

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRIAN KERRY O'KEEFE,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Supreme Court Case No. 69036

E.S.D.C. Case No. C250630

Dept. XVII

FILED

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BY
DEPUTY CLERK

APPELLANT'S OPENING BRIEF
PROPER - PERSON

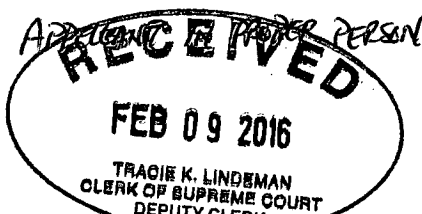
APPEAL FROM JUDGMENT DENYING WRIT OF HABEAS CORPUS AS TIME-BARRIED

APPELLANT'S OPENING BRIEF

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16-04286

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

BRIAN KERRY O'KEEFE,)

Case No. 69036

Petitioner - Appellant,)

-vs-

THE STATE OF NEVADA,)

Respondent - Appellee.)

APPELLANT'S OPENING BRIEF

Comes Now, Brian O'Keefe, appellant pro se, to file his Opening Brief pursuant the express orders of this Court, 1/13/16; 1/27/16. Orders specify appellant has until 2/12/16 to file and serve brief.

This action raises the sua sponte power to address claims of want of subject-matter jurisdiction and the courts obligation to consider issues that the parties have disclaimed or have not presented. Emphasis, subject-matter jurisdiction can be raised at anytime and can never be waived or forfeited. (Colwell v. Nevada, *infra*; U.S. v. Cotton, *infra*.)

Petitioner humbly requests the express dictates of Haines v. Kerner, 404 U.S. 519 (1972) to be afforded. This brief is submitted with all the following Points and Authorities, argument, along with all papers and pleadings on file and the power of the Nevada Constitution, the U.S. Constitution, 1st, 5th, 6th, 14th U.S. Amendments, Article 1 § 8.

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26

27

28

I. (ROUTING STATEMENT) JURISDICTION

Pursuant NRAP 17, this court retains Class "A" felony cases.

II. JURISDICTION TO HEAR

This Court acquires jurisdiction to hear pursuant the timely Amended Notice of Appeal, supplementing NR 34.575 with NRAP 4(b), on October 29, 2015.

Moreover, subject-matter jurisdiction may be raised at anytime, even on appeal. Appellant claims this judgment was obtained during colorable interlocutory appeal. Noting, this entire action relates back to pending appeal.

III. PREDOMINATE OVERVIEW OF CASE

Due diligence requires appellant to continue to pursue and challenge what he contends is the state's wrongful conduct in not only committing a double jeopardy violation, but then proceeded with a third trial during the pendency of a colorable interlocutory appeal despite being a procedural appeal holding a colorable constitutional claim found debatable by the Ninth Circuit Court.

Ultimately, because ~~they~~ state did proceed, now appellant must also pursue relief to the best of his ability. Noting subsequent the issue on appeal, valid questions of subject-matter jurisdiction concerning voidness.

IV.

PROCEDURAL HISTORY RELEVANT

Appellant was wrongfully charged by complaint with murder by the "battery act" described as stabbing.

see Proper Person Appellant's Appendix (hereinafter "PPAA") 1-2.

(FORMAL CRIMINAL COMPLAINT CASE 08F23348X FILED 11/7/2008.)

(FORMAL BATTERY/DOMESTIC VIOLENCE: ADMINISTRATION OF RIGHTS COMPLAINT 11/7/2008.)

"... At this time, I am charged with battery constituting domestic violence in having willfully and unlawfully committed an act of force or violence upon my spouse..." (i.e., "stabbing.")

State files INFORMATION supporting only manslaughter, 12/19/2008.

see PPAA 3-5. (INFORMATION lacking all malice elements.)

Appellant is brought in for entry of plea on January 20, 2009.

Pleading not guilty brought all elements into play. However, without any notice, state files Amended-Information in another courtroom not even hearing the trial. (Dept. V)

see PPAA 6-8 (AMENDED-INFORMATION, February 10, 2009) (Dept. V)

Defendant never noticed or repleaded to matter of substance.

This is naturally tantamount to the state's first major fundamental constitutional error based on prosecutorial misconduct, coupled with ineffective assistance of counsel.

Appellant's first trial proceeds, March 16-20, 2009 ending in jury verdict of guilty of second-degree murder W.D.W. on the state's general verdict form. On first appeal,

1 Supreme Court of Nevada (hereinafter "SCN") case no. 53859,
2 reverses and remands with judgment as follows:

3 CLERK'S CERTIFICATE,

4 JUDGMENT

5 The court being fully advised in the premises and the law,
6 it is now ordered, adjudged and decreed, as follows:

7
8 "ORDER the judgment of conviction REVERSED AND REMAND
9 this matter to the district court for proceedings consistent
10 with this order."

11 Judgment, as quoted above, entered this 7th day of April, 2010.

12 see PPAA 9 (Clerk's Certificate - JUDGMENT - FILED MAR 06, 2010)

13 see also PPAA 10-11 (ORDER OF REVERSAL AND REMAND APR 7 2010.)

