

IN THE SUPREME COURT OF THE STATE OF NEVADA

CASIMIRO VENEGAS,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

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Case No. 83964

RESPONDENT'S ANSWERING BRIEF

**Appeal From Denial of Habeas Relief
Eighth Judicial District Court, Clark County**

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ROUTING STATEMENT

This is presumptively assigned to the Court of Appeals because it challenges a judgment of conviction offenses that are not Category A felonies. NRAP 17(b)(3).

STATEMENT OF THE ISSUES

Whether the underlying petition failed to make specific factual allegations.

STATEMENT OF THE CASE

On March 4, 2016, an Information charged Casimiro Venegas (“Appellant”) with thirteen criminal counts:

1. Conspiracy to Commit Robbery
2. Burglary While in Possession of a Firearm
3. Robbery With Use of a Deadly Weapon
4. Burglary While in Possession of a Firearm
5. Robbery With Use of a Deadly Weapon
6. Battery With Use of a Deadly Weapon Resulting in Substantial Bodily Harm

7. Attempt Murder With Use of a Deadly Weapon
8. Battery With Use of a Deadly Weapon Resulting in Substantial Bodily Harm
9. Battery With Use of a Deadly Weapon Resulting in Substantial Bodily Harm
10. Battery With Use of a Deadly Weapon Resulting in Substantial Bodily Harm
11. Aiming a Firearm at a Human Being
12. Coercion With Use of a Deadly Weapon
13. Battery With Intent to Commit a Crime

AA 1-6. The State provided notice of its intent to seek punishment as a habitual criminal and of Appellant's prior burglary and/or home invasion convictions. AA 8-9. The Third Amended Information filed on March 15, 2017, contained the same charges and notices. AA 59-68.

On March 15, 2017, a jury found Appellant guilty of these charges, except that for Counts Nine and Ten, they found him guilty of Battery With Use of a Deadly Weapon (without the Substantial Bodily Harm). AA 69-72. Appellant was sentenced to an aggregate sentence of twenty-two to fifty-five years imprisonment, with 476 days credit for time served. AA 117-20. The Judgment of Conviction was filed on September 21, 2017. AA 117.

The Nevada Supreme Court affirmed Appellant's conviction on October 22, 2018. AA 215-19. Appellant filed a Motion for Modification of Sentence on February 1, 2019. AA 121-24. This was denied on March 7, 2019. AA 129-32.

He filed a Petition for Writ of Habeas Corpus on March 18, 2019. AA 134-60. A Supplemental Petition for Writ of Habeas Corpus was filed October 7, 2020 (hereinafter "Petition"). AA 200-12. The State responded. AA 220-29. Appellant

filed his reply May 3, 2021. AA 230-33. The Petition was denied on December 1, 2021. AA 235-44. This appeal was filed December 15, 2021.

STATEMENT OF THE FACTS

On January 12, 2016, at 3:50 AM, Appellant robbed a 7-11 with Jose Monay-Pina. AA 26. They racked their handguns and demanded the money (\$139) in the registers. AA 27. Half an hour later, the men entered the home of Javier Colen. AA 27. They pistol whipped him, then attacked him with an axe. AA 27. Police located the men in the adjoining backyard. AA 27. Monay-Pina told officers they did not understand the situation—Colen had slashed their tires previously. AA 27.

SUMMARY OF THE ARGUMENT

Because the Petition made only conclusory claims without specific factual allegations, the district court was unable to consider the Petition on its merits. Therefore, the district court properly denied the Petition as failing to state a claim.

ARGUMENT

This Court reviews a district court's denial of a habeas petition for an abuse of discretion. Rubio v. State, 124 Nev. 1032, 1047, 194 P.3d 1224, 1234 (2008). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001). In habeas matters, this Court reviews the district court's application of the law *de novo* and gives deference to its factual findings. State v.

Huebler, 128 Nev. 192, 197, 275 P.3d 91, 95 (2012), cert. denied, 133 S.Ct. 988 (2013). This Court gives deference to the factual findings made by the district court as long as they are supported by the record. Little v. Warden, 117 Nev. 845, 854, 34 Pd. 3d 540, 546 (2001).

Appellant asserts the district court erred by denying his Petition for failing to plead specific facts that would entitle him to relief. AOB at 11. “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.” AOB at 11.

Contrary to the district court’s findings, Appellant assures this Court that he did make “specific factual allegations regarding witnesses.” AOB at 12. However, Appellant fails to allege a single specific fact in his Petition.

When a petitioner claims his attorney was ineffective because he did not adequately investigate the case, he 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). The petitioner must prove the disputed factual allegations by a preponderance of the evidence. Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). Claims of ineffective assistance of counsel must be supported by specific factual allegations, which if true, would entitle the petitioner to relief.

Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 224 (1984). “Bare” and “naked” allegations are insufficient, as are those belied and repelled by the record. Id. NRS 34.735(6) warns petitioners that a failure to allege specific facts rather than just conclusions may lead to a petition’s dismissal.

