IN THE SUPREME COURT OF THE STATE OF NEVADA

THOMAS CASH,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

CASE NO: 82060

ANSWER TO PETITION FOR REVIEW

COMES NOW the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through his Chief Deputy, KAREN MISHLER, and submits this Answer to Petition for Review in obedience to this Court's order filed July 6, 2022, in the above-captioned case. This Answer is based on the following memorandum of points and authorities and all papers and pleadings on file herein.

Dated this 14th day of July, 2022.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar # 001565

BY */s/ Karen Mishler*
KAREN MISHLER
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ARGUMENT

"Supreme Court review is not a matter of right but of judicial discretion." NRAP 40B(a). Pursuant to that rule, this Court considers certain factors when determining whether to review a Court of Appeals decision, including, "(1) Whether the question presented is one of first impression of general statewide significance; (2) Whether the decision of the Court of Appeals conflicts with a prior decision of the Court of Appeals, the Supreme Court, or the United States Supreme Court; or (3) Whether the case involves fundamental issues of statewide public importance." NRAP 40B(a). Appellants bear the burden of "succinctly stat[ing] the precise basis on which [they] seek[] review by the Supreme Court." NRAP 40B(d).

Appellant raises three claims in support of Supreme Court review. First, Appellant argues that the Court of Appeals' finding that Appellant was not entitled to an evidentiary hearing conflicts with this Court's holding in Mann v. State, 118 Nev. 351, 46 P.3d 1228 (2002). Petition for Review ("Petition") at 3. Second, Appellant contends that the Court of Appeals' finding that Appellant was not entitled to post-conviction counsel conflicts with NRS 34.750 and this Court's holding in Renteria-Novoa v. State, 133 Nev. 75, 391 P.3d 760 (2017). Petition at 7. Finally, Appellant contends that his second claim is an issue of fundamental statewide importance due to it concerning the Sixth Amendment right to the assistance of counsel. Petition at 11. As discussed more fully below, none of these claims have

merit.

I. THE COURT OF APPEALS CORRECTLY AFFIRMED THE DISTRICT COURT'S RULING THAT APPELLANT WAS NOT ENTITLED TO AN EVIDENTIARY HEARING

Both the district court and the Court of Appeals properly found that Appellant was not entitled to an evidentiary hearing on his post-conviction claims. The Court of Appeals applied well-established law to reach a predictable disposition: Appellant failed to present specific factual allegations that would entitle him to relief if true, and therefore the district court properly denied Appellant's request for an evidentiary hearing.

a. This Court's Holding in Mann v. State Does Not Require an Evidentiary Hearing in this Case

Appellant wrongly contends that this Court's holding in Mann necessitates an evidentiary hearing in this case. "A petitioner is entitled to a post-conviction evidentiary hearing when he asserts claims supported by specific factual allegations not belied by the record that, if true, would entitle him to relief." Mann v. State, 118 Nev. 351, 353, 46 P.3d 1228, 1229 (2002).

In Mann, the petitioner raised a specific claim that would clearly have entitled him to relief if it were true—he alleged that his attorney failed to file a direct appeal after petitioner requested his attorney do so. Id. This was clearly an allegation that would entitle him to relief if it were true, due to this Court's decision in Lozada v. State, 110 Nev. 349, 359, 871 P.2d 944, 950 (1994)). This Court correctly recognized

that if this factual allegation were true, then under Lozada the petitioner would have established he received ineffective assistance of counsel, as when a defendant is deprived of an appeal, prejudice is presumed. Id. at 353-54, 46 P.3d at 1229-30.

Here, Appellant has not raised such a claim. Appellant contends an evidentiary hearing is warranted on his claims that counsel did not canvass his neighbors, interview a potential witness, or present expert testimony from a pathologist. Petition at 05-07. Unlike the allegation in Mann, these claims do not carry a presumption of prejudice if they were true. Even if it is true that counsel did not canvass or interview these individuals, or obtain an expert witness, this would not establish that counsel performed ineffectively. This Court has never found that simply pleading such claims entitles a petitioner to an evidentiary hearing. This Court has also never interpreted Mann to require an evidentiary hearing be conducted simply because a petitioner has raised allegations of ineffective assistance of counsel.