14
15 State files Second-Amended INFORMATION charging again malice
16 murder, implied, utilizing abandoned and malignant heart. Again,
17 state never affords appellant opportunity to plead former
18 jeopardy. Moreover, state rebashes all evidence and again
19 presents battery domestic violence third misdemeanor conviction,
20 enhanced to felony only for punishment purposes, case C207835,
21 in its case-in-chief without alleging in charging document,
22 and against the law of the case. Becomes a variance.

23 Ultimately, second trial ends in a mistrial on September 2,
24 2010. Moreover, state fails to notice and charge felony act, new.

25 Due diligence at this point required appellant to
26 dismiss counsel, requesting Faretta hearing, being granted.
27 Appellant, pending third trial, filed for federal aid.

28

1 Regardless and despite any "exhaustion" debate, U.S. District
2 Court determined the Ground 2 collateral estoppel claim, concerning
3 the battery charged as unlawful act of stabbing, to be colorable.
4 see PPA 12-17 (Pretrial section "2241" ORDER; Jan. 6 2012.)

5
6 Once dismissed for lack of exhaustion, upon timely appeal,
7 the Certificate of Appealability Panel under Circuit Judges
8 PAEZ and CLIFTON concluded that a "COLORABLE" federal
9 constitutional double jeopardy violation, that defendant claimed,
10 manifested itself, and questioned the procedural dismissal.

11 see PPA 18-21 (9th Circuit ORDER granting "COA"; APR 13 2012.)

12 Noting with emphasis, the "COA" panel cited
13 Slack v. McDaniel, 529 U.S. 473 (Congress expressed no intention to
14 allow trial court procedural error to bar vindication of substantial
15 constitutional rights on appeal.)

16 Appellant admits, via himself
17 and federal public defender appointed, a motion to stay the
18 third trial was petitioned for utilizing 28 USC § 1651,
19 mandamus. However, as in Nevada, writs of mandamus
20 are barred when another remedy is available such as
21 the granted appeal under sections 1291, 1331, 2241 and 2253.

22 Basically, there was no need to request a stay.

23 The Ninth Circuit was manifesting, by the status quo
24 "ORDER," they had jurisdiction of all language in its
25 entirety within and encompassed within their issued order.

26 Moreover, summary denials hold absolute zero precedent
27 to which "Courts" are required to determine jurisdiction.

1 On March 16, 2012 appellant file his "Motion to DISMISS BASED
2 UPON VIOLATIONS OF THE FIFTH AMENDMENT COMPONENT OF THE DOUBLE JEOPARDY
3 CLAUSE, CONSTITUTIONAL COLLATERAL ESTOPPEL AND ALTERNATIVELY, CLAIMING
4 RES JUDICATA, ENFORCEABLE BY THE FOURTEENTH AMENDMENT UPON THE
5 STATE'S PRECLUDING STATE'S THEORY OF PROSECUTION BY UNLAWFUL
6 INTENTIONAL STABBING WITH KNIFE, THE ALLEGED BATTERY ACT
7 DESCRIBED IN THE AMENDED INFORMATION" (the "DISMISSAL MOTION").
8

9 Trial court denied motion 3/31/2012 with appellant renewing his
10 Dismissal Motion on the first day of third trial again denied.
11

12 Stand-by counsel filed Motion to Continue third trial on June -
13 1, 2012 being denied by the trial court at calendar call,
14 June 5, 2012. Stand-by counsel visits appellant at jail
15 on June 8, 2012 informing that the trial court announces
16 an unscheduled vacation, for the entire third trial. (?)

17 Judge Bonaventura, Sr. assigned to hear case.

18 Mr.
19 O'Keefe points out he had constructed a "Judicial Notice"
20 pursuant NRS 47.140, NRS 47.150(2) over the weekend to
21 aid the court. Judge Bonaventura had copied and
22 filed a copy in the courtroom for the record. This
23 included the ORDER granting the "CoA", case 12-15271.
24

25 To all objections placed by appellant, third trial commences
26 with Judge commenting "I always had the Ninth Circuit
27 appeal despite any disposition. Comments I was a gentleman."
28

1 Court appointed counsel files deficient Fast Track Statement on 11/01/12.
2 This Court ordered to correct with amended being filed November 2, 2012.

3 Affirmance of no. 61631 on April 10, 2013. Petition for Rehearing
4 filed April 26, 2013 with rehearing granted but denied June 13, 2013.

5 Appellant then informed, U.S. certiorari would not be entertained by
6 counsel. Appellant files motion for leave to appear and file motions
7 with En Banc on June 25, 2013 with this Court ordering clerk to
8 file ultimately denying on June 28, 2013. Among other motions,
9 appellant humbly requests by filing motion to "stay" mandate
10 pending certiorari to the U.S. Supreme Court on July 12, 2013.

11 This Court instructs clerk to unfile motion and return on
12 July 16, 2013.

13 Clerk instantly issues remittitur on July 23, 2013.

14 Court appointed counsel manifesting on record bars appellant from filing.

15 Finally, counsel files Motion to Withdraw, subsequent remittitur
16 having already been filed, on August 1, 2013. On August 5, 2013

17 this Court issues order, on docket no. 61631, stating no action
18 will be taken on Motion since counsel has satisfied obligations.

19 However, due diligence required appellant to utilize his right
20 to file for U.S. Certiorari review of SON no. 61631 on August 19, 2013.

21 Nevada Solicitor General files waiver of right of Respondent Nevada
22 to respond. U.S. Supreme Court clerk notifies Nevada Supreme clerk
23 that U.S. Certiorari had been filed on August 19, 2013.