A. Conclusory Allegations

The Petition alleges trial counsel was ineffective for “failing to investigate, interview, and/or introduce testimony from certain favorable witnesses.” AA 208. This is a conclusory statement because it fails to provide details about these alleged witnesses. Other conclusory statements include:

- “[C]ounsel failed to investigate, interview, and/or introduce evidence witnesses.” AA 209.
- “In this case the investigation and introduction of these individual’s [sic] statements would have been critical in Petitioner’s defense yet were completely ignored by trial counsel.” AA 209.
- “The introduction of these witness statements would have led to a reasonable probability of a different outcome, showing both good cause and actual prejudice.” AA 209.
- “[C]ounsel failed to fully investigate and prosecute Petitioner’s appeal.” AA 211.

These quotations are the only “factual” allegations in the Petition. The State’s response pointed out these statements lacked specificity: “Petitioner failed to explain who these individuals are, what their statements would be, and how any additional testimony would be beneficial to his case.” AA 226-27. The State argued there was no need of an evidentiary hearing as no facts had been alleged. AA 229.

In his reply, Appellant failed to take the opportunity to add specifics to his conclusory allegations. He said he had shown trial and appellate counsel was ineffective through “multiple instances of error.” AA 232-33. He again made conclusory allegations:

- “Thus, because of Trial Counsel’s deficiencies in failing to present available evidence to show reasonable doubt regarding several counts of the Information, Mr. Venegas suffered prejudice such that the results of the trial would have been different because the jury would not have convicted him on all the charged counts.” AA 232.
- “Thus, because of Appellate Counsel’s deficiencies in failing to investigate and present available evidence and arguments, Mr. Venegas suffered prejudice such that the result of the appeal would have been different.” AA 232-33.
- “Mr. Venegas has raised claims that, if true, require reversal of his conviction. Because he has raised ‘colorable’ claims of ineffective assistance, Mr. Venegas is entitled to an evidentiary hearing.” AA 233.

Again, these are the only actual assertions in the reply.

The district court correctly found Appellant “raises bare assertions without specific factual support that would sustain a meritorious post-conviction claim.” AA 238.

Petitioner has 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. Petitioner also failed to allege what specific investigation should have been undertaken. Because there are no specific claims, there is no basis for this Court to hold an evidentiary hearing on this issue. These claims are denied.

AA 242.

On appeal, Appellant doubles down on his conclusory statements. “Appellant made specific factual allegations regarding witnesses in his Writ Petition that would entitle him to relief.” AOB at 12. He then quotes the above statements. He chides the district court for making credibility determinations without an evidentiary hearing. AOB at 13. “For purposes of this requirement, the district court must accept as true the factual allegations in the petition.” AOB at 14.

B. Specific Allegations

By contrast, the type of specific factual allegation that must be alleged to avoid summary dismissal pursuant to Hargrove would include actual details the district court could evaluate. If the allegation is that trial counsel failed to call “certain favorable witnesses,” AA 208, the allegation would need to actually name those favorable witnesses. Real names, first and last. There are almost eight billion people on the planet, so Appellant bears the burden of specifying which actual, specific humans should have been investigated.

Once the witnesses had been named, Appellant needed to assert he had brought the existence of these people to his attorney’s attention. A competent attorney is not expected to interview all humans to see if any have relevant information that might be favorable. Appellant would then need to show the witness could have been found and compelled to testify. A witness who would refuse to testify for fear of incriminating himself is unavailable.

Next, Appellant would need to explain why this named, specific witness is relevant to the matter at hand. Was he an eyewitness? An alibi witness? A character witness? What exactly is the named witness's relation to Appellant or the factual situation?

After this initial detailed showing had been made, Appellant then needed to specify what information this witness would have testified to. Did the specified eyewitness see a different version of events than the State's witnesses? Was the alibi witness able to show Appellant could not have been in the location where he was arrested at the time of his arrest? Would the character witness have given testimony of Appellant's favorable character that would outweigh evidence of his other violent crimes? An affidavit from the prospective witness would help Appellant meet his requirement to allege facts with specificity. Given the factual situation adduced at trial, Appellant must show what new information the specified witness could have added. Finally, Appellant must show that the addition of the witness's testimony would have had a reasonable possibility of changing the outcome.

Here, Appellant utterly failed to allege anything other than a bare assertion that one or two people among the billions on the planet might somehow have had something useful to say in court. This is far from a specific allegation meriting an evidentiary hearing. Appellant has not met his burden to allege specific facts. The district court did not err in dismissing this Petition without an evidentiary hearing.

CONCLUSION

Based on the foregoing, the State respectfully requests this Court AFFIRM the district court's denial of the Supplemental Petition for Writ of Habeas Corpus.

Dated this 31st day of May, 2022.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **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 Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page and type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, contains 1,813 words and does not exceed 30 pages.
3. **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 31st day of May, 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 May 31, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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