

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRIAN KERRY O'KEEFE,)

Case No. 69036

Appellant,)

-vs-

E.J.D.C. Case No. 0250630

Dept. No. XVII

THE STATE OF NEVADA,)

Judge M. Villani **FILED**

JUL 01 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT

BY DEPUTY CLERK

PETITION FOR REHEARING

PURSUANT NRAP 40(C)(2)(A)-40(C)(2)(B)

OF ORDER OF AFFIRMANCE, JUN 22 2016

COMES NOW, Appellate Brian O'Keefe, pro se, who was expressly permitted to file an Opening Brief, humbly petitions this Court for this Rehearing thereby vacating its Order of Affirmance filed June 22, 2016.

This petition is based upon N.R.A.P. 40(C)(2)(A) and (B).

Moreover, pursuant N.R.A.P. 40(a)(2), petitioner will manifest multiple instances of Abuse of Discretion in which the Court has overlooked material facts, rules and controlling authorities pointing out the location in Appellant's Appendix and the page the issue can be found in Appellant's Opening Brief both filed on February 9, 2016.

BY: Respectfully Submitted,

ACCORD Haines v. Kerner, 404 U.S. 519, 520 (1972)
Dated June 25, 2016 pursuant NRS 208-165.

Brian L. O'Keefe
Brian L. O'Keefe - #90244

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16-20637

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I. JURISDICTION FOR THIS PETITION

Jurisdiction obtained by timely petition pursuant NRAP 40(c)(2)(A) and 40(c)(2)(B) from Affirmance Order, June 22, 2016.

II. COURT'S ABUSE OF DISCRETION/SILENCE AS CONFESSION (NRAP 40(c)(2)(A), 40(c)(2)(B) / NRAP 31(d))

This Court has overlooked the following material facts, rules and controlling authorities, coupled with silence by all courts failing to address the original still pending ground of error in the original petition filed September 15, 2014. Noting the trial court granted the P.P.O.W., filed October 15, 2014, finding "good cause" to the only ground under Habeas Corpus pursuant N.R.S. 34.360 invoking NRS 34.500.

This ground raised the loss of liberty interest, due process, procedural and substantive, based on the trial court proceeding with the trial in want of jurisdiction. This Court and the trial court, the state and the attorney appointed, all failed to raise and debate this single ground, thereby remaining silent. This clearly is a confession as NRAP 31(d) dictates, pursuant this Court's decision in *Polk v. State*, 126 Nev. 19, 233 P.3d 357, 361 (2010). Pursuant NRAP 40(2)(2), see Proper Person Appellant's Appendix ("PPAA") 0030. (ORDER PPOW, Filed Oct. 15, 2014.) see also Proper Person Opening Brief, page 8, lines 18-20

The following facts overlooked manifest direct review concluded on October 15, 2013 with the Nevada Solicitor General, C. Wayne Howle filing a waiver on Sept. 13 2013;

• NRAP 40(2)(2) "PPAA" 22-23 / Opening Brief pages 11-13.

- 1 Second, note Appellant Filed Motion to stay remittitur on 7/12/2013
2 only to have this Court instruct to unfile on 7/16/2013;
3 • NRAP 40(2)(2) "PPAA" see Opening Brief pages 11-13 (DOCKET 61631)
4 Impediment and obstruction of justice caused by attorney not
5 withdrawing or filing stay of remittitur before this Court issued
6 remittitur denying review of this Court's Affirmance no. 61631;
7 • NRAP 40(2)(2) see Nevada Docket no. 61631 / Opening Brief, 11-13.
8 THIRD, Subject-matter jurisdiction can be raised anytime, even on
9 appeal for first time and cannot be procedurally defaulted, barred.
10 • NRAP 40(2)(2) "PPAA" 18-19 see Opening Brief pg. 8, lines 18-20, pg. 13.