24 see SCN no. 61631, docket entry no. 13-26049, filed September 4, 2013.

25 See PPA 22-23 (U.S. Supreme Ct. Docket no. 13-6031)

26

27 On December 6, 2013, Petition for Writ of Mandamus or,

28

1 in the Alternative, Writ of Coram Nobis being denied January 28, 2014.

2 On January 27, 2014, appellant filed Motion to Modify and/or
3 Correct Illegal Sentence pursuant NRS 176.555 raising solely the
4 substance of "want of jurisdiction" citing Almey v. U.S.,
5 431 U.S. 651 (1977), inter-alia. Trial court denied with appeal
6 made to this Court, no. 65217 docketed March 17, 2014. Denied
7 on July 23, 2014. Petition for Rehearing filed August 4, 2014.

8 This Court ordered clerk to file, September 26, 2014, however
9 denying on Post-Judgment Order. Appellant filed for stay of
10 remittitur on September 26, 2014, granted by this Court October 2, 2014.

11 U.S. Certiorari filed on October 15, 2014 being denied January 12, 2015.
12 January 21, 2015 notice received from U.S. remittitur issued on
13 02/19/2015. (U.S. Case no. 14-6834)

14 Appellant filed motion for
15 relief from judgment... NRCP (c)(6)(4) on July 23, 2014 being denied
16 August 14, 2014. Appeal made but dismissed as non-appealable.

17
18 Appellant files Petition for Writ of Habeas Corpus on September 15, 2014.

19 IAC claim raised for failure to raise trial court in want of jurisdiction.

20 Appellant amends petition October 3, 2014. (see XXV AA 4995-5007.)

21
22 State responds on October 27, 2014. Appellant files Supplemental Post-

23 Conviction Petition for Writ of Habeas Corpus on April 8, 2015.

24 (see XXVI AA 5094-5144).

25 State files response on June 2, 2015.

26 (see XXVI AA 5145-5146). Appellant motions June 8, 2015 to dismiss

27 counsel.

1 The state filed its opposition on June 25, 2015 with the court
2 denying on June 30, 2015. On June 15, 2015 using due diligence,
3 appellant filed pro se Supplemental Petition for Writ of Habeas
4 corpus with state responding on July 9, 2015. Appellant had
5 filed a Reply and on June 17, 2015 also filed a Judicial Notice.

6 Ultimately, O'Keefe's petition was denied on September 4, 2015.
7 Findings of Fact, Conclusions of Law and Order filed October 2, 2015.
8 (VOLUME II AA 327-328) Appellant filed his notice of appeal
9 on October 21, 2015 with AMENDED NOTICE OF APPEAL filed 10/29/2015.
10 Appellant filed motion to dismiss counsel and to take Judicial
11 Notice of U.S. Certiorari. On January 13, 2016 this court granted
12 motion to dismiss but denied motion to take judicial notice.
13 Order of this court to file opening brief by February 12, 2016.
14 Appellant filed Rehearing petition of denial of "Judicial Notice"
15 on January 27, 2016, pending. Pro Se Reply denied also 01/27/2016.

16
17 V. STATEMENT OF FACTS RELEVANT TO APPEAL.

18 (STATE ATTORNEYS APPOINTED.)

19 (a) On June 15, 2012, subsequent jury returning guilty
20 verdict in third trial on same offense, Judge Bonnaventure SR.
21 granted oral motion for expedited trial transcripts and stand-by
22 counsel was informed and acknowledged appeal would follow.

23
24 (b.) On November 6, 2014 the district court appointed counsel
25 Matthew Carling, who was just dismissed by this court on 1/13/16.
26 This attorney was appointed after the interest of justice
27 warranted such appointment for colorable claim of error raised.

(FEDERAL ATTORNEYS APPOINTED.)

(c.) Ninth Circuit issued a Certificate of Appealability, ("CoA") on a colorable double jeopardy violation and improper procedural ruling finding the interest of justice, Federal, warranted appointment of counsel on direct review, pretrial stage, on May 9, 2012. This Federal attorney submits "DECLARATION" admitting such: JAC; colorable double jeopardy claim; "2241" petition not meet; inter-alia. see PPAA 24-29 (REQUEST APPOINTMENT OF COUNSEL, DECLARATION.)

(d.) Ninth Circuit appoints Mark D. Eibert on July 9, 2015, case 15-15519, with Bob Wickard, filing notice of appearance for state of Nevada.

(e.) The United States Court of Appeals Ninth Circuit has explained the U.S. Supreme Court's holding of *Martinez v. Ryan*, 132 S.Ct. 1309 (2012) in its decision in *Hu Van Nguyen v. Curry*, 736 F.3d 1287 (2013).

An equitable rule exists to overcome any procedural defaults when "CAUSE" can be also a claim of appellate-counsel, on direct appeal, ineffectiveness with appellate-counsel failing to raise that themselves, when claims are meritable, along with counsel appointed on direct appeal acted as and gave complete ineffective assistance of counsel. Trial court's do not appoint counsel in post conviction proceedings unless interest of justice warrants. Then, attorneys are required to be effective when being paid tax dollars. Reminding all that appellant's claims relate back to the original petition the Ninth Circuit warranted.

VI.