To the contrary, this Court has repeatedly recognized that bare or speculative claims do not entitle a petitioner to an evidentiary hearing. See Colwell v. State, 118 Nev. 807, 813, 59 P.3d 463, 467 (2002) ("Colwell's claim fails because it remains vague and lacks specific factual allegations that would entitle him to relief even if true."); Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984) (observing that no relief was warranted where the lack of investigation claim did not include

descriptions of the witnesses' expected testimony). To receive an evidentiary hearing on claims of ineffective assistance of counsel, a petitioner must specifically allege that counsel committed errors that fell below an objective standard of reasonable competence, and that, but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063 (1984).

Important to note is that all of Appellant's claims allege that counsel failed to investigate certain matters sufficiently. As the Court of Appeals recognized, a petitioner who contends his attorney was ineffective because he did not adequately investigate must show how a better investigation would have rendered a more favorable outcome probable. Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). See Cash v. State, Docket No. 82060-COA (Order of Affirmance, March 4, 2022), at 2.

As discussed in more detail below, Appellant completely failed to adequately explain what additional evidence could have been developed with the further investigation Appellant claims was warranted. Appellant fails entirely to address this requirement, and instead argues for an interpretation of Mann that would necessitate an evidentiary hearing whenever a petitioner raises any allegation of ineffective assistance of counsel, regardless of how inadequately pled. Appellant fails to address the fact that this interpretation is irreconcilable with this Court's holdings in Mann,

Colwell, and Hargrove, all of which require a petitioner to allege specific factual allegations that would entitle him to relief if true.

b. The Court of Appeals Correctly Found the District Court Did Not Err by Not Holding an Evidentiary Hearing Because Appellant Failed to Support His Claims With Specific Factual Allegations

In his Petition, Appellant contends that three of his ineffective assistance claims warranted an evidentiary hearing. Specifically, he claims that counsel should have canvassed the neighbors, interviewed witness Sandi Cash[1], and consulted with a pathologist to assist in making a claim of self-defense. Petition, at 05-07.[2] Appellant fails to demonstrate any error by the Court of Appeals or the district court in concluding an evidentiary hearing was unwarranted on these claims. Instead, Appellant claims, without any legal support, that the district court should not have considered these claims as pled, but re-framed them into sufficiently specific factual allegations.

i. Appellant's Claim that Counsel Should Have Canvassed the Neighbors Is a Bare and Naked Claim

Before the district court, Appellant alleged that "Counsel failed to canvas [sic] Petitioners' neighbor's [sic] to see if they had relevant information to the case and

[1]The COA refers to this witness as S. Cash Earl in the Affirmance. Cash v. State, Docket No. 82060-COA (Order of Affirmance, March 4, 2022), at 3.
[2]Appellant raised additional claims both below and on appeal. Because Appellant only addresses these three claims in the instant Petition, the State only addresses these three claims.

other relevant witnesses to introduce…" 6 AA 1456. Appellant provided no information as to what these "neighbors" would have said, and provided no further detail related to this claim. The Court of Appeals properly recognized that it was Appellant's responsibility to allege what the outcome of such a canvass would have been and how it would have affected the proceedings. Cash v. State, Docket No. 82060-COA (Order of Affirmance, March 4, 2002), at 2. See Molina, 120 Nev. at 192, 87 P.3d at 538 (requiring a petitioner to allege what evidence would have been obtained via further investigation and how it would have produced a more favorable outcome).

Appellant's failure to indicate the names of these individuals he claims should have been canvassed, and specify what information he believes they could provide, is obviously fatal to this claim. This Court has repeatedly recognized that such a vague, naked claim does not warrant an evidentiary hearing. Hargrove, 100 Nev. at 502, 686 P.2d at 225 (finding appellant not entitled to an evidentiary hearing because "appellant's claim that certain witnesses could establish his innocence of the bomb threat charge was not accompanied by the witness' names or descriptions of their intended testimony.").