11 12 III. POINTS AND AUTHORITIES

- 13 This Court committed several Flagrant Abuses of Discretion
14 in the Order of Affirmance filed June 22, 2016, no. 69036.
15 Amazingly, the Court fails to ORDER the state to
16 answer the single jurisdictional ground alive under Habeas
17 Corpus NRS 34.360 nor does this Court even ESCAPE
18 properly raise it. Again, with emphasis, this ground
19 was granted a "PPAW" ("PPAA" 0030) and NOBODY
20 will answer. Shame, Shame, Shame. see NRS 34.430
21 Respondents' silence indicates acquiescence that Petitioner
22 is right and they're wrong. see Foster v. EJC, 96 Nev. 4,
23 604 P.2d 359 (1980).
24 • Next, the ORDER failed to "consider
25 an essential factor", Robyns v. Reliance Standard of Life Ins. Co.,
26 130 F.3d 1231, 1236 (7th Cir. 1997), i.e., "the writ of Certiorari,
27 no. B-6031," denied on October 15, 2013, thereby the earliest
28 possible remittitur date possible for Nevada direct appeal 61631.

1 Clearly this would make appellant's petition timely having filed
2 within one year of direct review concluding by U.S. Supreme Court.

3 A stay of remittitur "may" be filed which is permissive.
4 see S.C.N., scf, R 2(9), NEAP, R. 1(e)(8). Appellant did this!

5 Noting, with emphasis, an appeal is not final until the
6 latter is filed. see Nika v. State, 124 Nev. 1272 (2008); 28 USC § 2244 -
7 (d)(1)(A); S.C.N., scf, R 13(1); Bower v. Roe, 188 F.3d 1157 (9th Cir. 1999).

8 As this Court noted in Cranes v. E.J.D.C., 107 Nev. 554,
9 556-57, 816 P.2d 451 (1991), prisoners must be allowed to file appeals.
10 see also Lippie v. Peter 112 Nev. 1008, 921 P.2d 1248, 1249-50 (1996).

11 Indeed, once a statute establishes an appellate process, such
12 avenues "must be kept free of unreasoned distinctions that can only
13 impede open and equal access to the courts". Rinaldi v. Yeager,
14 384 U.S. 305, 310 (1966); see also Lindsey v. Norment, 405 U.S. 56, 77 (1972).

15 If E.J.C.R., Rule 3.70 does not bar "notices of appeal
16 or other documents associated with an appeal that are submitted
17 for filing by persons acting in proper person," Cranes, 107 Nev. at 557,
18 then the same logic applies to appeals to S.C.O.T.U.S. (• see
19 O'Keefe's Motion to Stay Remittitur Filed 07/12/2013, #61631.)

20 Just recently, this Court recognized that "extraordinary circumstances
21 may exist in a particular case so that refusal to docket a pro se
22 motion could deprive a defendant of an opportunity to present
23 an issue to the Court." Tarter v. Hurx, 646 F.2d 1014 (5th Cir. 1981),
24 cited in Randolph v. State 2015 Nev. Unpub. LEXIS 126, NO. 60993, at
25 ¶ 1-2 (Nev. 1/30/15). This Case presents those exact circumstances.

26 Here, counsel was the external force causing the impediment
27 amounting to an abuse of discretion by waiting for the remittitur
28 to be issued, only then withdrawing. Counsel is not the alter ego

1 but is a trained advocate charged with representing an
2 accused within the parameters of the Code of Professional
3 Responsibility and according to counsel's obligation and duties
4 as an officer of the court. Recktenwald v. State, No. 32103
5 (Nev. 7/13/99) (citing People v. Schultheis, 638 P.2d 8 (Colo. 1981)).

6
7 The Appellant is the master of his own defense.
8 U.S. v. Teague, 953 F.2d 1525 (11th Cir. 1992); Criminal
9 Defense Ethics Law and Liability Standard 4-5.2 (Control
10 and Discretion of the Case); see Mulligan v. Kemp, 771 F.2d 1525
11 (11th Cir. 1985); R.P.C. 1.2. As William Ernest Henley
12 says in "Invictus", "I am the master of my fate."

