ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 47130

BRENDAN JAMES NASBY

Appellant

vs.

THE STATE OF NEVADA

Respondent.

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

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

ISSUES PRESENTED

I. **WHETHER THE CUMULATIVE EFFECT OF PROSECUTORIAL MISCONDUCT VIOLATED PETITIONER'S RIGHTS UNDER THE FOURTH, FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I SECTION 8 OF THE NEVADA CONSTITUTION.**

II. **WHETHER THE TRIAL COURT ERRONEOUSLY ALLOWED THE INTRODUCTION OF PRIOR BAD ACTS EVIDENCE AND FAILED TO PROPERLY INSTRUCT THE JURY ON MULTIPLE CRITICAL ISSUES IN VIOLATION OF THE FOURTH, FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.**

III. **WHETHER INEFFECTIVE TRIAL AND APPELLATE COUNSEL VIOLATED NASBY'S RIGHT TO COUNSEL UNDER THE UNITED STATES AND NEVADA CONSTITUTIONS.**

STATEMENT OF THE CASE

On August 11,1998, Brendan James Nasby (hereinafter referred to as "Nasby"), was charged by Criminal Complaint with Conspiracy to Commit Murder and Murder with Use of Deadly Weapon. After a trial by jury in the Eighth Judicial District Court, which began on October 13, 1999, Nasby was found guilty of all counts. Subsequently, a penalty hearing was held. The Court imposed a maximum term of 120 months with a minimum of 48 months for Count I Conspiracy to Commit Murder and one life sentence with the possibility of parole for Count II Murder with the use of a Deadly Weapon, plus an equal and consecutive term of life with the possibility for use of a deadly weapon. The Judgment of Conviction was filed on December 2, 1999.

Nasby appealed to the Nevada Supreme Court which upheld his sentence and conviction in an affirming opinion filed on February 7, 2001. On November 17, 2004, Nasby filed a petition for writ of habeas corpus post-conviction with the District Court. After an evidentiary hearing and further argument, the lower Court denied Nasby's petition on March 27, 2006. The instant appeal followed.

STATEMENT OF FACTS

A. Overview

On the night of July 16, 1998, around 10:30 p.m., appellant Nasby, Jeremiah Deskin, Tommie Burnside, and Jotee Burnside, all members of the LA Crazy Rider's gang, were at the Appellant's home. Jeremiah Deskin, Jotee Burnside, and Tommie Burnside drove to Michael

Beasley's home at approximately 10:00 p.m. Mr. Michael Beasley, (hereinafter Beasley) also a member of the LA Crazy Riders, would ultimately be shot and killed in the desert that night. Deskin and the Burnside brothers found Beasley at his home with his six month-old baby. Deskin and the Burnside Brothers lured Beasley to go for a ride under the pretense that they would drive into the desert to shoot a new gun and smoke marijuana. Beasley asked his aunt to watch the baby, while he went with his friends.

Mr. Deskin testified tentatively that in June of 1998, some conversation took place in which Nasby asked the gang members whether Beasley should be killed. This conversation allegedly took place approximately one month prior to Mr. Beasley's death. When directly asked whether he had a say about Beasley being killed, Deskin stated: "No, I was never asked." (T.T., Vol. III., pages 78 & 79; Appellant's Appendix "AA," Vol. 2, p. 364).

Deskin testified that after picking up Beasley, the four men drove to Nasby's home and picked him up. Nasby was picked up by the group and they drove to the desert. (T.T. Vol. III, p. 94, lines 8-11; AA, Vol. 2, p. 368). Once the group arrived at the desert, Deskin testified that he saw Nasby shoot Beasley. (T.T. Vol. III, p. 101, lines 19-20; AA, Vol. 2, p. 369). Then Deskin, the Burnside Brothers, and Nasby drove back to Nasby's house. (T.T. Vol. III, p. 109, lines 2 - 5, AA, Vol. 2, p. 371). Nasby has always maintained that he was not in the desert and that he was not involved in the murder.

Police interviewed both Jotee and Tommie Burnside, who told the police the shooter was Damien Von Lewis aka "Sugar Bear." Mr. Von Lewis was also a member of the LA Crazy Riders. (T.T., Vol. V, p. 109, line 3, p. 110, line 17 and p. 128, lines 12-18; AA Vol. 3, p. 547, 548, 552). After negotiating deals with the State, the Burnside Brothers changed their statements and implicated Nasby in the shooting.

On or about August 4, 1998, the police executed a search warrant on the residence of Nasby. (T.T. Vol. IV., p. 148, lines 14-21; AA, Vol. 3, p. 479). Mr. Nasby was arrested at that time. Mr. Nasby voluntarily showed Detective Buczek a nine millimeter pistol. (T.T. Vol. IV., p. 153, lines 9-16; AA, Vol. 3, p. 480). Nasby told the officers that he had purchased the weapon after the death of Beasley from an individual named "Sugar Bear." (T.T. Vol. IV., p. 154, lines 19-21; AA, Vol. 3,

p. 481). In fact, Detective Buczek stated that Nasby was cooperative with him and not disruptive or violent in any way. (T.T. Vol. IV, page 154, lines 3-5; AA, Vol. 3, p. 481).

The weapon was later identified as the murder weapon. (T.T., Vol. V., p. 29, lines 8-18, AA, Vol. 3, p. 527). Nasby's fingerprints were not found on the murder weapon. (T.T. Vol. IV, p. 97, lines 2-15; AA, Vol. 3, p. 544). At the crime scene, in addition to bullet casings, the crime scene analyst impounded three Winston cigarette butts and photographed two footwear impressions. (T.T. Vol. V., p. 244, lines 1-3; p. 245, lines 18-22 and p. 246, lines 12-20; AA, Vol. 3, p. 582).

When the police executed the search warrant at the Nasby residence, the crime scene analyst impounded and photographed approximately seven pairs of shoes. (T.T. Vol. IV., p. 74, lines 10-20; AA, Vol. 3, p. 461). The shoes seized from Nasby's residence did not match the footwear impressions at the scene of the murder. (T.T. Vol. IV, p. 97, lines 16-20; AA, Vol. 3, p. 466).

The crime scene analyst also retrieved multiple cigarette butts from the Nasby residence. They were Kool, Benson & Hedges and a generic brand. No Winston cigarettes were found in the Nasby residence. (T.T. Vol. IV., p. 75, line 12; p. 76, line 1; AA, Vol. 3, p. 461).