Appellant's claim that "it is clear that he is asserting that had any neighbors witnessed the alternation [sic], they would have testified consistently with his defense…" is simply false. It is certainly *not* clear from the pleadings below that

Appellant was alleging this; he merely claimed that it should have been determined if the neighbors had "relevant information." 6 AA 1456. It was Appellant's burden to specifically allege in his petition factual allegations that would entitle him to relief if true. He did not do so, because he merely alleged that counsel did not canvass the neighbors. He made no showing or even cogent argument as to how not doing so was objectively unreasonable or caused him prejudice.

Appellant complains that he did not have counsel to assist him in pleading this claim. But the fact that he did not have counsel does not excuse him from the burden to plead specific factual allegations. Unsurprisingly, as none exists, Appellant fails to cite a single case or legal authority that supports his contention that he should not be excused from the foundational requirement to plead specific factual allegations that would entitle him to relief if true. This Court has never found that this requirement is excused simply because a petitioner was not represented by counsel during post-conviction proceedings. This Court has stated "claims must consist of more than 'bare' allegations and that an evidentiary hearing is mandated only when a post-conviction petitioner asserts specific factual allegations that are not belied or repelled by the record and that, if true, would entitle him to relief." Nika v. State, 124 Nev. 1272, 1300–01, 198 P.3d 839, 858 (2008) (citing Hargrove, 100 Nev. at 502-03, 686 P.2d at 225). Appellant did not do so, and therefore the Court of Appeals properly concluded Appellant was not entitled to an evidentiary hearing on this

claim.

ii. Appellant's Claim Regarding Sandi Cash is Belied by the Record

The Court of Appeals correctly found that Appellant was not entitled to an evidentiary hearing on his claim that counsel was ineffective for not interviewing Sandi Cash ("Sandi") and not presenting her as a witness. His claims regarding what testimony she could have presented are belied by the record. "A defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record." Hargrove, 100 Nev. at 503, 686 P.2d at 225.

Appellant alleged to the district court that Sandi was present at the scene of the crime, and she would have corroborated Appellant's testimony. 6 AA 1475. Appellant did not testify at trial, so this corroboration claim is contradicted by the record. The trial record reveals that two witnesses testified that Sandi was not present when the crime occurred. 4 AA 981-82; 5 AA 1104. Thus, Appellant's contention that testimony from this witness would have assisted his defense is contradicted by the record, and no evidentiary hearing is warranted.

As the Court of Appeals recognized, the affidavit Appellant provided from Sandi also gives no indication that Sandi could have provided testimony beneficial to Appellant. The affidavit describes a violent incident involving Ezekiel Devine, the victim in this case. 7 AA 1501. Sandi indicates that she did not inform Appellant of this incident. Id. Thus, any testimony regarding this incident would not have been

relevant and thus would have been inadmissible. See Burgeon v. State, 102 Nev. 43, 45–46, 714 P.2d 576, 578 (1986) (finding specific acts which of violence by the deceased irrelevant for establishing self-defense because the acts were not previously known to the defendant). Sandi also gives no indication that she was present at the scene of the crime. 7 AA 1501. Thus, nothing in the affidavit supports Appellant's claim that Sandi could have provided beneficial information, or that counsel was ineffective for not interviewing or calling this witness.

Appellant, mis-reading this Court's holding in Mann, contends that the district court erred by considering this affidavit when determining if Appellant's factual allegations were belied by the record. Appellant is mistaken. Mann does not prohibit consideration of affidavits; it merely states that a court cannot resolve factual disputes solely based upon affidavits attached to post-conviction pleadings.

In Mann, the petitioner alleged counsel failed to file a direct appeal even though petitioner requested counsel do so. 118 Nev. at 352, 46 P.3d at 1229. The State responded to the petition by arguing that this claim was belied by the record, and supported this claim by attaching an affidavit from both of petitioner's trial attorneys, in which both attorneys stated petitioner did not request a direct appeal filed on his behalf. Id. The district court denied the petition without holding an evidentiary hearing. Id., 46 P.3d at 353. In responding to the petitioner's appeal, the State argued that the petitioner's claims were belied by the record because the

affidavits from petitioner's counsel contradicted petitioner's appeal deprivation claim. Id. at 354, 46 P.3d at 1230. This Court found that the petitioner's claim was not belied by the record, and stated as follows:

> A claim is not "belied by the record" just because a factual dispute is created by the pleadings or affidavits filed during the post-conviction proceedings. *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*.

