neighbors) or consult with an expert (pathologist).
13 Cash has asserted that he believes these witnesses have statements to make that
14 would support his defense theory, which was that he was first defending Brittany
15 and then defending himself, discussed *supra* in section II of the instant pleading.
16 **OB 20-24; RB 7-10.** Cash has asserted that he believes that these witnesses are
17 either percipient witnesses of the incident or they have knowledge of the prior
18 violence of Davis and knowledge that Cash had knowledge of this prior violence as
19 well to support the argument that Cash also knew about this prior violence and
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25 ² Although this Court also determined and important factor in appointing Renteria-
26 Novoa counsel was the fact that his first language was Spanish and he needed an
27 interpreter at trial, this was no considered when determining whether or not he
28 needed to conduct investigation and discovery.

1 believed that he needed to defend Brittany, discussed *supra* in section II of the
2 instant pleading. **OB 20-24; RB 7-10.** Cash has asserted the need for investigation
3 with far more specificity than Renteria-Novoa did. Therefore, the decision by the
4 Court of Appeals conflicts with the standard set forth and ruling in Renteria
5 Novoa.
6

7
8 The Court of Appeals failed to recognize the fact that Cash had discovery
9 and investigation to conduct and could not do so without an appointed attorney.

10
11 **OA 7.** In fact, this factor is **OA 7.** In fact, it appears the Court did not even
12 consider this factor given that it is not mentioned in the
13 analysis by the Court of Appeals despite Cash arguing it in his appellate briefs. **OA**
14 **7; OB 15; RB 4-5.**

15
16 The decision of the Court of Appeals affirming the district court's denial of
17 Cash's request for appointed counsel so as to conduct discovery and investigation,
18 conflicts with the decision of this Court in Renteria-Novoa as well as Nev. Rev.
19 Stat. §34.750(1). Cash requests that the Supreme Court review and reverse the
20 decision of Court of Appeals affirming the district court denial of his petition for
21 writ of habeas corpus without appointing him counsel.
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1 **IV. THE RIGHT TO COUNSEL PURSUANT TO THE SIXTH**
2 **AMENDMENT TO THE UNITED STATES CONSTITUTION IS**
3 **INFRINGED UPON WHEN A PETITIONER IS UNABLE TO**
4 **LITIGATE HIS INEFFECTIVE ASSSITANCE OF COUNSEL**
5 **CLAIMS IN A PETITION FOR WRIT OF HABEAS CORPUS**

6 The issue raised is one of fundamental statewide importance because it
7 affects the right to effective assistance of counsel pursuant to the Sixth
8 Amendment to the United States Constitution. A petition for writ of habeas corpus
9 is the “only opportunity to assert ineffective-assistance and other claims that could
10 not have been raised at trial or on direct appeal.” Renteria-Novoa, 133 Nev. at 77,
11 391 P.3d at 762. If a defendant is not permitted to conduct discovery through
12 investigation with the assistance of counsel as well as present testimony and
13 evidence at an evidentiary hearing in support of his claim of ineffective assistance
14 of counsel, then it becomes impossible for a defendant to meaningfully litigate the
15 claim that he was denied his Sixth Amendment right to effective counsel.
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19 Therefore, Cash respectfully requests that this Court review and reverse the
20 Court of Appeals Order and remand his case to district court for appointment of
21 counsel and the holding of an evidentiary hearing, which would be consistent with
22 the previous decisions of this Court in both Renteria-Novoa, 133 Nev. at 76, 391
23 P.3d at 761 and Mann 118 Nev. 351, 46 P.3d 1228.
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1 **CONCLUSION**

2 Based upon the arguments contained herein, Cash respectfully requests that
3 this Court REVERSE the decisions of the Court of Appeals and REMAND his
4 case to the district court for appointment of counsel and evidentiary hearing in his
5 Petition for Writ of Habeas Corpus.
6

7
8 Dated this 20th day June of 2022.

9 Respectfully submitted,

10
11
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1 **CERTIFICATE OF COMPLIANCE**

2 1. I hereby certify that this brief complies with the formatting requirements of
3 NRAP 40 because:
4

5 **This brief has been prepared in a proportionally spaced typeface**
6 **using Microsoft Word 2010 Edition in Times New Roman 14 point font; or**
7

8 This brief has been prepared in a monospaced typeface using [state name
9 and version of word-processing program] with [state number of characters per inch
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12 2. I further certify that this brief complies with the page- or type-volume
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22 DATED this 20th day June of, 2022.

23 BY: /s/ Jean Schwartzer
24 JEAN J. SCHWARTZER, ESQ
25 Nevada State Bar No. 11223
26 Counsel for Appellant
27
28

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that Appellant’s Petition for Rehearing was filed
3
4 electronically with the Nevada Supreme Court on the 20th day of June, 2022.

5 Electronic Service of the foregoing document shall be made in accordance with the
6
7 Master Service List as follows:

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11 I further certify that I served a copy of this document by mailing a true and
12 correct copy thereof, postage pre-paid, addressed to:

13
14 Thomas Cash
15 Inmate No: #1203562
16 High Desert State Prison
17 P.O. Box 650
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