ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 47130

BRENDAN JAMES NASBY

Appellant

vs.

THE STATE OF NEVADA

Respondent.

FILED

MAR 28 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

Appeal from District Court's Denial of Post-Conviction Writ of Habeas Corpus

APPELLANT'S REPLY BRIEF

ANTHONY P. SGRO, ESQ.
Nevada State Bar No. 3811
Patti, Sgro & Lewis
720 South 7th Street, Suite 300
La Vegas. Nevada 89101

Attorneys for Appellant

ORAL ARGUMENT REQUESTED

07-06222

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutions

ISSUES PRESENTED

I. **APPELLANT NASBY'S PROSECUTORIAL MISCONDUCT CLAIMS AND TRIAL ERROR CLAIMS ARE NOT BARRED, AS BOTH GOOD CAUSE AND PREJUDICE EXIST SUFFICIENT TO OVERCOME THE PROCEDURAL BARS SET FORTH IN NRS 34.810(1)(b).**

II. **DEFENDANT'S TRIAL AND APPELLATE COUNSEL WERE INEFFECTIVE UNDER BOTH THE CRONIC AND STRICKLAND STANDARDS**

STATEMENT OF THE CASE/STATEMENT OF FACTS

Appellant Nasby hereby adopts the "Statement of the Case" and the "Statement of Facts" as previously set forth in his opening brief, filed with this Honorable Court on or about November 28, 2006. Specific facts necessary to reply to the State's Opening Brief will be discussed further below as necessary.

ARGUMENT

I. **APPELLANT NASBY'S PROSECUTORIAL MISCONDUCT AND TRIAL ERROR CLAIMS ARE NOT BARRED, AS BOTH GOOD CAUSE AND PREJUDICE EXIST SUFFICIENT TO OVERCOME THE PROCEDURAL BARS SET FORTH IN NRS 34.810(1)(b).**

Nasby asserts that his Prosecutorial Misconduct Claims as well as his Due Process claims are cognizable and, further, that his claims are not barred by the procedural constraints set forth in NRS 34.810(1), as Nasby's claims of prosecutorial misconduct and his claims regarding ineffective assistance of counsel are inextricably intertwined.

NRS 34.810 provides in pertinent part:

> 1. The Court shall dismiss a petition if the court determines that:...
> (b) The petitioner's conviction was the result of a trial and the grounds for the petition could have been:
> (1) Presented to the trial court;
> (2) Raised in a direct appeal or a prior petition for a writ of habeas corpus or post-conviction relief; or
> (3) Raised in any proceeding that the petitioner has taken to secure relief from his conviction and sentence, unless the court finds both cause for the failure to present the grounds and actual prejudice to the petitioner.

....

....

....

Thus, a procedural default is excused if a petitioner establishes both good cause for the default and prejudice. See NRS 34.810(3); *Bejarano v. State*, 2006 146 P.3d 265, 270 (Nev. 2006). Prejudice occurs where the errors worked to a defendant's "actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *United States v. Frady*, 456 U.S. 152, 170 (1982). Furthermore, even absent a showing of good cause, this Court has held that it will consider a claim if a petitioner can demonstrate that applying the procedural bars would result in a fundamental miscarriage of justice. *State v. Bennett (Bennett III)*, 119 Nev. 589, 597-598 (2003)(emphasis added); *Leslie v. Warden*, 118 Nev. 773, 780 (2002)(emphasis added). This is such a case.

In the present case, Nasby's previous trial and appellate counsel were blatantly ineffective in failing to raise the meritorious issues discussed at length in Appellant's Opening Brief, particularly issues of prosecutorial misconduct which served to unfairly preclude Nasby from presenting a valid defense to the members of the jury. As a result, the instant Prosecutorial Misconduct and Due Process claims must be allowed, as they are the by-product of the timely-pled ineffective assistance of counsel claims brought by Appellant Nasby. In other words, his previous counsel were ineffective in failing to raise the previously briefed issues in any of their actions or pleadings, effectively denying Nasby the right to both effective trial and appellate representation. *See Lozada v. State*, 110 Nev. 349 (1994)(if a petitioner for a post conviction writ of habeas corpus demonstrates that he did not knowingly waive his right to an appeal, the district court shall appoint counsel to represent the petitioner and counsel shall present issues which could have been raised in direct appeal). At this juncture it must be noted that a member of Nasby's trial counsel team, Frederick Santacroce, also served as his appellate counsel. Accordingly, it would have seemingly been impossible for Nasby to bring these claims in a previous brief, as Mr. Santacroce was the *very same attorney* who in fact failed to raise these claims throughout trial.

