

IN THE SUPREME COURT OF THE STATE OF NEVADA

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JESSE NOBLE, JR.,

Appellant,

vs.

THE STATE OF NEVADA,

Appellee.

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Case No. 83024  
Elizabeth A. Brown  
Clerk of Supreme Court

**APPELLANT'S OPENING BRIEF**

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## **NRAP 26.1 DISCLOSURE STATEMENT**

The undersigned counsel of record, on behalf of Appellant JESSE NOBLE, JR., 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 29th day of November 2021.

  
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## **TABLE OF CONTENTS**

<b>I.</b>	<b>TABLE OF AUTHORITIES .....</b>	<b>4</b>
<b>II.</b>	<b>JURISDICTIONAL STATEMENT.....</b>	<b>5</b>
<b>III.</b>	<b>ROUTING STATEMENT .....</b>	<b>5</b>
<b>IV.</b>	<b>STATEMENT OF ISSUES .....</b>	<b>6</b>
<b>V.</b>	<b>STATEMENT OF THE CASE.....</b>	<b>6</b>
<b>VI.</b>	<b>STATEMENT OF FACTS.....</b>	<b>7</b>
<b>VII.</b>	<b>ARGUMENT.....</b>	<b>9</b>
	<b>STANDARD OF REVIEW .....</b>	<b>9</b>
<b>A.</b>	<b>THE DISTRICT ERRED WHEN IT DENIED APPELLANT’S PETITION FOR WRIT OF HABEAS CORPUS FOR AN ALLEGED LACK OF SPECIFICITY IN HIS PLEADING...9</b>	
	<b>a. Appellant Made Specific Factual Allegations Regarding Witnesses That Would Entitle Him To Relief.....10</b>	
	<b>b. Appellant Made Specific Factual Allegations Regarding A Video That That Would Entitle Him To Relief..... 15</b>	
<b>VIII.</b>	<b>CONCLUSION.....</b>	<b>21</b>
<b>IX.</b>	<b>CERTIFICATE OF COMPLIANCE.....</b>	<b>22</b>
<b>X.</b>	<b>CERTIFICATE OF SERVICE .....</b>	<b>24</b>

## I. TABLE OF AUTHORITIES

### Cases

<u>Berry v. State</u> , 131 Nev. 957, 967, 363 P.3d 1148, 1154-57 (2015) ...	
.....	<i>passim</i>
<u>Hargrove v. State</u> , 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984) .	
.....	11, 16
<u>Hathaway v. State</u> , 119 Nev. 248, 255, 71 P.3d 503, 508 (2003) .	11, 16
<u>Hurd v. State</u> , 114 Nev. 182, 188, 953 P.2d 270, 274 (1998).....	14, 19
<u>Kirksey v. State</u> , 112 Nev. 980, 992, 923 P.2d 1102, 1110 (1996)	14, 20
<u>Lioce v. Cohen</u> , 124 Nev. 1, 20, 174 P.3d 970, 982 (2008) .....	9
<u>Mann v. State</u> , 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002)	<i>passim</i>
<u>McMann v. Richardson</u> , 397 U.S. 759, 771, 90 S. Ct. 1441, n. 14 (1970)	
.....	13, 19
<u>SIIS v. United Exposition Servs. Co.</u> , 109 Nev. 28, 30, 846 P.2d 294, 295	
(1993) .....	9
<u>Strickland v. Washington</u> , 466 U.S. 668, 685, 104 S. Ct. 2052, 2063 (1984)	
.....	<i>passim</i>

### Other References

Nev. Const. art. VI, § 4.....	5
<u>Nevada Postconviction Proceedings: A Guide for District Court Judges</u>	
(2019) .....	12, 17
N.R.S. 1.030 .....	5

## **II. JURISDICTIONAL STATEMENT**

This Honorable Court has jurisdiction under Nev. Const. art. 6, § 4(1), and NRS 1.030. Petitioner filed a Motion for New Trial (treated as a Petition for Writ of Habeas Corpus), on November 18, 2019, which was supplemented on August 11, 2020. AA0038 & AA0045. On May 17, 2021, the District Court made an erroneous ruling denying Petitioner's Petition without the benefit of an evidentiary hearing. AA0090. On June 1, 2021, Appellant filed his Notice of Appeal. AA0095.

## **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 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.**
  - b. Appellant Made Specific Factual Allegations Regarding A Video That That Would Entitle Him To Relief.**

#### **V. STATEMENT OF THE CASE**

On October 24, 2016, Petitioner was convicted of Robbery and Burglary and sentenced to 48 – 120 months and 36 – 120 months respectively in the Nevada Department of Corrections. On December 21, 2017, while serving his sentence, an incident occurred at the High Desert State Prison. Petitioner was charged with Battery by Prisoner. AA0001. Slight or marginal evidence was found at the Petitioner's Preliminary hearing on December 19, 2018. AA0004. Petitioner was bound over to the District Court on the same day. Id.

Petitioner went to trial on the charge that is the subject of this matter on February 11, 2019, and a guilty verdict was rendered on February 12, 2019. AA0037a. Petitioner was sentenced on April 11, 2019, to 28 – 72 months consecutive to C-16-312733-1. AA0043.

Thereafter, Petitioner filed a Motion for New Trial (treated as a Petition for Writ of Habeas Corpus), on November 18, 2019, which was supplemented on August 11, 2020. AA0038 & AA0045. On May 17, 2021, the District Court made an erroneous ruling denying Petitioner's Petition without the benefit of an evidentiary hearing. AA0090. On June 1, 2021, Appellant filed his Notice of Appeal. AA0095.