ISSUE(S) ON APPEAL (TWO PARTS)

1

2

1.) Whether the district court improperly denied as time-barred?

3

2.) Whether a procedural bar existed to a "new claim"?

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5

LEGAL ARGUMENT / POINTS AND AUTHORITIES

6

7 Question 1. - Appellant requested leave of court to stay remittitur.

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Filed July 16, 2013. How ironic this court opines that they will protect one's right to appeal and to file notices of appeal in proper person. see CRAINES v. Eighth Judicial D.C.,

107 Nev. 554, 556-57 See Also NRAP 41(3)(A) (A party may

file a motion to stay the remittitur pending application to the Supreme Court of the United States for a writ of certiorari.)

Additionally, NRAP Rule 1(e)(8) reads: "Shall" is mandatory and "May" is permissive.

Moreover, with the colorable double jeopardy claim existing, petitioner had every right to have assistance in filing his certiorari from Supreme Court of Nevada no. 61631.

The Ninth Circuit stated the interest of justice warranted counsel. see Douglas v. California, 392 U.S. 353; see also

Roe v. Flores-Ortega, 528 U.S. 470 (2000)

Here, when appellant's direct appeal and petition for rehearing was commencing, appellant could not get attorney to file, comment or even explain my rights for U.S. Certiorari review. Counsel would not answer this court or my letters or calls to stay remittitur.

1 Clear and undisputed interference by court appointed counsel on
2 direct appeal existed coupled with failure to communicate by phone.

3 see Murray v. Carrier, 477 U.S. 478, 488; State v. Huebner, 120 Nev. Adv. Op. 19

4 This Court fails to be advised, until now, that the clerk
5 had already issued the remittitur on July 23, 2013. Court appointed
6 counsel ignored all parties and waited until remittitur issued
7 and only then, to fire the hands of the defendant, filed
8 a Motion to withdraw on August 1, 2013. This Court then
9 issued a "Statement" only on August 5, 2013 stating;

10 ● "Filed order. On August 1, 2013, appellant's counsel filed a motion
11 to withdraw as counsel in this appeal. Because appellant's counsel
12 has fulfilled his obligation in this appeal and nothing remains
13 pending in this court, no action will be taken on the motion."

14 Petitioner was prevented to file stay of remittitur. Had issued
15 This Court has the inherent power to file order nunc-pro-tunc
16 to change the wrongfully issued remittitur issued July 23, 2013
17 to the date that the pro se U.S. Certiorari was denied, being
18 October 15, 2013.

19 Moreover, legally, with the Nevada Solicitor
20 General, C. Wayne Howke, participating and filing the required
21 responses pursuant United States Supreme Court Rules 9 and 15,
22 warrants the above nunc-pro-tunc ORDER to manifest the
23 denial of U.S. Certiorari on October 15, 2013 as the earliest
24 possible new remittitur date.

25
26 Mr. C. Wayne Howke filed
27 his Notice of Appearance, not by mere choice also.

1 IN FACT, the action of the Solicitor General comply with the lecture
2 given in Gonzalez v. Thaler, 132 S.Ct 641, 659; 28 USC § 518 (2).

3 When the U.S. is interested in any appeal or suit pending
4 in the U.S. Supreme Court, such as the Ninth Circuit's
5 interest, via the "ORDER" granting the "COA" on a
6 federal question of law, namely, a double jeopardy violation; and
7 on an improper question concerning the U.S. district court's
8 procedural ruling.

9 Noting also the "COA"'s both cite
10 Stacy v. McDaniel, 529 U.S. 473. (Congress expressed no intention
11 to allow trial court procedural error to bar vindication of substantial
12 constitutional rights on appeal.)

13 Here, the Solicitor General
14 clearly acted for and on behalf of the State of Nevada.

15 Therefore, as this court stated in Nikz v. Nevada,
16 124 Nev 1272, an appeal cannot be final until the certiorari
17 filed is or was denied. Appellants, in the instant case,
18 was denied on October 15, 2013. Mr. O'Keefe had filed his
19 petition well within the one Year timeline of NRS 34-226(1).

20 Noting Cowell v. Nevada, 118 Nev 807 (2002) states facts
21 relevant to this entire appeal. Besides subject-matter jurisdiction
22 not being waivable and can be raised for the first time, even
23 on appeal, it quotes, all I.A.C. claims should be raised in
24 your first petition, the law-of-the-first-appeal is the law
25 of the case in all later appeals and a case only becomes
26 final after judgment entered, the availability of appeal is exhausted,
27 and a petition for Certiorari, if filed, is denied, here 10/15/2013.

The mere fact that appellant has filed several post actions in which the clock clearly tolled. The state omits this factor not considering. Specifically, the two actions filed post would add (8) months credit tolling the one year timeline making the petition filed September 15, 2014 more than timely in the alternative. Accord *Wall v. Kholi*, 131 S.Ct 1278 (2011).

Appellant humbly points out that the state attempts to allege appellant fails to manufacture good cause being absurd. The law is clear. I filed not only the post-motions but successfully docketed a petition for certiorari review of the third trial direct appeal, SCN No. 61631, ultimately denied 10/15/2013. Emphasis again in that the Solicitor General of Nevada acted on behalf of the state by express filings. If the denial of U.S. certiorari was entered on 10/15/2013 then one year would constitute being timely if filed before 10/15/2014.