Furthermore, the gravity of the prosecutorial misconduct apparent from the evidence presented before the District Court, which included firm evidence of a prosecutor actually *dissuading* a defense witness from testifying, simply cannot be ignored in the instant matter. The prosecutor's

. . . .

actions, which visibly tainted Nasby's entire defense and served to compel an alibi witness not to testify, rose to such an egregious level that enforcing a procedural bar in the instant case would result in a fundamental miscarriage of justice at the expense of Appellant Nasby's constitutional rights. See Affidavits of Crystal Sobrian and Colleen Warner, Appellant's Appendix (AA) Vol. 1, pp. 1-5.

Simply put, Nasby's Appellate Counsel failed to raise potentially meritorious issues in his appeal. The evidence omitted by his previous counsel, both trial and appellate, served to establish his best defense at trial—that he was never present at the scene of the crime. The clear and blatant errors of his trial and appellate counsel are noted more specifically below as well as in Nasby's Opening Brief.

II. DEFENDANT'S TRIAL AND APPELLATE COUNSEL WERE INEFFECTIVE UNDER BOTH THE CRONIC AND STRICKLAND STANDARDS.

Generally, a defendant alleging ineffectiveness of counsel has the burden of demonstrating that: (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). Some errors by counsel, however, are so egregious that the Supreme Court has delineated a second standard to be applied in such cases. Under this second standard, the defendant need not demonstrate that the error affected the reliability of the trial's outcome. *U.S. v. Cronic*, 466 U.S. 648, 658-659, 104 S.Ct. 2039, 2046-2047 (1984). Instead a per se presumption of prejudice arises where the evidence and surrounding circumstances indicate an actual breakdown in the adversarial process at trial. In the instant case, Nasby's trial and appellate counsels' failure to properly advocate for their client demonstrates their ineffective assistance under both standards.

Nasby asserts that his trial defense counsel failed to call any witnesses, failed to call rebuttal witnesses, failed to sufficiently investigate, failed to present any evidence, failed to object repeatedly, and failed to specifically object to the accomplice instruction that was provided at trial. Also, Nasby asserts that his defense counsel failed to allow him to testify and exerted extreme pressure for him to plea bargain the case. These failures, which were discussed thoroughly in Nasby's Opening Brief,

. . . .

. . . .

establish that defense counsel was deficient. These deficiencies, in turn, clearly prejudiced the defense and resulted in the failure of the defense to present potentially exonerating evidence. While these issues have been previously briefed, it is important to discuss several key errors by counsel which prejudiced Nasby's right to a fair trial in accordance with the Nevada and U.S. Constitutions.

A. Nasby's Counsel Failed To Object To The State's Preventing Of A Key Defense Witness From Testifying, And Appellate Counsel Failed To Discuss The Issue In Nasby's Direct Appeal.

Where the substance of what the Prosecutor communicates to a defense witness is a threat over and above what the record indicates was timely, necessary, and appropriate, the inference that the State sought to coerce a witness into silence is strong. *See Kitchen v. U.S.*, 227 F.3d 1014, 1022-1023 (7th Cir. 2000).

In the instant case, Ms. Colleen Warner was set to testify in Nasby's defense regarding how he came to possess the murder weapon. Ms. Warner's testimony is crucial to Petitioner's defense, because the Prosecution presented testimony that the Petitioner maintained possession of the gun in question, both before and after the crime. Ms. Warner's testimony would have refuted that claim, especially since the incriminating testimony came from co-defendants testifying in order to receive short sentences. See Affidavit of Colleen Warner, AA, Vol. 1, p. 1-3. Additionally, Ms. Warner would have provided testimony in support of Nasby's alibi defense. She would have provided testimony that Nasby had remained with her on the evening in question until approximately 2 a.m., and, further, that Nasby had not gone to the desert with his friends on the night in question.

Ms. Warner ultimately did not testify, however, because the Prosecutor told her Nasby's co-defendants had beaten him to the punch and implicated him. As a result, the Prosecutor told her, Nasby's defense did not have a chance. Furthermore, the Prosecutor also showed Ms. Warner a letter *allegedly* written by Nasby. The letter contained several harsh and disparaging remarks about Ms. Warner's character—and was presented to Ms. Warner for the sole purpose of dissuading her from testifying in Nasby's defense.

. . . .

. . . .