B. <u>The Trial</u>

1. State's Case

On October 11, 1999 through October 18, 1999 the Defendant's jury trial took place. Seventeen witnesses were called by the State. The following summarizes the evidence put forth by the State to support its case-in-chief:

- James Carroll, Sergeant for the Las Vegas Metro Police Department, testified that he arrived at the scene in his patrol car and found Mr. Beasley dead. He sealed off the area and called for the detectives.(T.T. Vol. III, p. 10, lines 16-22; AA, Vol. 2, 347).
- Kelly Neil, Crime Scene Analyst for the Las Vegas Metro Police Department, testified that he found shiny cartridges and three Winston Cigarette butts that appeared new. He also found the partial footwear impressions. He photographed the scene and the victim. There were no finger prints found on the shell casings. (T.T., Vol. III, page 57, line 24, page 58,. Line 1; AA, Vol. 2, p. 358-359).

- Jerimiah Deskin, a co-defendant in the matter, testified that there was a meeting in June of 1998, in which Nasby asked the members of the gang whether or not Beasley should be killed. (T.T. Vol. III, page 77, lines 3-7; AA. Vol. 2, p. 363). Deskin testified that on July 16, 1998, he was asked by Nasby to pick up Beasley "to shoot him." (T.T. Vol. III, page 80, lines 22-24, and page 81, lines 1-2; AA, Vol. 2, p. 364). Deskin testified that Nasby would forgive a $100 debt if Deskin picked up Beasley. (T.T. Vol. III, page 82, lines 10-15; AA, Vol. 2, p. 365). Deskin testified that they were going to tell Beasley that they would go into the desert to smoke weed and shoot off Beasley's gun. (T.T. Vol. III, page 84, lines 8-10; AA, Vol 2., p. 365). Deskin testified that he saw Beasley's son, and that Beasley appeared proud of his baby son just before Deskin took him to the car. (T.T. Vol. III, page 88, lines 12-14; AA, Vol. 2, p. 366). Deskin testified that he witnessed Nasby shoot Beasley three times. (T.T. Vol. III, pages 101-106; AA, Vol. 2, p. 369-371). Deskin testified that he fled to California after the murder.
- Dr. Robert Jordan, a retired forensic pathologist who was the Clark County Coroner/Medical Examiner on July 18, 1998, testified that he conducted the autopsy and that Michael Beasley died from gunshot wounds to the head and chest. (TT, Vol III, page 170, lines 9-10; AA, Vol. 2, p. 387).
- Sheree Norman, Senior Crime Scene Analyst for the Las Vegas Metro Police Department, testified as to her documentation of the autopsy. She testified that she removed a projectile from between the victims skin and the shirt. (TT, Vol. III, page 214, lines 10-13; AA, Vol. 2, p. 398).
- Jomeka Beavers, victim Michael Beasley's aunt, testified that on July 16, 1998, she was living with her mother, step-father, and Michael Beasley. She testified that on July 16, 1998, she answered the phone and talked to a male, who requested to speak with Beasley. Beasley then asked his aunt to watch the baby for about 30 minutes while he went out with his friends. She testified that she saw Mr. Deskin pick up Beasley that evening.

- Tanesha Banks, former girl friend of the victim and the mother of the victim's child testified that Michael Beasley came to pick up his son for the child's first over night visit with his father on July 16, 1998. (T.T. Vol. IV., page 9, lines,16-18; AA, Vol. 3, p. 447-448). She testified that she was on a three-way phone call with her friend Crystal and Nasby. Nasby told her that Beasley was out of the L.A. Crazy Rider's gang. She also testified that she was beaten up by a Brittany Adams on August 1, 1998, and that Ms. Adams told her to keep her mouth shut about Nasby. (T.T. Vol. IV, page 22, lines 1-22; AA, Vol. 3, p. 449).
- Crystal Bradley was a member of the LA. Crazy Riders gang. She testified that on July 17, 1998, Nasby told her over the phone that he had killed Beasley because he was taking his clout. (T.T. Vol. IV, page 43, lines 4-8; AA, Vol. 3, p. 454). She further testified that she called Tanesha and told her what Nasby had just relayed over the phone. (T.T. Vol IV, page 48, lines 5-10; AA, Vol. 3, p. 455).
- Randall McPhail, crime scene analyst with the Las Vegas Metro Police Department, testified that he impounded a Browning style Ingles nine millimeter semi-automatic handgun and two empty magazines. He also impounded seven pairs of shoes from the room and three different brands of cigarettes; Kool, Benson & Hedges, and a no-name brand. He testified that no Winston brand cigarettes were found. (T.T. Vol IV. Page 74, lines 15-23, page 75, lines 14-24; AA, Vol. 3, p. 461). He also testified that no prints were recovered from the firearm and that there was no match made from the seven pairs of shoes to the footwear impressions at the scene. (T.T., Vol. IV, page 97, lines 1-19; AA, Vol. 3, p. 466).
- Fred Boyd, latent print examiner of the Las Vegas Metro Police Department, testified that he found no prints on the gun or on the magazine. (T.T. Vol. IV, page 116, lines 23-24, page 117, lines 1-7; AA. Vol. 3, p. 471). He also testified that the seven shoes did not match the footprints at the scene. Further, no other shoes were sought for testing, including all of the other co-defendants' shoes. (T.T. Vol. IV, page 136, lines 1-24; AA, Vol. 3, p. 476).
- James Buczek, a homicide detective with the Las Vegas Metro Police Department, arrested Nasby and testified that Nasby told him where the gun was in his home. (T.T., Vol. IV, page 153, lines 7-11; AA, Vol 3., p. 480). Nasby told the officer that he had purchased the gun

following Beasley's death from Sugar Bear. (T.T. Vol. IV, page 154, lines 19-21). He testified that DNA was run on the Winston Cigarettes that were recovered at the scene and that there was NO match to Tommie Burnside, Jotee Burnside, Brendan Nasby, Jeremiah Deskin or the victim Michael Beasley. (T.T. Vol. IV, page 161, lines 1-12; AA, Vol. 3, p. 482).