Without tolling, my petition was filed on September 2013, making it at eleven months.

Equitable tolling should be also considered by the fact that appellant had attorneys appointed by the court who failed to file claims in the third trial direct appeal, 61631; should have filed the claim raised pro se in the Habeas petition filed 9/15/2014, plus the claims in the supplemental petition. Additionally, post conviction counsel, just dismissed, failed to raise any claims but the claim concerning failure to provide jury instructions when he had the perfect opportunity to support the claim appellant raised, not only any concern of IAC which resulted from federal counsel.

1 Appellant's filings demonstrate he has attempted due diligence
2 and believes his actions filed to be timely. Pointing out the
3 pretrial habeas matter filed timely itself relates back actually
4 to this entire action. The federal court has converted the
5 case to the new case no. 15-15519 without the loss of
6 claims to be raised, and properly litigated and asserted.

7 Here, IAC claims under *Nguyen v. Curry*, *supra* were
8 explained to apply also to appellate-counsel IAC.

9 My attorneys failed me at trial, on direct appeal
10 and now post trial on claims found with merit. The order
11 from the Ninth Circuit speaks for itself. Here, all parties
12 were properly informed of the issuance of status quo order.

13 One would have to ask, "Why did the trial court go
14 on unscheduled vacation the weekend before the start
15 of the third trial?"

16 "Why did the Attorney General's
17 office not comment or act on the "CoA" issued to them?"

18 There was a host of attorney's and judges with hundreds
19 of years of combined legal experience and nobody condoned
20 themselves accordingly. A colorable interlocutory appeal was
21 pending on a Fifth Amendment claim already, No. 12-15271.

22 What petitioner believed is irrelevant. The court should
23 have at least acted in *SUA SPONTE* when it concerns a
24 colorable claim and a question of subject-matter jurisdiction.

25 A vacation was not the answer. Admonition of the U.S. is,
26 "state courts, equally with the courts of the union, rests the
27 obligation to guard, enforce, and protect every right granted or
28

1 secured by the Constitution of the United States ...".

2 see Cook v. Hart, 146 U.S. 183; Robb v. Connolly, 111 U.S. 624, 637

3

4 Question 2.) Whether a procedural bar exists IAC claims?

5

6 Incorrectly, the trial court overlooks the true claim asserted.

7 The initial and amended petition submitted raise IAC, in

8 which the claim was a SIXTH AMENDMENT for failing to

9 raise that the trial court committed fundamental constitutional

10 error by not staying the trial, sua sponte even, instead of

11 going on a surprise vacation. The court even scolded

12 petitioner specifically stating you better be ready to go

13 asking his clerk what time the trial started Monday.

14 He additionally stated on record that the signature

15 page of the "COA" was missing when there is none and he

16 had all four pages, as did the A.G.'s office, electronically

17 even. The state asserted he didn't believe the order

18 pertained to this case and later asserted it was considered

19 a collateral attack when appellant was pretrial, under no

20 judgment. see Harrison v. E.J.D.C., 2008 WL 2570925 (D.Nev. 2008)

21 see also Harrison v. BILLESPIE, 640 F.3d 888 (9th Cir. 2011)

22 (section "2241" supplied jurisdiction over petitioner's double jeopardy challenge.)

23

24 Noting, any wrongful denial of stay is not lost by change of

25 circumstances depriving plaintiff of his right to injunction.

26 see U.S. v. Bates Valve Bag Corp., 39 F.2d 162 (1930 D.C. Del.)

27 Subsequent events cannot moot an appeal. see Bode v. Clark Equip., 807 F.2d 879

28

1 When something more than a naked allegation has been asserted,
2 it is error to resolve the apparent factual dispute without granting
3 the accused an evidentiary hearing. see Mann v. State, 118 Nev 351, 354

4
5 Not only did the court deny the timely petition, the judge
6 failed to remember that he had already granted the petition.
7 (By the Writ; by the Order issued on October 15, 2014.)

8 see PPAA 30 (ORDER FOR PETITION FOR WRIT OF HABEAS CORPUS, 10/15/2014)

9 However, this order was mailed to a different inmate and
10 turned over to appellant the following year, February 2015.

11
12 Appellant has clearly demonstrated that actions that effect
13 the appellant were by external forces justifying "good cause."

14 see State v. Hubler, *supra*; see also Murphy v. Carrier, *supra*.

15 VII. FATAL VARIANCE (SUBJECT-MATTER JURISDICTION)

16
17 see Colwell v. Nevada 118 Nev 807; see also United States v. Cotton, 535 U.S. 625, 630

18 ● A fatal variance exists in two ways. First, proof was
19 entered, not alleged in the charging document, in the state's
20 case-in-chief. Additionally, this evidence was barred.

21 Besides the third misdemeanor battery domestic violence being a
22 true misdemeanor, only enhanced for punishment purposes, the
23 law-of-the-case had been established in that appellant
24 committed no unlawful battery act. Here, the state repeated
25 the same variance from the first direct appeal, no. 53859.

26 see PPAA 31-33 (SECOND-AMENDED INFORMATION FILED 8/19/2010)

27 Moreover, the state notices no new unlawful felony act to

1 support their charge of second-degree implied malice murder.

2 The state makes as a matter of the court record, they are
3 proceeding again on implied malice failing to allege new act.