In fact, the Prosecutor had previously joked that he might show Ms. Warner the letter. The Trial Court specifically advised him not to. AA, Vol. 1, p. 131. The Prosecutor, however, did not follow the Court's instructions and showed Colleen the letter in open court in the presence of Mr. Sciscento and Mr. Santacroce, counsel for Nasby at trial. The Prosecutor then asked her, "How do you feel about testifying now?" Perhaps even more shocking is the fact that Nasby's counsel conceded this point, and, essentially conceded Mr. Nasby's entire alibi defense, as discussed below. Further, it is unclear whether or not counsel even *subpoenaed* Ms. Warner for trial.

The State clearly tampered with Ms. Warner and prejudiced Nasby's right to a fair trial. In *U.S. v. Vavagas*, 151 F.3d 1185 (9th Cir. 1998), the Ninth Circuit ruled that, "whether substantial government interference with defense witness' choice to testify occurred is a factual determination to be made by the District Court and is reviewed for clear error. A Defendant alleging substantial interference with defense witness' choice to testify is required to demonstrate misconduct by a preponderance of the evidence." Further, according to *U.S. v. Schelei*, 122 F.3d 994 (11th Cir. 1997), the court stated, "if the witness did not testify and the allegation of intimidation is true, no prejudice need be shown." In the instant case, the prosecutor substantially interfered with the testimony of Ms. Warner. The prosecutor knew that the presentation of such a letter to Ms. Warner would dissuade her from testifying, and, despite the admonition of the trial court, chose to reveal the letter to her—effectively eliminating his right to present an alibi witness at trial. Appellant Nasby would assert that this claim, which bears such a substantial impact on his fundamental right to present a defense, must be considered by this Court. Further, his trial counsels' failure to take steps to remedy the situation similarly deprived Nasby of an effective defense.

Finally, it is imperative to note that this pivotal issue was *never even briefed* by counsel on Direct Appeal, Frederick Santacroce. Mr. Santacroce omitted this issue directly contrary to the wishes of Appellant Nasby, despite the existence of favorable case law in the area of prosecutorial interference with defense witnesses. This plain error rises to the level of constitutional proportion and further demonstrates that appellate counsel was deficient in failing to raise numerous meritorious issues on direct appeal.

. . . .

B. Nasby's Trial And Appellate Counsel Failed To Investigate The Alleged "Concocted Alibi."

As it did during the trial, the State alleges in its Reply Brief that it was able to recover information which indicated that Nasby was coaching witnesses with false testimony. Respondent's Reply Brief, pp. 14, lines 3-14. In support of its allegations the State references numerous letters written by Nasby to potential witnesses in the case. AA, Vol. 1, pp. 0059-0084.[1] Despite the State's allegations, however, one fact remains visibly apparent: neither trial nor appellate counsel investigated these claims in order to adequately determine whether or not an alibi defense could be presented. In short, without conducting their due diligence, Mr. Sciscento and Mr. Santacroce unilaterally decided to abandon the alibi defense, despite the fact that the letters allegedly written by Nasby did not conclusively prove the existence of any perjured testimony. Furthermore, at trial Nasby's counsel failed to call a single witness when it abandoned the "alibi" defense; in fact Counsel offered no defense at all. "If counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then that has been a denial of Sixth Amendment Rights which makes adversary process itself presumptively unreliable." *U.S. v. Cronic*, 466 U.S. at 660. Indeed, it is this *Cronic* standard that should be used, and under this standard, reversal may be mandated without even any proof of prejudice. *Id.*

Petitioner's Counsel submitted a list of alibi witnesses to be called at trial, but never called any of them. Had he called them, they could have testified to Petitioner's whereabouts during the time the crime occurred, thereby changing the outcome of the trial. *Harris v. Reed*, 894 F.2d 871 (7th Cir. 1990) (en banc) (Counsel's strategy not to call any witnesses at murder trial, despite existence of credible defense, and reliance on perceived weaknesses of prosecution's case was ineffective assistance because it fell outside wide range of professionally competent assistance at P. 878); See also *Washington v. Smith*, 219 F.3d 620, 634-35 (7th Cir 2000) (Failure to produce possible alibi witnesses at trial resulted in prejudice to Petitioner). See Affidavits of Colleen Warner and Crystal Sobrian, AA, Vol. 1, p. 1-5.

---

[1] Appellant maintains that it was never proven that he attempted to coach witnesses. An example would be letter written to a key witness in the case, Brittany Adams, wherein Defendant Nasby encourages her to stick with her story, even if it was different than his.

In the present case, both trial counsel testified that they did not pursue the alibi defense because of an apparent attempt by Nasby to concoct witness statements as to his whereabouts. However, as the entire record of the post-conviction evidentiary transcript reveals, neither counsel investigated the allegations independently and simply improperly relied on the State's representations that Nasby had written the letter. At the very minimum, prudent counsel would have nonetheless further interviewed the witnesses to determine whether or not the alibi defense was proper. Counsel failed to do so.

