



**CLARK COUNTY COURTS
EIGHTH JUDICIAL DISTRICT COURT
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June 29, 2011

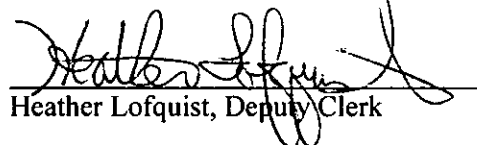
Tracie Lindeman
Clerk of the Supreme Court
201 South Carson Street, Suite 201
Carson City, Nevada 89701-4702

RE: STATE OF NEVADA vs. BRENDAN NASBY
S.C. CASE: 58579
D.C. CASE: C154293-2

Dear Ms. Lindeman:

Pursuant to your Notice to Transmit Required Document, dated June 22, 2011, enclosed is a certified copy of the Findings of Fact, Conclusions of Law and Order filed June 17, 2011 in the above referenced case. If you have any questions regarding this matter, please do not hesitate to contact me at (702) 671-0512.

Sincerely,
STEVEN D. GRIERSON, CLERK OF THE COURT


Heather Lofquist, Deputy Clerk

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Ann L. Smith
CLERK OF THE COURT

98C154293-2
FCL
Finding of Fact and Conclusions of Law
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1 **ORDR**
2 **DAVID ROGER**
3 **Clark County District Attorney**
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11 **Attorney for Plaintiff**

DISTRICT COURT
CLARK COUNTY, NEVADA

12 **THE STATE OF NEVADA,**

13 **Plaintiff,**

14 **-vs-**

15 **BRENDAN NASBY,**
16 **#1517690**

17 **Defendant.**

CASE NO: 98C154293-2

DEPT NO: XVIII

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER

DATE OF HEARING: May 11, 2011
TIME OF HEARING: 8:15 A.M.

18 THIS CAUSE having come on for hearing before the Honorable Douglas E. Smith,
19 District Judge, on the 11th day of May, 2011, the Petitioner nor defense counsel, Anthony P.
20 Sgro, being present, the Respondent being represented by DAVID ROGER, District
21 Attorney, by and through JAY RAMAN, Deputy District Attorney, the Court having
22 considered the matter, including briefs, transcripts, no argument, and documents on file
23 herein, now therefore, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

- 24
- 25 1. The State charged Brendan Nasby ("Defendant") by way of Information with
- 26 Count 1 - Conspiracy to Commit Murder (Felony - NRS 199.480, 200.010,
- 27 200.030) and Count 2 - Murder With Use of a Deadly Weapon (Open
- 28 Murder)(Felony - NRS 200.010, 200.030, 193.165).

CLERK OF THE COURT

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2. A jury trial commenced on October 11, 1999. On October 19, 1999, the jury returned with a verdict of guilty on both counts.
3. On November 29, 1999, Defendant was sentenced as to Count 1 – to a maximum of one hundred twenty (120) months, with a minimum parole eligibility of forty-eight (48) months in the Nevada Department of Corrections (“NDC”); as to Count 2 – to Life with the possibility of parole with a consecutive term of Life with the possibility of parole.
4. Judgment of Conviction was entered on December 2, 1999.
5. Defendant filed a Notice of Appeal on December 14, 1999. The Nevada Supreme Court affirmed Defendant’s conviction on February 7, 2001. Remittitur was issued on March 6, 2001.
6. On February 1, 2002, Defendant filed a pro per Petition for Writ of Habeas Corpus (post-conviction). The State filed a Response on April 5, 2002. This matter was never litigated.
7. On March 1, 2004, the district court set a new briefing schedule. Defendant filed his Petition on November 17, 2004. On February 4, 2004, the State filed its Opposition to Defendant’s Petition.
8. On November 9, 2005, an Evidentiary Hearing was held.
9. On March 27, 2006, the court denied Defendant’s Petition.
10. Defendant filed a Notice of Appeal on April 12, 2006.
11. The district court filed its Notice of Entry of Decision and Order on April 27, 2006.
12. On May 24, 2006, Defendant filed a second Notice of Appeal. On June 8, 2007, the Nevada Supreme Court affirmed the district court’s denial of Defendant’s Petition. Remittitur was issued on July 13, 2007.
13. Defendant filed a Second Petition for Writ of Habeas Corpus on February 18, 2011. The State filed a Response and Motion to Dismiss Defendant’s Second Petition on April 8, 2011.

1 14. Defendant's Petition is procedurally time barred.

2 15. Defendant's Petition is successive.

3 16. Defendant failed to establish good cause for the delay in filing his post conviction
4 petition.

5 17. The State has pled laches and Defendant has not overcome the statutory
6 presumption that his delay of more than five years in filing the instant Petition
7 has prejudiced the State.