- Torrey Johnson, a criminalist who worked in the forensic laboratory for the Las Vegas Metro Police Department, testified that he worked in the firearm detail. Mr. Johnson testified that he could not say for sure that the casings were fired in the specific .22 caliber handgun that was retrieved from Nasby's home. However, his testimony was that the bullets from the victim's body were fired by the gun. (T.T. Vol V, pages 71, lines 21 & 22, page 72, Lines 1-2; AA, Vol. 3, p. 538).
- Tommie Burnside, a co-defendant, testified that his brother Jotee, Nasby, the victim, Deskin, and himself drove to the mountains. He testified that Beasley was shot and that he, his brother, and Deskin did not shoot Beasley. He also testified that on August 4, 1998, he gave a prior inconsistent statement implicating Sugar Bear as the shooter and as the person who planned to kill Beasley. (T.T. Vol. V, page 111, lines 12-14, T.T., Vol. V, page 110, lines 7-17; AA. Vol 3, p. 548).
- Jotee Burnside, a Co-defendant, testified that he traveled with his brother Tommie, and Deskin, to pick up Beasley at his home. (T.T. Vol V, page 121, lines 15-18; AA, Vol. 3, p. 550). He testified that the five of them, Nasby, him, his brother, Deskin, and the victim traveled to the desert. (T.T. Vol. V, page 122, lines 10-12; AA, Vol. 3, p. 551). He testified that he had given another version of the story to the police on August 4, 1998, in which he implicated Sugar Bear. He received a 12-30 month sentence for his involvement and had received parole for his participation in the conspiracy to commit murder. (T.T. Vol V, page 139, lines 9-18; AA, Vol. 3, p. 555).
- Brittany Adams, a member of the L.A. Crazy Riders testified that she was very good friends with the victim Beasley and that they would beat up people for each other. (T.T. Vol. V, page 152, lines 3-6; AA, Vol. 3, p. 558). She also testified that Nasby told her that Sugar

Bear killed Beasley with the assistance of Chrystal and Tanesha. (T.T. Vol. V, page 153, lines 21-23; AA, Vol. 3, p. 558). She testified that Nasby told her that Sugar Bear, Tanesha, and Chrystal went out in to the desert with Beasley and killed him and that Tanesha was blaming Nasby. (T.T. Vol V, page 155, lines 1-14; and page 156, lines 1-4; AA, Vol. 3, p. 559). She testified that upon Nasby's insistence, she went to Tanesha's house and beat her up. She also admitted lying to the police about the story Nasby told her and pretending that it was her that directly received the information. (T.T. Vol. V, page 162, lines 18-20; AA., Vol. 3, p. 561).

- John R. Holmes, an inmate from the Clark County Detention Center, who was arrested for an unrelated robbery with the use of a deadly weapon, testified that he spoke with Nasby while incarcerated, and Nasby admitted that he killed Beasley. (T.T. Vol. V, page 212 lines, 21-23; AA, Vol. 3, p. 573).
- Thomas Thowsen, a police officer with the Las Vegas Metro Police Department homicide section, testified that he was in charge of the crime scene investigation. As the investigation unfolded, Metro received a call from Tanesha Banks who told the police that Nasby was threatening her not to testify. Mr. Thowsen examined Tanesha's caller ID and identified that the call came from CCDC from the telephone banks right next to where Mr. Nasby was housed. (T.T. Vol. V, page 258, lines 1-10; AA, Vol. 3, 585).

2. <u>Defense Case</u>

Nasby's defense centered on his assertion that he was not present at the time of the murder. His defense focused on the fact that many witnesses had implicated Sugar Bear for the murder, then each one later changed their stories to implicate Brendan Nasby. The co-defendants all received favorable charging and sentencing in exchange for their testimony against Nasby. The only witness who did not change their story was Deskin. Deskin fled to California immediately following the murder. He implicated Nasby when he was arrested for murder.

Nasby had intended to call his former girl friend, Colleen, who is also the mother of his child. The prosecution showed Colleen a negative letter that was allegedly written by Nasby. Following this interference by the prosecution, Colleen never testified. To Nasby's surprise, his counsel called

no witnesses at the time of trial. This was decided unilaterally by his defense counsel. Nasby had also subpoenaed Crystal Sobrian, a potential alibi witness. Please see the affidavit of Crystal Sobrian attached hereto. Furthermore, Nasby's counsel prevented him from testifying at trial, despite his vehement requests.

3. The Verdict

The Jury ultimately concluded Defendant Nasby was guilty of Conspiracy to Commit Murder, and First Degree Murder with the Use of Deadly Weapon. At the subsequent penalty hearing, which began on November 29, 1999, the State presented the pre-sentence report of Nasby, which showed that he had no prior felony or misdemeanor convictions. The Court imposed a sentence of 48 to 120 months for the Conspiracy to Commit Murder charge and a sentence of two consecutive terms of life with the possibility of parole for the First Degree Murder With Use of A Deadly Weapon Count.

4. Direct Appeal/Previous Post-Conviction Relief

Nasby appealed his conviction to the Nevada Supreme Court. On February 7, 2001, the Court issued its Order of Affirmance. Appellant Nasby subsequently filed a Petition for Writ of Habeas Corpus and a Supplemental Points and Authorities to the Writ of Habeas Corpus before the District Court. In his petition, Nasby asserted claims of prosecutorial misconduct and trial error similar to those asserted in the instant appeal. Furthermore, Nasby asserted that trial and appellant counsel were ineffective. At an evidentiary hearing held on November 9, 2005, Nasby's counsel testified as follows:

- 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. (Reporter's Transcript of Evidentiary Hearing, November 9, 2005, "EHT," p. 6, lines 16-21; 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. (EHT p. 7, lines 4-10; 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." (EHT, p. 7, lines 14-16; 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. (EHT, p.7, lines 17-20; 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. (EHT, p. 12, lines 13-15, p. 13, line 1; 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. (EHT, p. 13, lines 2-3; AA, Vol. 4, p. 676).

- 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. (EHT, p. 24, lines 12-17; AA, Vol. 4, p. 687). Sciscento subsequently testified that, in his opinion, the alibi started to "fall apart." (EHT, p. 26, lines 10-12; 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. (EHT, Id.). 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. (EHT, p. 30, lines 1-7; 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.

After further oral argument, the District Court denied Nasby's Petition on March 27, 2006. An order to that effect was filed on or about April 26, 2006. The instant appeal followed.

ARGUMENT

I. THE CUMULATIVE EFFECT OF PROSECUTORIAL MISCONDUCT VIOLATED PETITIONER'S RIGHTS UNDER THE FOURTH, FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I SECTION 8 OF THE NEVADA CONSTITUTION

Prosecutorial misconduct occurs when a prosecutor uses improper methods calculated to produce a wrongful conviction. *Berger v. U.S.*, 295 U.S. 78, 88 (1935).

In order for Appellant Nasby to have his conviction reversed, it is not enough that the prosecutor's remarks or conduct were improper. "The relevant question is whether the Prosecutor's comments or conduct so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). In addition, this court must view the Prosecutor's comments in the context of the entire trial. *U.S. v. Young*, 470 U.S. 1, 11-12 (1985).

In the case at hand, numerous instances of prosecutorial misconduct, both alone and in combination, infected Appellant Nasby's trial to such a great extent that the proceedings against him were fundamentally unfair.

A. Nasby's Claims Are Not Barred By NRS 34.810(1).

As a preliminary matter, 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).

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 WL3319541 (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); *Leslie v. Warden*, 118 Nev. 773, 780 (2002).

In the present case, Nasby's previous trial and appellate counsel were blatantly ineffective in failing to raise the meritorious issues presented in this 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 for failing to raise the following issues in any of their actions or pleadings.