At the post-conviction evidentiary hearing held on November 9, 2005, Nasby's counsel testified as follows (emphasis added):

1. Frederick Santacroce, Esq., Nasby's appellate counsel and one-half (½) of his trial counsel team, testified when he began working on Nasby's case, shortly before trial, he learned that a notice of alibi witness had been previously filed by Joseph Sciscento, Nasby's other counsel. AA, Vol. 4, p. 669. Approximately one week prior to the start of trial, defense counsel learned that a letter had been intercepted by the jail where Nasby was housed. AA, Vol. 4, p. 670. Mr. Santacroce testified that the intercepted letter "indicated that the alibi was a concocted alibi story and there may have been some perjury involved." AA, Vol. 4, p. 670. Based upon this letter, defense counsel chose not to pursue the alibi witness defense because he felt that doing so would be suborning perjury. AA, Vol. 4, p. 670. Santacroce was unable to give testimony as to his efforts to investigate whether the "letter" was in fact an attempt by Nasby to concoct an alibi defense. Furthermore, Santacroce testified that he did not personally speak with any potential alibi witness involved in Nasby's case. AA, Vol. 4, p. 675-676. Santacroce testified that he did not personally speak with any potential witnesses because he *believed* that his private investigator had already spoken with these witnesses. AA, Vol. 4, p. 676.
2. Joseph Sciscento, Nasby's primary trial counsel, testified that he felt Nasby's strongest defense centered around allegations by involved witnesses which stated that it was an individual nicknamed "Sugar Bear" who actually committed the crimes in question. AA, Vol. 4, p. 687. Sciscento subsequently testified that, in his opinion, the alibi started to "fall

apart." AA, Vol. 4, p. 689. He further discussed a letter allegedly sent out from the jail which the District Attorney had intercepted and presented to him—a letter which showed that Nasby was allegedly attempting to set up the story for the alibi. Sciscento testified that he felt that if he presented the alibi evidence and it had "fallen apart," then there would have been no believability whatsoever for the defendant. AA, Vol. 4, p. 693. However, similar to Mr. Santacroce, Mr. Sciscento offered no testimony regarding any attempts to contact alibi witnesses after the interception of this letter; further, he offered no testimony regarding his investigation into any of the allegations surrounding this letter.

Thus, in the instant case, previous counsel clearly abandoned the alibi defense, a potentially exonerating defense, without even taking the time to speak to the witnesses involved to ascertain if indeed a credible alibi defense existed. Two witnesses, Crystal Sobrian and Colleen Warner, maintain as of the time of filing of the instant post-conviction brief that Nasby was not at the scene of the murder on the night in question. Considering the existing of only circumstantial evidence against Mr. Nasby, it is impossible to state beyond a reasonable doubt that he would have been convicted had the alibi evidence been introduced. In this case, this constitutional error amounts to nothing less than clear evidence of prejudice.

Furthermore, Appellant would ask this Court to consider not only the failure to conduct due diligence exhibited by Nasby's trial counsel, but also the fact that, unsurprisingly, Mr. Santacroce again *failed to brief* this extremely important issue—as well as numerous others discussed in Nasby's opening brief. Simply put, neither trial nor appellate counsel took the time to adequately investigate and/or research the existing issue. It is noteworthy to mention that the undersigned quickly obtained the Affidavits of these individuals with very little effort. Unfortunately, such effort was more than Nasby's trial and appellate counsel were willing to put into his case.

. . . .

. . . .

. . . .

. . . .

Thus, the issue for this Court to consider is not whether Nasby loses the right to claim ineffective assistance because he allegedly wrote the letters, as the State would have this Court believe. Nasby's writing of these letters was never conclusively proven at trial or at an evidentiary hearing before trial. Instead, the issue is: why didn't Nasby's counsel investigate these claims to determine whether or not a credible alibi defense existed?

C. Petitioner's Counsel Failed to Sufficiently Investigate and Failed to Present Any Evidence.

As discussed in Nasby's Opening Brief, Mr. Sciscento began Nasby's trial by joking about how long his sentence would be. AA, Vol. 1, p. 161. This comment set the tone for Mr. Sciscento's lackadaisical representation of Nasby through trial. Mr. Sciscento called no witnesses to testify on Petitioner's behalf, presented no defense at all, and failed to sufficiently investigate the case to locate witnesses listed above and in Appellant's Opening Brief, including Charles a.k.a. Damion Von Lewis. Mr. Sciscento relied on the State to do that. *Hess v. Mazurkiewicz*, 135 F.3d 905, 909-911 (3d Cir. 1998). This was improper, particularly considering that Nasby's counsel had pertinent knowledge that these witnesses could provide potentially exonerating evidence for Nasby.