8 **CONCLUSIONS OF LAW**

- 9 1. NRS 34.726(1) states that "unless there is good cause shown for delay, a petition that
10 challenges the validity of a judgment or sentence *must* be filed within one (1) year
11 after entry of the judgment of conviction or, if an appeal has been taken from the
12 judgment, within one (1) year after the Supreme Court issues its remittitur."
13 (Emphasis added).
- 14 2. "NRS 34.726(1) . . . evinces intolerance toward perpetual filing of petitions for relief,
15 which clogs the court system and undermines the finality of convictions." Pellegrini
16 v. State, 117 Nev. 860, 875, 34 P.3d 519, 529 (2001).
- 17 3. The "[a]pplication of the statutory procedural default rules to post-conviction habeas
18 petitions is mandatory." State v. District Court (Riker), 121 Nev. 225, 331 112 P.3d
19 1070, 1074 (2005). Primarily, because the excessive number of habeas corpus
20 petitions that are filed years after conviction have placed an "unreasonable burden on
21 the criminal justice system." Id.
- 22 4. The Nevada Supreme Court interprets NRS 34.726 very strictly. In Gonzales v. State,
23 118 Nev. 590, 53 P.3d 901, 902 (2002), the Nevada Supreme Court rejected a habeas
24 petition, pursuant to the mandatory provisions of NRS 34.726(1), that was filed a
25 mere two days late.
- 26 5. NRS 34.810(2) provides as follows: "A second or successive petition must be
27 dismissed if the judge or justice determines that it fails to allege new or different
28 grounds for relief and that the prior determination was on the merits or, if new and

- different grounds are alleged, the judge or justice finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.”
6. As the Nevada Supreme Court noted in Evans v. State, 117 Nev. 609, 621-22, 29 P.3d 498, 507 (2001), “[a] court must dismiss a habeas petition if it presents claims that either were or could have been presented in an earlier proceeding, unless the court finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner.” Lozada v. State, 110 Nev. 349, 358, 871 P.2d 944, 950 (1994); Pellegrini, 117 Nev. 860, 34 P.3d 519.
 7. The Court went on to hold that “post-conviction habeas claims that are independent of ineffective assistance claims and that could have been raised on direct appeal are waived.” Evans, 117 Nev. at 621-22, 29 P.3d at 507.
 8. In addition, meritless, successive and untimely petitions clog the court system and undermine the finality of convictions. Lozada, 110 Nev. at 358, 871 P.2d at 950; Dickerson v. State, 114 Nev. 1084, 967 P.2d 1132 (1998).
 9. The Nevada Supreme Court has also stated, “[u]nlike initial petitions which certainly require a careful review of the record, successive petitions may be dismissed based solely on the face of the petition.” Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995).
 10. To establish good cause to cure procedural default, a defendant must demonstrate some external impediment that prevented compliance with procedural rules. Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) citing Pellegrini v. State, 117 Nev. 860, 886-87, 34 P.3d 519, 537 (2001); Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994).
 11. Such an external impediment could be “that the factual or legal basis for a claim was not reasonably available to counsel, or that ‘some interference by officials’ made compliance impracticable.” Hathaway, 119 Nev. at 252, 71 P.3d at 506; *quoting* Murray v. Carrier, 477 U.S. 478, 488, 106 S.Ct. 2639, 2645 (1986).
 12. The failure of counsel to inform the petitioner of his right to direct appeal, however,

1 does not rise to good cause for overcoming the time bar. Dickerson v. State, 114 Nev.
2 1084, 976 P.2d 1132 (1998).

3 13. Any delay in the filing of a petition must not be the fault of the petitioner. NRS
4 34.726(1)(a).

5 14. Lack of adequate legal resources in prison is not good cause to overcome procedural
6 bars. Phelps v. Director, Prisons, 104 Nev. 656, 660, 764 P.2d 1303, 1306 (1988).

7 15. Return from federal court to exhaust state remedies is not good cause to overcome
8 state procedural bars. Shumway v. Payne, 223 F.3d 982 (9th Cir. 2000).

9 16. NRS 34.800 creates a rebuttable presumption of prejudice to the State if "[a] period
10 exceeding five years [elapses] between the filing of a judgment of conviction, an
11 order imposing a sentence of imprisonment or a decision on direct appeal of a
12 judgment of conviction and the filing of a petition challenging the validity of a
13 judgment of conviction..."

14 17. The Nevada Supreme Court observed in Groesbeck v. Warden, 100 Nev. 259, 679
15 P.2d 1268 (1984), that "petitions [] filed many years after conviction are an
16 unreasonable burden on the criminal justice system. The necessity for a workable
17 system dictates that there must exist a time when a criminal conviction is final."

18 ORDER

19 THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction
20 Relief shall be, and it is, hereby DENIED.

21 DATED this 16th day of June, 2011.

22
23 DISTRICT JUDGE *DS*

24 DAVID ROGER
25 DISTRICT ATTORNEY
26 Nevada Bar #002781

27 BY Pamela Weckerly
28 PAMELA WECKERLY
Deputy District Attorney
Nevada Bar #006163

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DOCUMENT ATTACHED IS A
TRUE AND CORRECT COPY
OF THE ORIGINAL ON FILE

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Steven J. Blum
CLERK OF THE COURT
JUN 29 2011