4 see PPAA 34-39 (STATEMENT OF FACTS - Attorney's Supplement.)

5 (Third trial day (1) June 11, 2012 Statement of Facts pages 9-13.)

6 ● Citing to the statement of facts, these issues preserved.

7 a.) Appellant filed Judicial Notice open court. (see PPAA 35)

8 b.) Cites U.S. v. Green; claims res judicata; same evidence
9 is barred by same standard of proof; law of the case;

10 Citing Byford v. Nevada, 994 P2d 700 headnote 25 stating

11 trial court decisions do not constitute the law of the case

12 and only the Supreme Court of Nevada could and did. (PPAA 36)

13 a.) Appellant moved to dismiss arguing state had no new evidence

14 and the theory of intentional stabbing was gone; 2241 petition

15 filed with Ninth Circuit issuing Double Jeopardy Violation;

16 state admits charged with open murder first trial. (PPAA 37)

17 d.) State admits nothing more than implied malice murder and

18 that first was express and second-degree was implied.

19 STATE CONCEDES FIRST FAST TRACK RESPONSE Jury Instruction

20 18 was nothing but implied malice. (PPAA 38)

21 e.) Court noted Judge Villani allowed again 3rd misdemeanor

22 battery d.v. conviction (PPAA 39)

23 f.) State concedes this Court reversed noting the Nevada

24 Supreme Court well knows "when" an INVOLUNTARY MANSLAUGHTER

25 becomes a second-degree murder and there was and still is

26 no evidence to support. This Court said it in their

27 opinion reversing the case. (PPAA 42)

1 see PPAA 40-44 (SECOND TRIAL TRANSCRIPT DAY(7) 8/31/2010.)

2 (settling the jury instructions which trial ended in mistrial.)

3 ● Facts preserved in the record by attorneys.

4 g.) No new notice of any unlawful act been filed. (PPAA 43)

5 There's evidence that she was coming at him with a knife

6 and that appellant was extremely intoxicated. (PPAA 43)

7 h.) State is not entitled to instructions based on theories

8 not related to the facts of the case and we haven't

9 had any notice for unlawful act unintentional (PPAA 44)

10
11 These facts are a complete continuance of wrongful conduct by the
12 same prosecutor from the second trial to the third, Mr. Calli.

13 With great emphasis, the state admits the *actus reus*, unlawful
14 act, was already determined by this Court as not proven.

15 Whether felony murder, battery, or malice murder implied, the
16 physical component is the same or ultimate element of the
17 greater charge murder. Only the *mens rea* varies for
18 whatever degree determined in the original "OPEN" malice
19 murder charged. The state's theory cannot change, yet
20 after acquittal of any unlawful battery act, the state proceeds
21 again noticing no new unlawful act required for implied.

22 The state clearly fails to "give" any notice of any
23 unlawful act. Accord *Benton v. Maryland*, 395 U.S. 784, 787

24 The state charges battery with a deadly weapon but fails
25 to notice charge subsequent the new second-Amended information.

26 Appellant was acquitted of the felony battery act yet is
27 sentenced to 8-20 years for the same acquitted act.

1 Additionally, in the record relating back, appellant points to
2 the Motion For COA. See PPAA 45-47 (3 pages filed 3/12/02)

3 Here, appellant clearly pointed out that the "Battery"
4 charged pursuant NRS 33.018 was defined in Nevada under
5 NRS 200.481. The lesser included offense of the "OPEN"
6 murder charge was charged by disjunctive theories in J.E.
7 no. (18) tantamount to the single crime of second-degree
8 murder. On page six of the Motion for "COA" as PPAA 47,
9 appellant pointed out the authorities of SCHAD v. ARIZONA,
10 pointing out that the "SULLIVAN RULE" applied and is
11 adopted in Nevada. For double jeopardy purposes, federal,
12 second-degree murder is still one offense even though there
13 may be alternative theories by which criminal culpability or
14 liability may be charged and prosecuted in the state.

15 Accord SCHAD v. ARIZONA, 501 U.S. 624, 641, citing People v. Sullivan, 173 N.Y. 122

16 In Morrison v. Estelle, 981 F.2d 425 explains when noticed.

17 Focus must be on the fact and binding effect of what
18 Clark County District Attorney's Office charged appellant with.
19 We must not concern ourselves with what the state did
20 not allege in the charging document for the battery complaint
21 was charged by a separate source document. For the record,
22 it is not a valid objection that the government has not
23 disclosed its theory of proof in the indictment. (Fed. R. Cr. 7(c)(1))

24 See U.S. v. Markee, 425 F.2d 1043, 1047-48 (9th Cir.)

25 Moreover, "short form" murder practice is acceptable.

26 Felony charge may be given, noticing by separate source document.

27 see Morrison v. Estelle, 508 U.S. 920 (cert denied) citing Sheppard v. Rees, 909 F.2d 1234

VIII. ACTUAL INNOCENCE

Undisputed is the state charged a single crime by "open" malice murder by all the various means or mens rea. Also undisputed is the fact that the state conducted all three trials on rehearsed evidence with most being barred.

The entire key and critical issue concerning this issue which will effect the disposition was due process and the permissible limits in defining criminal conduct as was conceded to in the Fast Track Response, no. 53859, issue 2.