Furthermore, Mr. Sciscento failed to introduce any evidence on Nasby's behalf. He had in his possession a videotape that depicted Mr. Von Lewis threatening Beasley with a gun. If Counsel had introduced this tape, it would have established the possibility that Von Lewis followed up on his threats and murdered Beasley, not Nasby. Counsel advocated this theory during cross-examination of the States' witnesses, but refused to introduce evidence of it. Failure to introduce this key piece of evidence, in combination with counsel's failure to introduce the aforementioned alibi defense, calls into question the validity of Nasby's underlying conviction.

Moreover, Mr. Sciscento witnessed the Prosecutor show a potential defense witness a letter written by Petitioner, in an attempt to prevent her from testifying. Sciscento did not report this to the Court and in fact never objected to it, as discussed above. Indeed, he was an eyewitness to the States' intimidation of a defense witness, and did not feel it was worthy to notify the Court.

. . . .

. . . .

Accordingly, this Court must consider the totality of the circumstances, from counsels' missed objections to counsels' outright failure to advocate for his client, particularly in the face of such egregious conduct from State officials. It is clear that counsels' representation of Nasby fell far below the standards set forth in both Strickland and Cronic.

D. Counsel On Direct Appeal Was Similarly Ineffective For Raising These Issues.

Counsel on direct appeal was likewise ineffective for failing to raise all the meritorious issues contained in Nasby's Opening and Reply Briefs. *U.S. v. Mannino*, 212 F.3d 835, 845 (3d Cir. 2000); *Bell v. Jarvis*, 198 F.3d 432, 444 (4th Cir. 1999); *U.S. v. Williamson*, 183 F.3d 458, 463-64 (5th Cir. 1999); *Masen v. Ranks*, 97 F.3d 887, 894 (7th Cir. 1996) (Counsel's failure to raise obvious and significant issues was ineffective assistance because counsel's deficient performance creates presumption of prejudice)(emphasis added). Thus, if any procedural default arguments are raised by the State, such alleged default must be excused by the ineffective assistance of both his trial and appellate counsel.

Considering the fact that Mr. Santacroce prepared Nasby's brief on direct appeal—and was one-half (½) of Nasby's trial counsel team—it is shocking that he could have ignored such issues pertaining to prosecutorial misconduct, which undoubtedly violated Appellant Nasby's fundamental right to a fair trial.

....

....

....

....

....

....

....

....

....

....

CONCLUSION

WHEREFORE, Appellant Nasby requests that after considering the above arguments this Honorable Court reverse his convictions based upon the violations of Mr. Nasby's Constitutional Rights under the Fourth, Fifth, Sixth, and Fourteenth Amendment to the United States Constitution, as well as based upon the violations of Mr. Nasby's rights under the Nevada Constitution. At the very minimum, Nasby was entitled to competent representation, and both a fair trial and appeal. He received neither.

Respectfully submitted,

PATTI, SGRO & LEWIS

ANTHONY P. SGRO, ESQ.
Nevada Bar No. 3811
720 South Seventh Street, Suite 300
Las Vegas, Nevada 89101
Attorneys for Appellant Nasby

CERTIFICATE OF COMPLIANCE

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 Procedures, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be support by appropriate references to the record on appeal. 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 9th day of March, 2007.

PATTI, SGRO & LEWIS

ANTHONY P. SGRO, ESQ.
Nevada Bar No. 3811
720 South Seventh Street, Suite 300
Las Vegas, Nevada 89101
Attorneys for Appellant Nasby

CERTIFICATE OF MAILING

I hereby certify that on the 14th day of March, 2007, I duly deposited for mailing, postage prepaid, at Las Vegas, Nevada, a true and correct copy of the above and foregoing APPELLANT'S OPENING BRIEF, addressed to the following:

DAVID ROGER
Clark County District Attorney
200 Lewis Avenue
Las Vegas, Nevada 89155

GEORGE CHANOS
Nevada Attorney General
100 North Carson Street
Carson City, Nevada 89701

FRANK COUMOU
Deputy District Attorney
200 Lewis Avenue
Las Vegas, Nevada 89155

JAMES TUFTELAND
Chief Deputy District Attorney
200 Lewis Avenue
Las Vegas, NV 89155

Gloria J. Reyna
An employee of PATTI, SGRO & LEWIS

///

///

///

///

///

///

///