13
14 Thus, the Ineffectiveness of Counsel satisfies Cause & Prejudice.
15 Edwards v. Carpenter, 529 U.S. 446, 451 (2000); see
16 King v. Lemarque, 455 F.3d 1040, 1045 (9th Cir. 2006), op.
17 withdrawn, sub. op.; cf. Brimage v. Warden, 94 Nev. 520 (1978).

18 The very
19 same C. Wayne Howle of Brimage, supra, took cognizance
20 of appellant's Certiorari by filing expressly a
21 Notice of Appearance as the Solicitor General of Nevada,
22 thereby validating the legality of the right to appeal
23 mandating that no remittitur could issue based on
24 61631 being affirmed by the Supreme Court of Nevada
25 which was the decision up for review. The
26 state cannot ignore this. see also 28 U.S.C. § 518(2);
27 see Gonzalez v. Thaler, 132 S.Ct. 641, 659 (2012). The
28 Solicitor General actions invokes judicial estoppel.

1 Once ineffective Counsel abdicates his role as advocate
2 for the defense by failing to file a simple, "fill in the
3 blank" stay of the remittitur motion, literally taking
4 two minutes, inter alia, (sending in jury instructions),
5 and acts as an amicus curiae, Jones v. Barnes,
6 463 U.S. 745, 758 (1983); Anders v. Cal., 386 U.S. 734, 738
7 (1967), Ellis v. U.S., 356 U.S. 674, 675 (1958), appointment
8 under N.R.S. 34.750 is terminated and ergo, becomes
9 an impediment external to Mr. O'Keefe's defense.

10
11 The second Abuse of Discretion is because the
12 Court's decision is based upon an erroneous legal standard.
13 • Jackson v. State, 117 Nev 116, 17 P.3d 998, 1000 (2001).

14 The
15 full standard for Good Cause is enunciated in State v. -
16 Huebner, 128 Nev. Adv. Op. 9, 275 P.3d 91, 94-95 (2012).

17 While Hathaway is the first level of review, there
18 are two more that follow.

19 If appellant cannot show
20 "good cause" to overcome the bars to an untimely petition,
21 habeas relief may still be granted if the petitioner
22 can demonstrate that a constitutional violation has
23 probably resulted in the conviction of one who is
24 actually innocent. Mitchell v. State, 122 Nev. 1269, 1274,
25 149 P.3d 33, 36 (2006), overruled by Nika in part, *ibid*...

26 As evinced by the prior reversal order, 53859,
27 there was/is no evidence to support second degree
28 murder with a deadly weapon. Without evidence of

1 malice, appellant's current and same second degree murder
2 conviction cannot stand. Same offense. Same standard/
3 of proof, with same evidence "rehashed" wrongly.
4 As well, appellant was acquitted of the
5 deadly weapon which he was subsequently reconvicted
6 of. The absence of the elements, which the
7 state conceded was only implied malice in the
8 first reversal first track response, 53859, which
9 was raised under In re Winship, equates to innocence.
10 See Golden v. Hayes, 444 F.3d 1062 (9th Cir. Nev. 2006).

11
12 And if that fails, if the procedural bar will
13 result in a fundamental miscarriage of justice, then the
14 petitioner is entitled to raise an untimely petition.
15 (Emphasis, appellant's petition however, ~~is~~ not untimely.)
16 State v. Bennett, 119 Nev 589, 81 P.3d 1 (2003). Clearly,
17 the now twice certified ("COA") Double Jeopardy
18 Violation would fall squarely within this parameter noting
19 the entire action relates back to the still
20 pending Federal Appeal. see 9th Cir. Orders, COA's.
21 (9th Circuit case No.s 12-15271 and 15-15519.)