Here the state concedes that Jury Instruction 18 was nothing more than defining implied malice in provision (2). The state has adopted the holdings of SCHAD, and recognize that an information need not allege the overt act for alternatives. Duplicitly would exist by such. The fundamental proposition is embodied in Federal Rule of Criminal Procedure 7(c)(1), which provides that,

"[I]t may be alleged in a single count that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specific means."

This applies to general verdicts and alternatives of theories constituting still only a single offense. Plainly, there is no general requirement that the jury reach an agreement on the preliminary factual issues which underlie a verdict.

see McGoy v. North Carolina, 494 U.S. 433, 449

1 SCHAD, the rule is also applied to cases that best describe
2 alternative theories of alternative states of mens rea which
3 satisfy the required mental element of second-degree implied malice
4 murder. This issue concerns the law-of-the-first-trial or
5 law-of-the-case which permits citation of unpublished cases
6 pursuant Supreme Court Rule 123 and Ninth Circuit Rule 36-3.

7 The Ninth Circuit holds that the "Sullivan" rule applies
8 to alternative theories of second-degree implied malice murder.
9 see MARQUEZ v. GUNN and A.G. of Cal., 1994 U.S. App. LEXIS 16085
10 citing State of Utah v. Russell, 733 P.2d 162, 167-68 (Utah 1987)

11
12 Pointing out also now that this Court cited Crawford v. State,
13 121 Nev 744 (2005) which comments on SCHAD, and also the case
14 of Jennings v. State, 116 Nev 488 (2000) in the first appeal (53859)
15 reversal order.

16 (2013 U.S. App. LEXIS 4658) (Jennings was just upheld in the 9th Cir., 3/7/2013.)

17 The relevancy here is that they upheld and divulge that
18 states may properly designate multiple theories as "alternative"
19 theories to satisfy the mental element for a single offense.

20
21 The state has already conceded in the record, F.T.R. - 53859,
22 that J.E. 18 was a correct statement of the law which
23 utilized common-law antecedents in discussion of issues
24 two and six. J.E. 18 was nothing more than defining
25 implied malice murder using the abandoned and malignant heart
26 mens rea pursuant NRS 200.020(2). see Rose v. State, 255 P.3d 291, 294;
27 State v. Hall, 54 Nev 213; Barton v. State, 117 Nev 686; Labastida v. State, 112 Nev 1502.

1 see also GRAHAM v. State, 116 Nev 23.

2 Noting that no statute
3 spells out the exact language of the abandoned and malignant heart
4 tantamount to conscious-disregard-for-life-malice also known as
5 depraved heart murder in other states. You define by specific
6 instructions and utilize the cumulative effect of all instructions.

7 SCHAD, again explains the permissible limits in defining single crimes
8 by equal alternative means utilizing the mens rea requirement.

9 J.E. 18, utilized disjunctively, provisions (1) or provision (2)
10 still equal the single crime of second-degree murder. However,
11 provision (2) actually defined implied malice whereas provision (1)
12 was the common-law definition. Theory (2) or provision (2)
13 was the factors indicating NRS 200.020(2), fin.

14 It also
15 became harmonious with the elements of the battery charge.
16 Utilizing the elements of unlawful, willfully, and act.

17 see also Labastida, 112 Nev 1502 Regardless of any argument,
18 theory or provision (1) and (2) hold equal culpability, blameworthiness.

19 If it doesn't support one it cannot support the other.

20 Moreover, provision one remained unchallenged and underwent
21 jeopardy already. Stated best in USA v. UCO Oil Co.,
22 546 F.2d 833, 838 (9th Cir. 1976),

23 "Once it is determined that
24 the statute defines but a single offense, it becomes proper
25 to charge the different means, denounced disjunctively..."

26 Proof of any one of the allegations will sustain a conviction.

27 see Todorow v. U.S., 173 F.2d 439 (9th Cir.)

1 Also emphasis in that, "but a judgment of guilty will bar
2 any further prosecution with respect to any of the prohibited means
3 embraced within the count." see Tut Center Inc. v. U.S., -
4 325 F.2d 793, 796 (9th Cir. 1963); Fed. Rule Crim. Pro. Rule 7(c)(1)

5 Also note, it is not a valid objection that the
6 government has not disclosed its theory of proof in the indictment.
7 see U.S. v. Mar Lee, 425 F.2d 1043, 1047-48 (9th Cir.)

8
9 Here, the Nevada Supreme Court stated in its affirmance (61631)
10 that the state was not precluded from proceeding on an
11 alternative theory of second-degree murder which was
12 presented and alleged in the charging document. This
13 clearly is double jeopardy when jeopardy terminated on the
14 states theory of concealed implied malice by the language
15 in the reversal order stating that, "the evidence presented at
16 trial did not support this theory of second-degree murder."
17 see Burks v. U.S., 437 U.S. 1, 16-17

18 This ruling was not appealed
19 and holds. see U.S. v. Scott, 437 U.S. 82.

20 Even if a ruling is
21 given in error. see U.S. v. Martin Linen Supply, 430 U.S. 564

22
23 The law-of-the-first-trial is the law-of-the-case in all subsequent
24 trials where the facts remain substantially the same.

25 All (3) trials were conducted on the same evidence only
26 rehearsed. As Judge, Circuit, S. Reinhardt opines, the
27 government doesn't get a mulligan. Here, the state had two!