Id. (emphasis added).

The circumstances of Mann do not exist here. In finding Appellant was not entitled to an evidentiary hearing, neither the Court of Appeals nor the district court resolved a factual dispute based upon contradictory affidavits. The State did not file an affidavit in this case. There also was no factual dispute created by the affidavit Appellant filed. It is certainly possible that Sandi did in fact witness the altercation she describes in the affidavit. But Sandi does not contend that she witnessed the crime. According to her affidavit, she witnessed a separate incident—a violent act by the victim, which was unknown to Appellant. 7 AA 1501.

There is no factual dispute regarding the truth of the affidavit. Even if the affidavit is true, it is not relevant because the incident described would only be relevant to a self-defense claim if Appellant had witnessed or was aware of it. The affidavit does not support a claim that counsel was ineffective for not interviewing or presenting testimony from this witness, because the affidavit does not contain information that would have benefited Appellant at trial.

Furthermore, Appellant wrongly contends that the question as to whether Sandi witnessed the crime must be resolved via testimony from Sandi. Petition, at 6. But Appellant's claim that Sandi witnessed the crime is belied by the trial 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. Here, as both the district court and the Court of Appeals recognized, two trial witnesses testified that they witnessed the crime and Sandi was not present at the time. 4 AA 981-82; 5 AA 1104. Appellant attempts to cast this finding as speculation. Petition, at 6. It is not. This testimony was not speculation—these witnesses testified to observing the stabbing and to the fact that Sandi was not present at the time. Neither the witnesses, nor the district court or the State engaged in speculation as to whether or not Sandi witnessed the crime. The trial record clearly contradicts this claim, and this record existed at the time Appellant raised this claim. Accordingly, under Mann this claim is belied by the record. The Court of Appeals and the district court correctly found Appellant was not entitled to an evidentiary hearing on this claim.

iii. Appellant's Claim that Counsel Should Have Retained a Pathologist Does Not Entitle Him to an Evidentiary Hearing

Appellant contends that counsel was ineffective for not retaining the services of a pathologist to testify regarding the victim's stab wounds. Petition, at 7. Both the district court and the Court of Appeals recognized that Appellant failed to allege

what evidence such a pathologist could have provided that would have affected the outcome of the trial. See Molina, 120 Nev. at 192, 87 P.3d at 538. Appellant appears to acknowledge that he did not meet this burden, but claims that he should be excused from this burden because it was difficult for him to plead his claims properly without the assistance of post-conviction counsel. This Court has never held that a post-conviction petitioner is excused from pleading requirements due to not being represented by post-conviction counsel, and Appellant cites no authority to support this argument. Appellant failed to allege what the testimony from another pathologist would have been, or how not retaining such a pathologist was objectively unreasonable or prejudiced him. Accordingly, this claim should be summarily denied.

II. THE COURT OF APPEALS CORRECTLY FOUND THAT APPELLANT WAS NOT ENTITLED TO THE APPOINTMENT OF POST-CONVICTION COUNSEL

The Court of Appeals did not err in affirming the district court's denial of Appellant's request for the appointment of post-conviction counsel. The COURT OF APPEALS properly recognized that the appointment of post-conviction counsel is discretionary, and that the issues in this matter were not difficult and Appellant was able to comprehend the proceedings. Cash v. State, Docket No. 82060-COA (Order of Affirmance, March 4, 2022), at 7. Importantly, when requesting counsel from the district court, Appellant made no mention of needing counsel in order for

discovery purposes. 7 AA 1506-07. Thus, it is unsurprising that the district court concluded no additional discovery was needed, or that the Court of Appeals did not mention this factor in affirming the district court's decision. 15 AA 1593; Cash v. State, Docket No. 82060-COA (Order of Affirmance, March 4, 2022), at 06-07.

Regardless, Appellant contends that he needs the assistance of counsel to perform discovery and investigation, but he fails to detail why this is needed. He contends that there are witnesses who have statements to make that would support his defense theory, but even without the assistance of counsel he has already obtained and presented affidavits from Sandi and Angel Turner. 7 AA 1501-02. Appellant is simply repeating his three post-conviction claims and alleging that discovery would help him present these claims.