22 Noting, another Abuse of Discretion based upon
23 an erroneous legal conclusion, Gonzales v. Free Speech
24 Coalition, 408 F.3d 613, 618 (9th Cir. 2005), is the review
25 standard for Jurisdictional claims. Of primary
26 importance is that jurisdictional objections may be
27 resurrected at any point in the litigation. see
28 Gonzales, i.d. at 648 (quoting Henderson v. Shinseki, -

1 131 S.Ct 1197, 1202-03 (2011)). "Subject-matter jurisdiction
2 [("SMTJ")] can never be waived or forfeited."

3 Conzales, *ibid* Lambright v. Stewart, 220 F.3d 1022
4 (9th Cir. 2000); see Ex parte Smith 26 P. 655, 671 (Nev. 1912)
5 ("it is the duty of the Court to determine whether it
6 has jurisdiction of any case presented [...]");
7 U.S. v. Luna-Acosta, 715 F.3d 860, 864, n. 4 (10th Cir. 2013);

8 Steel v. Steel, 1 Nev. 27 (1865) (failure to comply
9 with pre requisites to acquire jurisdiction; Landrith v.
10 Malik, 251 P.3d 163, 166 (Nev. 2011) ("SMTJ" can be raised
11 by the parties at any time and cannot be conferred
12 by the parties.") The "lack of "SMTJ" renders
13 a judgment void."; State Industrial Ins. Sys. v. Steeper,
14 100 Nev. 267, 269 (1984); see Ex parte Dela 25 Nev. 346, 352 (1900)
15 ("All is coram non iudice and void.")

16 Moreover, Cause
17 Cause and Prejudice simply doesn't apply. "The point
18 of Cause and prejudice [...] is to overcome the waiver.
19 But this analysis of cause assumes that the error in
20 question is a waivable one. And jurisdictional defects
21 are not." • Kelly v. U.S., 29 F.3d 1107, 1117 (7th Cir. 1994),
22 overruled in part on other grounds by U.S. v. Ceballos, 302 F.3d
23 679, 690 (7th Cir. 2002) "Whatever the scope of the cause
24 and prejudice requirement, it clearly does not bar
25 [habeas] review when a defendant raises a jurisdictional
26 claim [...]." Chambers v. U.S., 22 F.3d 939, 945 (9th Cir. 1994)
27 vac on other grounds, 47 F.3d 1015 (9th Cir. 1995) (emphasis in
28 original); Harris v. U.S., 149 F.3d 1304, 1308-09 (11th Cir. 1998) (def.-

1 -endant need not show cause and prejudice to collaterally attack
2 the enhanced sentence because jurisdictional claims cannot be
3 procedurally defaulted."); McCoy v. U.S., 266 F.3d 1245,
4 1248-49 (11th Cir. 2001); Foreman v. U.S., 20 F.Supp 2d 229, 231 (D.M.A.S 1998)

5 Lastly, this Court not only mistook the nature of the
6 writ filed below, but misapplied NRS ch. 34 thereto.

7 Appellant did not file a 34-726 writ but instead filed
8 under 34-360 invoking NRS 34-500. Pursuant NRS
9 34-722, petition as used in sections 720-830 only apply
10 to writs filed under 34-724. However, the timebar
11 issues under NRS 34-726(a) do not apply to writs
12 under 34-360 asking again for relief pursuant 34-500.

13 Accordingly, timeliness woes do not concern this Court's
14 review. ● Finally, an obscure footnote which violates

15 Byford v. State, 123 Nev. 67, 70 (2007) and State v. Green,
16 129 Nev. —, —, 307 P.3d 322, 325-26 (2013), this Court concludes
17 that no relief is warranted for a document filed.