Furthermore, the gravity of the prosecutorial misconduct apparent from the evidence presented before the District Court, which included firm evidence of a prosecutor 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, 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.

B. The State violated Nasby's Due Process Rights Under the United States Constitution when the Prosecutor prevented a Defense Witness from Testifying

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.

The Prosecutor had previously joked that he might show Ms. Warner the letter. The Trial Court specifically advised him not to. (T.T. Vol. I, page 12, lines 12-18; 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?"

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. Applying a procedural bar to the issue in question would serve only to approve of the egregious prosecutorial misconduct in question here.

C. The Prosecutor violated Nasby's Due Process Rights Under the United States Constitution when he vouched for the Credibility of State Witnesses.

"Improper vouching may occur when government 1) Refers to facts outside the record or implies that veracity of witness is supported by outside facts that are unavailable to jury; 2) implies guarantee of truthfulness; or 3) expresses personal opinion about credibility of witness." See *United State v. Santana*, 150 F.3d 860 (8th Cir. 1998).

In the case at hand, Nasby's conviction was based largely on the testimony of persons who traded testimony for plea bargains. During the prosecutor's closing argument he stated: "He [Deskin] has pled guilty to that and he has told police, pursuant to that negotiation, what happened. . . He is guilty of his culpability in this crime and sure he has cooperated with the State." (T.T. Vol. VI, page 64, lines 5-7; AA, Vol. 3, p. 649).

These statements imply the State's personal endorsement of Mr. Deskin's testimony. The fact that the State connected Mr. Deskin's testimony with the fact that he negotiated with the State, impermissibly lends credibility to his testimony. The Prosecutor later told the Jury that Mr. Deskin "cooperated" with the State, (T.T. Vol. VI, page 64, line 2; AA, Vol. 3, p. 649) which suggests the State's satisfaction with Mr. Deskin's testimony. Further, the Prosecutor told the Jury, referring to all of the Nasby's co-defendants and other criminals that testified on behalf of the State, "they told you the truth and the truth came out." (T.T. vol. VI, Pgs. 64-68; AA, Vol. 3, p. 649-650).

In *Rowland v. State*, 118 Nev. 31 (Nev. 2002), the Nevada Supreme Court found that the prosecutor's comments during closing argument of guilt phase describing inmate witness as telling the truth constituted vouching for testimony given, and thus the comments were improper. The Prosecutor in *Rowland* described an inmate witness as "a man of integrity" in closing argument. The *Rowland* case was affirmed only because there was overwhelming evidence of defendant's guilt. In Nasby's situation, there was no evidence to link him to the crime scene except for the testimony of accomplices. All of the accomplices and co-defendants in Nasby's case were inmates awaiting sentencing. Accordingly, this error can not be harmless in considering the facts of Nasby's trial.

These type of statements made by the State in Petitioner's case have also been condemned by the Federal Courts. In *United States v. Kerr*, 981 F.2d 1050, 1053 (9th Cir. 1992), the Court discussed Prosecutors vouching for credibility of four government witnesses was reversible error. The witnesses' testimony in *Kerr* was crucial to the Prosecutor's argument because the evidence connecting the defendant to the conspiracy was only indirect. The court further reasoned that vouching occurred when the Prosecutor asserted his own belief of the witnesses credibility through comments including, "I think [the witness] was candid. I think he was honest." Improper vouching also occurs when a Prosecutor supports or implies the State's personal belief in witness credibility. Thus, vouching does not have to be explicit. See also *U.S. v. Francis*, 170 F.3d 546 (6th Cir. 1999). In *Francis*, the court found that the prosecutor improperly vouched for witness' credibility and the court reversed and remanded the convictions.

D. The Prosecutor violated Nasby's Due Process Rights Under the United States Constitution when he referred to things not in evidence.

The Prosecutor moved on from vouching to testifying during his closing argument. The Prosecutor, after explaining to the Jury how Deskin's testimony was in keeping with his plea-bargain, tells the Jury that the reason Jotee and Tommie Burnside (also co-defendants) did not explicitly implicate Appellant in the crime was because they were afraid of being labeled snitches in prison. He implied that he had special knowledge about their situation, and he continued to emphasize that the fact that they pled guilty signified that Nasby was guilty as well. (T.T. Vol. VI. Pgs. 65-66; AA, Vol. 3, p. 650). None of this portion of the Prosecutor's closing argument was supported by admitted evidence. Closing argument should not refer to matters not presented in evidence. *U.S. v. Taren-Palma*, 997 F.2d 525 (9th Cir. 1993). This was a device on the part of the State to vouch for the credibility of the testifying co-defendants and to unfairly fill in the blanks with information that was not presented in evidence. *U.S. v. Kerr*, 981 F.2d 1050, 1052-1054 (9th Circuit 1992).

In *Sanborn v. State*, 107 Nev. 399, 408 (1991), the Court stated that a prosecutor's conduct during closing argument was improper and prejudicial. The prosecutor's remarks in that case, which were without evidentiary basis, constituted improper conduct. In the case at hand, no evidence or

testimony was presented that the Burnside brother's didn't want to be labeled snitches in prison, but the prosecutor stated it as a fact during his closing argument.

E. The Prosecutor violated Nasby's Due Process Rights Under the United States Constitution when he misstated the law in closing argument.

Repeatedly, the Prosecutor told the Jury that the accomplices all corroborate each other. (T.T. Vol VI, pg. 59; AA., Vol. 3, p. 648) This is a misstatement of the law. In closing argument the prosecutor stated, "[a]nd all these witnesses corroborate each other one after another showing that the fact that the defendant, in fact, the murderer." (T.T. Vol. VI, page 65, lines 5-7; AA, Vol. 3, p. 650) Accomplices cannot corroborate each other in Nevada. See *Sheriff v. Gordon*, 96 Nev. 205, 206 (1980), where the Nevada Supreme Court stated, "Witnesses whose testimony requires corroboration may not corroborate each other." See *LaPena v. State*, 92 Nev. 1, 13 (1976).

Further, NRS 175.291 provides:

> "1. A conviction shall not be had on the testimony of an accomplice unless he is corroborated by other evidence which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense; and the corroboration shall not be sufficient if it merely shows the commission of the offense or the circumstances thereof.
>
> "2. An accomplice is hereby defined as one who is liable to prosecution, for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

F. The Prosecutor violated Nasby's Due Process Rights Under the United States Constitution when it presented scripted, and false testimony as well as conflicting theories of the case.