Appellant fails to support his claim that the Court of Appeals's decision violated NRS 34.750 and this Court's ruling in Renteria-Novoa v. State, 133 Nev. 75, 391 P.3d 760 (2017). NRS 34.750 simply gives a court the discretion to appoint post-conviction counsel, and lists factors the court may consider when determining whether to appoint counsel. The district court's Findings of Fact, Conclusions of Law, and Order filed in this case indicates that all of these statutory factors were considered. 7 AA 1592-93. The fact that Appellant was able to file a timely post-conviction petition for writ of habeas corpus, as well as a supplemental petition, both containing relevant legal citations, indicates that Appellant was able to comprehend

the proceedings. The issues he raises are not difficult. Thus, the COURT OF APPEALS did not err in affirming the district court's denial of Appellant's request for post-conviction counsel.

III. APPELLANT'S SIXTH AMENDMENT RIGHT TO COUNSEL HAS NOT BEEN INFRINGED UPON BECAUSE HE WAS ABLE TO LITIGATE HIS INEFFECTIVE ASSISTANCE CLAIMS

Appellant's contention that this matter "affects the right to effective assistance of counsel pursuant to the Sixth Amendment to the United States Constitution" is blatantly incorrect. Petition, at 11. As preliminary matter, the Sixth Amendment provides no right to counsel in post-conviction proceedings. Coleman v. Thompson, 501 U.S. 722, 752, 111 S. Ct. 2546, 2566 (1991) ("There is no constitutional right to an attorney in state post-conviction proceedings."). In McKague v. Warden, 112 Nev. 159, 163, 912 P.2d 255, 258 (1996), this Court similarly observed that "[t]he Nevada Constitution…does not guarantee a right to counsel in post-conviction proceedings, as we interpret the Nevada Constitution's right to counsel provision as being coextensive with the Sixth Amendment to the United States Constitution." The McKague Court specifically held that with the exception of NRS 34.820(1)(a) (entitling appointed counsel when petitioner is under a sentence of death), one does not have "any constitutional or statutory right to counsel at all" in post-conviction proceedings. Id. at 164, 912 P.2d at 258.

Appellant is correct that the post-conviction process provides the sole

opportunity for a convicted person to raise ineffective assistance claims that could not be raised on direct appeal. However, this does not mean that whenever a petitioner raises ineffective assistance of counsel claims such a petitioner is entitled to the appointment of post-conviction counsel or to an evidentiary hearing. This Court has never held either is required, other than the exception for death penalty cases under NRS 34.820(1)(a). Any habeas petitioner, whether represented by counsel or not, is only entitled to an evidentiary hearing if such a petitioner presents specific factual allegations that are not belied by the record and that, if true, would entitle the petitioner to relief. Hargrove, 100 Nev. at 502-03, 686 P.2d at 225. This standard "is the cornerstone of post-conviction habeas review." Nika, 124 Nev. at 1301, 198 P.3d at 858. As discussed above, Appellant has not met this standard. Appellant has also not demonstrated that the assistance of counsel "is essential to accomplish a fair and thorough presentation [of his ineffectiveness claims]." Renteria-Novoa 133 Nev. at 77-78, 391 P.3d at 762. Appellant's Sixth Amendment rights have not been violated. He has received a fair opportunity to present such claims, and they were properly denied. He is entitled to no further consideration of his claims.

CONCLUSION

Appellant has failed to demonstrate any error by the Court of Appeals, let alone a conflict between the Court of Appeals' decision and any decision by this

Court. Appellant has also failed to demonstrate that his claims implicate a fundamental issue of statewide public importance. Accordingly, he has failed to demonstrate review by this Court is warranted. Therefore, the State respectfully requests that the Petition for Review be denied.

Dated this 14th day of July, 2022.

Respectfully submitted,

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BY */s/ Karen Mishler*
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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this petition for review or answer 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this petition complies with the page and type-volume limitations of NRAP 40, 40A and 40B because it is proportionately spaced, has a typeface of 14 points, contains 3,746 words.

Dated this 14th day of July, 2022.

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 July 14, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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