18 If this is ostensibly referring to the appendices,
19 then yet another Abuse of Discretion has been committed
20 for failing to consider the correct exhibits resulting
21 in a clearly erroneous assessment of the evidence [.]”
22 Cooter & Gell v. Hartman Corp. 496 U.S. 384, 405 (1990). see

23 ORDER of AFFIRMANCE, pg. 2, En-2 dated June 22, 2016.

24
25 Jurisdictional Claims can never be time barred. Legislation
26 is clear. Additionally, Certiorari completes (and tolls)
27 the State direct review process. And SCOTUS authority
28 explicitly states that IAC satisfies cause and prejudice.

IV. CONCLUSION

First and foremost is all respondent's have remained silent which indicates acquiescence that is tantamount to appellant's single initial ground raised being more than just odorable. Plays by all officers of the court in avoiding the "want of jurisdiction" timely raised September 15, 2014 by the Habeas Corpus petition under NRS 34.360. It is within court's "proper prerogative" to elect to treat respondent's failure to answer as a confession of error and to adjudicate petition accordingly. SEE ORME v. FJDC, 105 Nev. 712, 782 P.2d 1325, 1326 (1989).

Additionally, jurisdictional claims can never be barred in any manner and raised for first time on appeal.

● Second, humbly, petitioner asserts this Court can recognize that my petition in the first instance was filed (11) months after the conclusion of final review by the U.S. Supreme Court on October 15, 2013 noticed on docket no. 61631. see Bennett v. State, 111 Nev. 1099, 1102-03 (1995) (Sct declined to penalize...petitioner.)

V. PRAYER FOR RELIEF

Request ORDER vacating order of affirmance, Jan 16 2016. Remand back to trial court as a timely petition to resolve merits of all and denied untimely claims raised in supplemental petition(s) also. Invoke your authority under NRAP 31(d) and consider State's silence to be a confession of error. see Polk v. Nevada, 126 Nev. 11, 233 P.3d 357, 361 (2010).

Pursuant NRS 208.165, dated June 25, 2016. By: Brian K. O'Leary 902444

VI. CERTIFICATE OF COMPLIANCE

1.) I hereby certify that this Petition for Rehearing pursuant NRAP 40 (c)(2)(A) and (B) complies with the formatting requirements of NRAP 32 (a)(4)-(6), the typeface requirements of NRAP 32 (a)(5) and the type style requirements of NRAP 32(a)(6) because the Petition for Rehearing has been prepared in a proportionally spaced typeface by a handwritten text based upon NRAP 32(a)(5)(c) "unrepresented litigants may use elite type, 12 characters per inch, if they lack access to a typewriter."

2.) I further certify that this Petition for Rehearing complies with the page limitations of NRAP 40 (b)(3) because it does not exceed the 10 page limitation and contains less than 4,667 words and contains less than 433 lines of text.

3.) Finally, I certify I have composed and read the Petition for Rehearing declaring it to be true and non-frivolous and is supported by the record.

Dated this 25th day of June 2016. By: Brian K. O'Leary
Pursuant NRS 208.165 and 28 USC § 1746 Brian K. O'Leary
Appellant Pro Se
#90244

VII.

CERTIFICATE OF SERVICE BY MAIL

I do certify that I mailed a true and correct copy of the
foregoing Petition for Rehearing ... June 22, 2016
to the below address(es) on this 27th day of June,
2016, by placing same in the U.S. Mail via prison law library
staff, pursuant to NRCP 5(b): (Logged by Brass Slip No. 1993961)

Note: All registered parties of the appellate
CM/ECF electronic filing system will
be served by the clerk utilizing
that perspective system.

Supreme Court of Nevada
Office of the Clerk

201 S. Carson St., Ste. 201
Carson City, NV. 89701

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CASE No. 69036

Brian O'Keefe # 90244
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

Appellant In Pro Se
90244

VIII.

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding
Petition for Rehearing ... June 22, 2016 filed in
District Court Case No. 0250630 does not contain the
social security number of any person.

Dated this 27th day of June, 2016.

Brian O'Keefe
Appellant In Pro Se
90244