The Prosecutor, by nature, may not become the architect of a proceeding that does not comport with the Standards of Justice. The Prosecutor, therefore, violates the Due Process Clause if he knowingly presents false testimony—whether it goes to the merits of the case or solely to witness credibility. *Thompson v. Calderon*, 120 F.3d 1045, 1058 (9th Cir. 1997)(quoting *Napue v. Illinois*, 360 U.S. 264 79 S.Ct. 1173, 3L.Ed.2d 1217 (1959); *Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 340, 19 L.Ed. 791 (1935) n.12.

Nasby was tried on the charges of conspiracy to commit murder and first-degree murder with the use of a deadly weapon. He was alleged to have conspired with Jeremiah Deskin, Jotee and

Tommie Burnside. However, the only testimony with regard to a conspiracy came from Deskin. He exchanged testimony against Nasby for a plea-bargain. He was allowed to plead guilty to accessory to commit murder and for a significantly lighter sentence. He was originally charged with the same crimes as Petitioner.

Accessory to commit a felony (murder) consist of:

> "***After the commission of a felony*** harbor, conceals, or aids such an offender with intent that he may avoid or escape from arrest, trial, conviction or punishment, having knowledge that such offender has committed a felony or is liable to arrest, is an accessory to the felony." See N.R.S. 196.030 (1) (Emphasis added).

Deskin's testimony went way beyond what the Prosecutor claimed he was guilty of, in connection with Nasby's case. His testimony also conflicted with the crime the Prosecutor allowed him to plead guilty to. In his closing argument the Prosecutor told the Jury that Deskin had admitted his culpability in this crime. He then defined that culpability to be 'Accessory to Murder...not the actual puller of the trigger."(T.T. Vol.VI, pages 63-64; AA., Vol. 3, p. 649). That is not the correct definition of Accessory to Commit Murder. The crime of Accessory attaches after the crime. When an act occurs before the crime, then it is a conspiracy. Deskin did not testify that he was merely an accessory, but a conspirator. Thus, the Prosecutor actually argued to the Jury that Deskin did not conspire with Nasby in order to increase his credibility in the eyes of the Jury. The Prosecutor then emphasized the point by telling the Jury, "they told the truth," (T.T. Vol. VI page 68; AA, Vol. 3, p. 650), and that Deskin's testimony corroborated all the other witnesses testimony. (T.T. Vol. VI, pages 64 and 68; AA, Vol. 3, p. 649, 650).

The Prosecutor here not only misstated the law, *U.S. v. Rodrigues*, 159 F.3d 439, 451 (9th Cir. 1998), but presented false testimony and conflicting theories of the case. *Thomas v. Calderon*, 120 F.3d at 1058-59. By prior Judicial Determination at Deskin's change of plea hearing, his testimony at Nasby's trial is necessarily false. *Nichols v. Collins*, 802 F.Supp. 66(S.D. Tex 1992). The Prosecutor's erroneous description of what constitutes Accessory to Commit Murder could have confused the Jury as to the elements of Conspiracy to Commit Murder, leading them to think they are identical crimes. Therefore, in the minds of the Jurors mere knowledge of the crime after the fact would have been the same thing as conspiracy.

Furthermore, the fact that the Prosecutor agreed to the scripted testimony of Jotee and Tommie Burnside explicitly violates N.R.S. 174.061, that provides in pertinent part: (2) A prosecuting attorney shall not enter into an agreement with a defendant which: (A) limits the testimony of the defendant to a predetermined formula. (B) Is contingent on the testimony of the defendant contributing to a specified conclusion. *Sheriff v. Acuna*, 819 P.2d at 200 (Nev. 1991).

It was obvious that the prosecutor asked Jotee and Tommie Burnside questions that allowed them to specifically avoid implicating Mr. Nasby. Yet, despite this scripted testimony, their testimony against Nasby was extremely damaging, considering the lack of other evidence against him.

G. The Prosecutor led Nasby to Believe that Mr. Von Lewis Would be a Prosecution Witness.

Nasby's conviction for Conspiracy to Commit Murder is also based on the inference that the Prosecutor had led Petitioner's Counsel to believe that Mr. Von Lewis would be called as a witness for the Prosecution and Nasby's trial Counsel believed it. Therefore, he did not include Von Lewis on the defense witness list. The State's Witness List had Mr. Von Lewis on it and an ID number, which appeared to indicate that he was incarcerated and that the Prosecutor's office knew Mr. Von Lewis' location. See States Witness List, AA, Vol. 1, p. 107-109; AA, Vol. 1, p. 113-115.

At trial, it became obvious that the State had no intention of calling Von Lewis as a witness. The reason remains unknown. Counsel for the defense attempted to ascertain the reason during cross-examination of Detectives Buczek and Thowsen. They both testified that they tried, but could not locate him. (T.T. Vol. IV pg. 15-17; AA, Vol. 3, p. 637-638).

Nasby asserts that the detectives and the State were disingenuous about not being able to locate Von Lewis, because he had been in their custody during Petitioner's trial. Had Von Lewis been produced for his trial, he could have impeached accomplices Jerimiah Deskin, Jotee and Tommie Burnside's testimony that he was not present during the commission of the crime as well as other hearsay testimony by Crystal Bradley and Tanesha Banks. Von Lewis could have also testified to the true ownership of the murder weapon and the nature of his relationships with the victim. For purposes of disclosure obligation under *Brady*, the prosecution was deemed to have

known the true identity of a third person who also a suspect in the case, and should have disclosed his prior conviction and fugitive status. This duty applies when this information was known by a Police detective, whether or not Prosecutor had actual knowledge of the fact. *Smith v. Secretary of New Mexico Dept. of Corrections*, 50 F.3d 801, 826-27 (10th Cir. 1995); *U.S. v Andrews* 824 F.Supp. 1273 (N.D.Ill.1993).

It is impermissible for governmental authorities knowing of crucial witness who might be helpful to defendant, to conceal a witness, *Delgado v. New York City Department of Corrections*, 842 F.Supp. 711, (SDNY 1993). Compulsory Process and Due Process Right are both implicated where actions of the Government prevent a defendant from obtaining potentially favorable evidence.

H. The State Violated Petitioner's Sixth Amendment Right to Counsel When They Placed a Jail House Informant in Close Proximity to Nasby in Order to Gain Incriminating Information Against Him.

The United States Supreme Court in *Massiah v. U.S.*, 84 S.Ct. 1199, (1964), stated that a Defendant's Fifth and Sixth Amendment rights were violated by the use of incriminating statements which he made to a co-defendant after their indictment for federal narcotics offenses and their release on bail. Also, the statements were made in the absence of defendant's retained counsel. The statements were overheard on a radio by a government agent without defendant's knowledge that the co-defendant had decided to cooperate with the government.