## **VI. STATEMENT OF FACTS**

On October 24, 2016, Petitioner was convicted of Robbery and Burglary and sentenced to 48 – 120 months and 36 – 120 months respectively in the Nevada Department of Corrections. On December 21, 2017, while serving his sentence, an incident occurred at the High Desert State Prison. Petitioner was charged with Battery by Prisoner. AA0001. Slight or marginal evidence was found at the Petitioner's Preliminary hearing on December 19, 2018. AA0004. Petitioner was bound over to the District Court on the same day. Id.

Petitioner went to trial on the charge that is the subject of this matter on February 11, 2019, and a guilty verdict was rendered on

February 12, 2019. AA0037a. Petitioner was sentenced on April 11, 2019, to 28 – 72 months consecutive to C-16-312733-1. AA0043.

Petitioner was represented by Kenneth Frizzel, Esq. During the trial, Petitioner’s trial counsel failed to present contradictory and exculpatory evidence. AA0045. This created an ineffective assistance of counsel situation on the part of defense counsel. Id.

Thereafter, Petitioner filed a Motion for New Trial (treated as a Petition for Writ of Habeas Corpus), on November 18, 2019, which was supplemented on August 11, 2020. AA0038 & AA0045. On May 17, 2021, the District Court made an erroneous ruling denying Petitioner’s Petition without the benefit of an evidentiary hearing. AA0090. On June 1, 2021, Appellant filed his Notice of Appeal. AA0095.

As Mr. Noble was not effectively represented by counsel his conviction is unconstitutional and must be vacated.

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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. AA0090. The District Court further stated that Mr. Noble failed to allege how his attorney was deficient in cross examining the witnesses called at trial; and that merely stating that the witnesses were not impeached, without specific allegations of how they could have been impeached, is not enough to show by a preponderance of the evidence that Noble is entitled to relief and thus

warrant an evidentiary hearing. Id. Lastly, the District Court further alleged that Mr. Noble failed to show that his counsel was deficient for not introducing a video that does not show Noble in the video. 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. Noble's counsel failed to investigate, interview, and/or introduce evidence of four witnesses. These witnesses Dario Paccone, Joseph Dugan, Kerry Hunter, and a Newman made statements that were either conflicting or contradictory to the State's narrative.

...

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.

AA0053 lns 12 - 24. Further, Appellant alleged the following in his pleadings:

Mr. Noble's counsel failed to introduce conflicting evidence from the State's key witness Officer Brown.

...

In this case the introduction of Brown’s conflicting statements, that he changed his story regarding which hand he grabbed during the incident, and the testimony that he blacked out and when he awoke the incident was over, contradicts his institutional statement. The introduction of these contradictory statements would have led to a reasonable probability of a different outcome, showing both good cause and actual prejudice.

AA0055 lns 13 – 21.

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. Noble's 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 testimony from certain favorable witnesses and present conflicting evidence from the State's key witness Officer Brown. 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).

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).

Here, Mr. Noble’s counsel failed to introduce statements that were either conflicting or contradictory to the State’s narrative, investigate, interview, and/or introduce testimony from certain favorable witnesses, and present conflicting evidence from the State’s key witness Officer Brown. 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

introduction of Brown's conflicting statements, that he changed his story regarding which hand he grabbed during the incident, and the testimony that he blacked out and when he awoke the incident was over, contradicts his institutional statement. 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). Furthermore, Mr. Noble's counsel made errors which fell below minimum standards of representation, undermined confidence in the adversarial outcome, and deprived Mr. Noble of fundamentally fair proceedings.

**b. Appellant Made Specific Factual Allegations Regarding A Video That That Would Entitle Him To Relief.**

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

[P]rior 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 introduce the video of the alleged incident which show no instances of the Petitioner involved in any aspect of the alleged disturbance.

...

In this case the introduction of the State's video showing at no time was Petitioner involved in the acts which were the subject matter of this case, contradicts the statements prior witnesses. The introduction of the video in light of these contradictory statements would have led to a reasonable probability of a different outcome, showing both good cause and actual prejudice.

AA0056 lns 12 – 16, and AA0057 lns 17 - 24.

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. Specifically, Appellant's counsel failed to introduce a video which shows no instances of the Petitioner involved in any aspect of the alleged disturbance. AA0056 lns 12 – 16, and AA0057 lns 17 – 24. As well, the introduction of the State's video showing at no time was Petitioner involved in the acts which were the subject matter of this case, contradicts the statements of prior witnesses. Id. The introduction of the video in light of these contradictory statements would have led to a reasonable probability of a different outcome, showing both good cause and actual prejudice. Id. As a result, Mr. Noble's 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). 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).

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).

Here, Appellant's counsel failed to introduce a video which shows no instances of the Petitioner involved in any aspect of the alleged disturbance. As well, the introduction of the State's video showing at no time was Petitioner involved in the acts which were the subject matter of this case, contradicts the statements of prior witnesses. The introduction of the video in light of these contradictory statements would have led to a reasonable probability of a different outcome, showing both good cause and actual prejudice to introduce a government video of the incident. 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). And, again, 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*). Furthermore, Mr. Noble's counsel made errors which fell below minimum

standards of representation, undermined confidence in the adversarial outcome, and deprived Mr. Noble 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 29th day of November 2021.

  
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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 **4012** 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 29th day of November 2021.

  
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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 29th day of November 2021.

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

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