1 Finally and most importantly to this issue, is the fact that Nevada
2 recognizes any true self defense negates malice. The defense tried
3 to raise substantial evidence, preserved in issue one of the first
4 appeal, 53859, pertaining to the alleged victims suicides, attempts,
5 and acts of cutting with knives, scissors, anger management
6 therapy and a host of mental illness adding overdose levels
7 of medication and alcohol level of .24 at the time of autopsy.

8 The state countered with the argument, supported by
9 the only authority tantamount to insufficient evidence being
10 Jackson v. Virginia, 443 U.S. 309, 319 (1979). Appellant was
11 convicted on second-degree murder without. This clearly is
12 what the state felt they proved beyond a reasonable doubt.

13 This court ruled malice was not proven. There was
14 no battery or act of stabbing committed by appellant. The
15 state court truly lacked subject-matter jurisdiction when no
16 battery or assault act was noticed, again for implied malice.

17 Actual innocence applies under Mitchell v. State, 122 Nev. 269,
18 1274, and under SOLUP v. Delo, 513 U.S. 298.

19 Again, Appellant's
20 true substantive and procedural due process has been violated with
21 a charging document based on a fatal variance and not
22 supported by another source document charging a felony act,
23 unlawful, for implied malice second-degree murder.

24 See Benton v. Maryland, supra and U.S. 14th Amendment

25
26 The law of the trial were lost and filed under felonious number.
27 There is no theory charged to the jury in the instructions.
28

1 This Court allegedly has not even viewed the law of the trial.
2 For all practical purposes the instructions could be incorrect in
3 all law and manifest a host of errors such as incorrect case
4 number and no theory for second-degree implied malice.

5 Also, was not the law of the case a standard record item
6 mandated to be sent up? A lot of questions arise on an
7 appellate court affirmance without the instructions. Could
8 easily be asserted that double jeopardy plays a role!

9
10 Lastly, this Court recognizes petitioner is entitled to a post-
11 conviction hearing if claims are supported and not belied by
12 the record. see Toston v. State, 127 Nev. Adv. Op. 87 (2011)

13
14 Federal Courts alike recognize that an appeal is warranted when
15 "jurists of reason could disagree with the district court's resolution
16 of his constitutional claims or that jurists could conclude the
17 issues presented are adequate to deserve encouragement to proceed
18 further." see Miller-El, 537 U.S. at 327; Slack v. McDaniel,
19 529 U.S. 473, 484 (2000).

20 "Where something more than a naked
21 allegation has been asserted, it is error to resolve the apparent factual
22 dispute without granting the accused an evidentiary hearing."
23 see Mann v. State, 118 Nev. 351, 354 (2002).

24 The district court erred
25 in denying the second petition without an evidentiary hearing and
26 reaching the merits of the action. Therefore, humbly, this
27 court should, at a minimum, reverse the denial as not timebarred.

IX. Preservation of Issues

The state has conceded the issues were preserved in their own Fast Track Response filed.

Also, with the mistrial claims from Day (7) of the second trial, August 31, 2010, is supported with the Proper Person Appellant Appendix attached as pages "PPAA" 40 - 44 in the appendix attached.

Claims supported also by statement of the facts, attorney's supplement as "PPAA" 34 - 39 in the appendix attached.

The Motion for COA is attached as "PPAA" 45 - 47.

Further documents are also attached supported by argument.

X. CONCLUSION

Wherefore, appellant prays this court will identify the voidness of the judgment existing and construe this brief appropriately as needed in search of relief.

In the alternative, petitioner humbly requests, at a minimum, that this Court remand, subsequent a determination that the petition is not time barred, with a clear mandate, holding an evidentiary hearing on all claims. Respectfully Submitted,
Dated this 3rd day of February 2016. Dan L. O'Kup (guard)

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(2)(4), the typeface requirements of NRAP 32(2)(5) and the type style requirements of NRAP 32(2)(6) because this opening brief has been prepared in a proportionally spaced typeface by handwritten text based upon NRAP 32(2)(5)(c) "Unrepresented litigants may use elite type, 12 characters per inch, if they lack access to a typewriter with larger characters."

2. I further certify that this brief complies with the page or type volume limitations of NRAP 32(2)(7) because, it does not exceed 30 pages pursuant NRAP 32(2)(7)(i).

3. Finally, I hereby certify that I have read this opening 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 NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by reference to the page and volume, being, only one volume here, of the Proper Person Appellant's Appendix ("PPAA") where the matter relied on is to be found.

Dated this 3rd day of February 2016.

Pursuant NRS 208.165; 28 U.S.C. § 1746

Respectfully,
By: Brian K. O'Keefe
Brian K. O'Keefe
Pro-Se (#90244)

CERTIFICATE OF SERVICE

I do certify that I mailed a true and correct copy of the foregoing
(check appropriate box)

☒ Opening Brief

☐ Reply Brief

☐ Motion: _____

☐ Petition: _____

☒ (AND Other: PROPER PERSON (APPELLANT APPENDIX ("PPAA") ONLY VOLUME 1: 1-47)

to the below address(es) on this 5th day of February, 2016, by
placing same in the hands of prison staff for posting in the U.S. Mail, per
Nev.R.App.P. 25: • BRASS SLIP NO. (1997333)

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Original to Supreme Court of Nevada.

Pursuant NRS 208.165 and
28 U.S.C. § 1746.

Dated February 5, 2016.

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