The Nevada Supreme Court addressed *Massiah* in *Coleman v. State*, 109 Nev. 1 (1993), which held that the trial court committed reversible error by admitting statements of an inmate who shared a cell with Defendant, in that the statement was obtained in violation of defendant's Sixth Amendment right to counsel.

While Nasby was housed at the Clark County Detention Center awaiting trial, he was approached by Mr. John R. Holmes, in approximately November of 1998. Mr. Holmes repeatedly asked Nasby questions about the charges pending against him. Specifically, he wanted to know if Nasby was guilty, indicating that rumors were circulating that he was. While Nasby had met Mr. Holmes before, he did not know him well enough to discuss legal strategies. Appellant never provided Mr. Holmes any information about his personal life or the alleged charge.

Despite providing Mr. Holmes no information about his legal charges, Mr. Holmes testified at trial that Nasby had confessed to him on approximately November 5, 1998. (T.T. Vol. V., pages 210-213; AA, Vol. 3, p. 573). Appellant asserts that Mr. Holmes was acting at the behest of the State when he attempted to interrogate the him at the Detention Center. During the trial, the Prosecutor was allowed to refer to a letter allegedly written by the Nasby to Mr. Holmes, which requested that Mr. Holmes intimidate several witnesses. The Prosecutor told the Jury that Nasby had given this letter to Mr. Holmes while confined at the Detention Center. (T.T. Vol II, Pg. 190).

Mr. Holmes alleged that Petitioner gave him a letter dated November 5, 1998 and that he decided to work with the State following that date. (T.T. Vol. II, Pgs. 20-21; AA., Vol. 2, p. 238). However, Mr. Holmes was working for the State prior to November 5, 1998. Mr. Holmes testified as follows:

Q: Okay. Now I want to see if I understand this; Prior to November 5 - - prior to getting this letter, (indicated) - - you agreed with police that you were going to work with them and they asked you, in fact, to work for them, correct?

A: They asked me can I get them information.

Q: Okay. So they asked you to go out and get them information?

A: Yes (T.T. Vol. II, Pg.23; AA, Vol. 2, p. 239).

Therefore, Mr. Holmes was working for the State before he even met the Petitioner in the Detention Center. Detective Buczek testified that he had been contacted by an unnamed officer, who told him Mr. Holmes could provide valuable information against Petitioner. He also testified that he went to visit Mr. Holmes despite the fact he considered the case solved. (T.T. Vol IV., Pgs. 164-165; AA, Vol. 3, p. 483).

Despite the secrecy and lack of details regarding the unnamed officers who visited Mr. Holmes at the Detention Center, the nature and extent of Mr. Holmes work with the State, both the trial court and the prosecutor were aware that Mr. Holmes was working as an agent of the State when he produced the letter allegedly written by the Petitioner. (T.T. Vol. II, Pgs. 19-21, and 25; AA., Vol. 2, p. 238, 239). The trial judge, however, did not immediately rule regarding the admissibility

of the letter. The result was the Prosecutor's taking advantage of the Court's misstep as he placed before the Jury information obtained in violation of Petitioner's Sixth Amendment Right to Counsel

The information obtained by Mr. Holmes, while acting as an agent for the State, was tantamount to a denial of Counsel during Mr. Holmes' interrogation of the Petitioner. Furthermore, the actions of the State amounted to prosecutorial misconduct, as the veracity of Mr. Holmes' statements were never called into question. See Correspondence Between Nasby And John Holmes' Girlfriend, AA, Vol. 1, 79-84. The State's actions in recruiting Mr. Holmes to elicit information from Petitioner denied Nasby both his Federal and State Constitutional Rights. *Thompson v. State*, 105 Nev. 151, 156, 771 P.2d 592, 596 (1989); *U.S. v. Henry*, 447 U.S. 264 (1980); and *Kuhlmann v. Wilson*, 477 U.S. 436 (1986).

Therefore, the State of Nevada, through Mr. Holmes, violated Petitioner's Sixth Amendment Right to Counsel, and Mr. Holmes should not have been allowed to testify at the Petitioner's trial that the Petitioner confessed to him. Further, this error was not harmless, as Holmes' testimony regarding a confession was perhaps the only direct evidence linking Nasby to the crime.

In *Nika v. State*, 120 Nev. 600 (2004), The Nevada Supreme Court stated that the Defendant must show that informant acted as agent of the state when he first gained incriminating testimony. In the case at hand, from the testimony of Mr. Holmes it is clear that he was working for the state prior to receiving the letter and the alleged admission.

II. THE COURT ERRONEOUSLY ALLOWED THE INTRODUCTION OF PRIOR BAD ACTS EVIDENCE AND FAILED TO PROPERLY INSTRUCT THE JURY ON MULTIPLE CRITICAL ISSUES IN VIOLATION OF THE FOURTH, FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

A. The Court erroneously delayed a ruling on a letter that showed evidence of prior bad acts

At the *Petrocelli* hearing, outside the presence of the jury, the Court was presented with a letter allegedly written by Nasby, which supposedly contained information about a confession and possible evidence of witness intimidation. Counsel for Nasby specifically requested that this proposed letter not be presented to the jury. The Trial Court delayed the decision on whether to admit the letter. The Prosecutor used the letter and referred to witness intimidation in his opening

statement. Later, the Trial Judge properly ruled that the same letter and evidence was inadmissible. At that point, the damage was done, the jury heard inadmissible evidence against the Petitioner. This was clearly error, and taken in the context of the whole trial, it cannot be harmless, because there was no curative instruction. *U.S. v. Taren Palma*, 997 F.2d 525, 532 (9th Cir. 1993).

B. The Court Erroneously Allowed the Introduction of Prior Bad Acts Evidence.

N.R.S. 48.045(2) in pertinent part; "Evidence of other crimes, wrongs or acts is NOT admissible as to character of person in order to show that he acted in conformity therewith." The Federal Rules are much the same. *See U.S. v. Schuler*, 813 F2d 978, 981-982 (9th Cir. 1987) and *Chapman v. California*, 386 U.S. 18, 24 (1967).

During the testimony of Brittany Adams, the Prosecutor elicited testimony from her of prior bad acts of Nasby that improperly placed Petitioner's character at issue, and since he did not testify, severely prejudiced him. (T.T. Vol. V. Pgs. 158-159; AA, Vol. 3, p. 560).

Brittany Adams testified as follows:

Q. Now you mentioned something about he wanted to kill her?

A. Yes.

Q. What exactly did he do or say to you?

A. Well, before we left, he offered me his gun, one of his guns to kill her.

Nasby's counsel finally objected, albeit too late, to this line of questioning and the Court gave a brief curative instruction, but did not explain why the testimony was to be stricken.

Immediately after the above testimony, the Prosecutor continued with Ms. Adams:

Q. On the way to the house of Tanesha Banks, did he offer anything to you?

A. Yes. He offered me a hammer.

A few moments later, the Prosecutor asked her what the hammer was for and Ms. Adams stated:

A. He said: You can just hit her between the eyes and kill her; just kill her.

(T.T. Vol. V. Pgs. 158-159; AA, Vol. 3, p. 560)

Detective Thowsen later testified that Nasby had tried to intimidate a witness, specifically, Tanesha Banks, but could not prove conclusively it was Petitioner who phoned in the alleged threats. (T.T. Vol. V., Pgs 254-262; AA, Vol. 3, p. 584-586)

The letter that Petitioner allegedly gave Mr. Holmes that revealed alleged prior bad acts, and which the State mentioned in their opening argument, was ruled inadmissible during the testimony of Ms. Adams. (T.T. Vol. V, Pg. 173; AA, Vol. 3, p. 563). Notwithstanding the ruling, the Prosecutor reinforced the same arguments of witness intimidation in his closing arguments. This was extremely prejudicial to Nasby. Ultimately, the letter was *never* provided as evidence to the jury. (T.T. Vol. VI, Pgs 35-36; AA., Vol. 3, p. 642).

By the time the Jury had heard all of the Petitioner's alleged, yet unproven, prior bad acts, his character was totally destroyed and the verdict inevitable. *U.S. v. Sanchez*, 176 F.3d 1214, 1221 (9th Cir. 1999). (Prosecutor's use of prior bad acts to impeach defendant's testimony was reversible error). Here, Petitioner did not testify, but the Prosecutor, contrary to law, launched a furious attack on his character anyway. *U.S. v. LeQuire*, 943 F.2d 1554, 1571 (11th Cir. 1991). (Prosecutor's elicitation of testimony on five occasions about previous convictions of defendant was reversible despite curative instruction). Prior bad acts and convictions are generally inadmissable because they refer to crimes that the Petitioner allegedly committed in the past. In an analogous situation to the letter of Mr. Holmes, in the case of *U.S. v. Spinner*, 152 F.3d 950, 960 - 962 (D.C. Cir. 1998), the Court ruled that the prosecutor's questioning of the defendant's girlfriend regarding a letter she sent to him indicating prior bad acts was reversible error, because the prosecutor emphasized the letter in his closing argument. The exact same thing happened here.

In the case at hand, the Prosecutor repeatedly mentioned Nasby's prior bad acts in opening and closing statements, as well as during trial. This constitutional violation clearly warrants a reversal of the Petitioner's convictions. U.S.C.A.Const.Amend. 4, 5, 14; Nevada Constitution.

III. INEFFECTIVE TRIAL AND APPELLATE COUNSEL VIOLATED NASBY'S SIXTH AMENDMENT RIGHT TO COUNSEL UNDER THE UNITED STATES CONSTITUTION

The Sixth Amendment guarantees the right to effective assistance of Counsel in a criminal proceeding. *Strickland v. Washington* 466 U.S. 668 (1984). The Supreme Court established a

two-prong test to evaluate ineffective assistance claims. To obtain reversal of conviction, Nasby must prove: (1) that Counsel's performance fell below an objective standard of reasonableness, and (2) that Counsel's deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome of the proceeding. Id. At 687.

Furthermore, Nasby must allege specific errors or omissions of Counsel to prove ineffective assistance of counsel. *U.S. v. Cronic*, 466 U.S. 648, 665 (1984). What follows is a catalog of Counsel's errors, and law that supports Petitioner's position, mandating reversal here:

A. At Trial Nasby's Counsel Failed to Call Any Witnesses

Nasby's defense was two-pronged, with each prong related. First, that someone else committed the crime and second, that an alibi existed. Petitioner's alibi defense was that a time line of his whereabouts whereas proves he could not have committed the crime charged.

At trial, Nasby's counsel failed to call a single witness; 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.

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 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.

B. Nasby's Counsel Failed to Call Key Witnesses to Rebut the State's Witnesses

Furthermore, Brittany Adams testified at Nasby's trial. She testified that he had engaged in witness intimidation of a witness, Tanesha Banks, at trial. (T.T. Vol. V pgs. 148-175, AA, Vol. 3, p. 557-564). Miss Adam's testimony also constituted improper admission of prior bad acts of Nasby, in violation of *Petrocelli*. *Petrocelli v. State*, 101 Nev. 46, 52, 692 P.2d 503, 508 (1985). The Court allowed her to testify to prior bad acts because it ruled that it was more probative than prejudicial and her version of events were unchallenged. *Lay v. State* 110 Nev. 1189, 1193, 886 P.2d 448 (1994). Defense counsel could have changed this ruling. Ms. Adam's testimony severely prejudiced Nasby at trial because it went directly to the question of guilt or innocence. Indeed, however, there was another witness to the events that Miss Adams described in her testimony. Her name is Porsche Nichols. She gave a statement contradicting ***everything*** Brittany Adams said. Miss Nichols essentially said no witness intimidation occurred at the behest of Nasby. Further, despite the fact that counsel was aware of Miss Nichols' statement, he failed to call her at the *Petrocelli* hearing and at trial. If he had called her at the *Petrocelli* Hearing, it is doubtful the Court would have let Miss Adams testify at Trial to witness intimidation, because it would have been in doubt whether Petitioner was the source of the intimidation. See *Lay v. State*, supra. If he had called her to Trial to rebut Miss Adams' testimony, it would have significantly changed the outcome of the proceedings. Miss Adams' unchallenged testimony was devastatingly prejudicial to Petitioner's defense.

Nasby's Counsel also failed to investigate the possibility of other witnesses to support the defense theory of the case. If he had, he would have located Madison Jones and Michelle McKinrion. At trial, Nasby's Counsel ultimately advanced a theory during cross-examination that Charles Von Lewis actually committed the crime for which Nasby is currently imprisoned. Mr. Jones and Miss McKinnon would have testified that they saw Mr. Von Lewis put a nine millimeter to Michael Beasley's head and threatened to kill him with the gun because he wanted to leave the gang. Michael

Beasley is the murder victim in Petitioner's case. Madison Jones and Michelle McKinnon could have provided the Jury with the reason, motive, and capacity in which Von Lewis could have committed the murder. Nasby located these witnesses by simple word of mouth, and told Counsel to interview them. Defense counsel did not, nor did he call them as witnesses. Instead, he chose to put on no defense at all. *Lord v. Wood* 184 F.3d 1083, 1093-96 (9th Cir. 1996) (Counsel's failure to investigate and introduce three possible witnesses was prejudicial because testimony was the only support for defendant's alibi); See also *Cronic*, supra.. Indeed, these witnesses were the only support for the defense theory that Mr. Von Lewis committed the crime.

Likewise, Nasby's counsel failed to call Crystal Sobrian and Colleen Warner who would have provided an alibi for Nasby on the evening of the murder. Crystal was also available to testify. See attached Affidavit.

C. Nasby's Counsel Had a Conflict of Interest Having Accepted Employment With the Public Defender's Office

The Public Defender's Office represented Nasby's co-defendants who testified against him. The Special Public Defender advised Nasby's co-defendants to testify against Petitioner and accept a plea-bargain in exchange for their testimony. Co-defendants Jotee and Tommie Burnside accepted and acted upon the Public Defender's advice.

At Nasby's sentencing, Mr. Sciscento advised the Court, albeit late, that there is a conflict of interest, because he works for the Public Defender, who represented Petitioner's co-defendants. On that basis he requested the Court allow him to withdraw from Petitioner's case, to relieve him of any obligation to assist in the preparation of Nasby's direct Appeal. The Court granted his request and appointed Frederick Santacroce to represent Petitioner on direct appeal.

Nasby asserts that Mr. Sciscento operated under a conflict of interest during his trial and labored under divided loyalty. *Paradis v. Arave*, 130 F.3d 385 (9th Cir. 1997). Mr. Sciscento's conflicting interests were: 1) protecting Nasby's co-defendants, who were represented by Mr. Sciscento's employer, and 2) representing Nasby. The co-defendants' interests were diametrically

opposed to Petitioners. Mr. Sciscento's actions prejudiced Petitioner at Trial, as Mr. Sciscento could not protect Petitioner's interests. In fact, Mr. Sciscento had an actual interest in seeing Petitioner convicted, because if Petitioner was found not guilty, additional charges could have been filed against his law firm's (the Public Defender's Office) other clients (Nasby's co-defendants). *Blankenship v. Johnson*, 118 F.3d 312, 318 (5th Cir. 1997); *U.S. v. Hall*, 200 F.3d 962, 966 (6th. Cir. 2000); *Stoia v. U.S.*, 22 F.3d 766, 769 (7th Cir. 1994); *U.S. v. Martin*, 965 F.2d 839, 842 (10th Cir. 1992).

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

Mr. Sciscento began Nasby's trial by joking about how long his sentence would be. (T.T. Vol.1 Pg. 132; 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, as well as 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 (3rd Cir. 1998). See also *Stoia*, supra. This was improper.

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.

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. Indeed, he was an eyewitness to the States' intimidation of a defense witness, and did not feel it was worthy to notify the Court.

E. Counsel for Nasby failed to Object Concerning the Accomplice Instruction and Many Other Times Throughout the Trial

Mr. Sciscento was further ineffective, possibly as a result of his attempt to protect his other clients, Tommie and Jotee Burnside, Petitioner's co-defendants. He did not object to the Court's failure to issue the mandatory cautionary accomplice instruction in order to insure that their testimony was credible. This likely carried significant weight with the Jury. Sciscento did not request the accomplice instruction either, even though he was aware that most of the witnesses against Petitioner were accomplices.

Mr. Sciscento, through his own inaction, allowed the Prosecutor to lead the Jury to believe that all testifying accomplices were only guilty of accessory to commit murder, and did not expose the fact that if that were true, the Petitioner could not have been guilty of conspiracy to commit murder, because he would have hand no one to conspire with. He also allowed the Prosecutor to continually vouch for co-defendants' credibility without objection. Both of these assignments of error occurred during direct examination and closing arguments.

Lastly, even when Mr. Sciscento won an issue, he refused to take advantage of the small victory. Mr. Sciscento was successful in preventing the admission of testimony in regards to witness intimidation, on the basis that it came in the form of a letter that the Prosecutor could not prove Petitioner authored. As discussed extensively, supra, the letter came from a Jailhouse informant who obtained it illegally at Police direction. According to the State, the letter was meant to intimidate potential witnesses for the State.

All the facts regarding how the informant received the letter and when he received it, the nature of its contents, and his connection with the Police were known the first day of trial. Yet, the Court did not make a ruling on its admissibility, allowing the Prosecutor to refer to it in his opening statement. When the Court finally did rule on its admissibility, it ruled in favor of Defense. However, the damage had been done. The Prosecutor advanced the idea that he only mentioned it in his opening because he thought it would be admissible. On what basis was never said, but the D.A. requested that Defense Counsel not be allowed to correct his error and Sciscento agreed. (T.T. Vol.V pgs. 198 and 199; AA, Vol. 3, p. 570).

Mr. Sciscento should have fought for the right to try to cure the error in closing argument or for the Court to issue a curative instruction, instructing the Jury to disregard the portion of the State's opening argument referring to the letter. Instead, the error went unchallenged and Sciscento sought a mistrial outside the presence of the Jury.

Mr. Sciscento was not functioning as an advocate. See *Cronic*, supra. Appellant Nasby submits that he has presented an obvious claim of conflict of interest. Further, Nasby has satisfied the standard of *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980), for showing a violation of the Sixth Amendment by factually demonstrating: (1) that defense Counsel was actively representing conflicting interest and (2) that the conflict had an adverse effect on specific instances of Counsel's performance. Id. at 348.

Nasby respectfully requests that the Court consider each of the individual allegations of ineffective assistance of Counsel listed above as part of the conflict of interest claim individually. Each of the instances of ineffectiveness of Counsel stated above can, on its own, constitute ineffective assistance of Counsel whether or not the Court agrees that there was a conflict of interest.

F. Counsel for Nasby Failed to Allow His Client To Testify Against the Petitioner's Desire.

Appellant Nasby wanted to testify in his own behalf in light of the fact that Defense Counsel did not intend to call any witnesses on Petitioner's behalf, but Counsel refused to let Petitioner testify without explaining why, except to say it's "general practice." Petitioner did not have anything to hide, nor did he have any felony conviction or any convictions at all at the trial. The Prosecutor trampled Petitioner's character during closing arguments and the presentation of the State's case. Petitioner was restrained by Counsel from rebutting this or telling his side of the story regarding his alibi, why and how he came to possess the murder weapon, etc. This is improper. *Gallego v. U.S.*, 174 F.3d 1196, 1197 (11th Cir. 1999) (Counsel's alleged refusal to allow defendant to testify, if proved, would fall outside range of reasonably effective assistance).

G. Counsel On Direct Appeal Was Similarly Ineffective.

Counsel on direct appeal was likewise ineffective for Failure to raise all the meritorious issues contained in ***this*** memorandum of Law. *U.S. v. Mannino*, 212 F.3d 835, 845 (3rd 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). 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 a fair trial. He received neither.

Respectfully submitted,

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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 22 day of November, 2006.

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CERTIFICATE OF MAILING

I hereby certify that on the 22nd day of November, 2006, 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:

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