



**EIGHTH JUDICIAL DISTRICT COURT
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Tracie K. Lindeman
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Court Division Administrator

March 31, 2015

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

RE: STATE OF NEVADA vs. BRENDAN J. NASBY
S.C. CASE: 67580
D.C. CASE: C154293-2

Dear Ms. Lindeman:

Pursuant to your Order Directing Entry and Transmission of Written Order, dated March 24, 2015, enclosed is a certified copy of the Findings of Fact, Conclusions of Law and Order filed March 30, 2015 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

A handwritten signature in black ink, appearing to read "Heather Ungermann", with a long horizontal flourish extending to the right.

Heather Ungermann, Deputy Clerk


CLERK OF THE COURT

FCL
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
CHRISTOPHER BURTON
Deputy District Attorney
Nevada Bar #012940
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,

-vs-

BRENDAN JAMES NASBY,
#1517690

Defendant.

CASE NO: 98C154293-2

DEPT NO: XIX

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER

DATE OF HEARING: FEBRUARY 25, 2015
TIME OF HEARING: 8:30 AM

THIS CAUSE having come on for hearing before the Honorable WILLIAM KEPHART, District Judge, on the 25th day of February, 2015, the Defendant not being present, PROCEEDING IN FORMA PAUPERIS, the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through CHRISTOPHER BURTON, Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT, CONCLUSIONS OF LAW

This is Defendant BRENDAN JAMES NASBY's third post-conviction petition for writ of habeas corpus. Nasby was charged by way of Information on November 9, 1998, with Conspiracy to Commit Murder and Murder with use of a Deadly Weapon. On October 19,

1 1999, the jury returned a verdict of guilty on both counts. On November 29, 1999, Nasby was
2 sentenced to 48 to 120 months in the Nevada Department of Corrections (NDC) for conspiracy
3 to commit murder and to Life for first-degree murder, plus an equal and consecutive term for
4 the use of a deadly weapon. Nasby's Judgment of Conviction was filed on December 2, 1999.
5 Nasby filed a notice of appeal on December 14, 1999, with the Nevada Supreme Court
6 affirming Nasby's conviction on February 7, 2001. See Nasby v. State, No. 35319, Order of
7 Affirmance (Feb. 7, 2001). Remittitur issued on March 6, 2001.

8 Nasby filed his first post-conviction petition for writ of habeas corpus on January 30,
9 2002. The district court denied Nasby's petition on March 27, 2006, and the Nevada Supreme
10 Court affirmed the district court's denial of the petition on June 28, 2007. See Nasby v. State,
11 No. 47130, Order of Affirmance (June 28, 2007). Remittitur issued on July 13, 2007.

12 Nasby filed his second post-conviction petition for writ of habeas corpus on February
13 18, 2011. The district court denied Nasby's petition as procedurally barred on May 11, 2011,
14 and the Nevada Supreme Court affirmed the denial of the petition on February 8, 2012. Nasby
15 v. State, No. 58579, Order of Affirmance (Feb. 8, 2012). Remittitur issued on March 5, 2012
16 On December 9, 2014, Nasby filed the instant post-conviction petition for writ of habeas with
17 this Court, his third attempt at post-conviction relief. The State moved to dismiss the petition
18 as procedurally barred on February 4, 2015.

19 This Court finds Nasby's petition is time-barred pursuant to NRS 34.726(1). A petition
20 that challenges the validity of a judgment or sentence must be filed within one (1) year of entry
21 of judgment of conviction or within one (1) year after the Nevada Supreme Court issues
22 remittitur from a direct appeal. NRS 34.726(1); Dickerson v. State, 114 Nev. 1084, 1087, 967
23 P.2d 1132, 1133-34 (1998); see Gonzales v. State, 118 Nev. 590, 53 P.3d 901 (2002) (the one-
24 year time limit for preparing petitions for post-conviction relief under NRS 34.726 is strictly
25 applied). Here, Remittitur following Nasby's direct appeal was issued on March 6, 2001.
26 Therefore, Nasby had until March 6, 2002, to file a timely petition. The instant petition was
27 not filed until December 9, 2014. Thus, Nasby's petition is dismissed as untimely pursuant to
28 NRS 34.726(1).

1 This is also Nasby's third attempt at post-conviction relief. A second or successive
2 petition must be dismissed if it fails to allege new or different grounds for relief or if failing to
3 bring those grounds in a previous petition constitutes an abuse of the writ. NRS 34.810(2).
4 Indeed, "[w]ithout such limitations on the availability of post-conviction remedies, prisoners
5 could petition for relief in perpetuity and thus abuse post-conviction remedies. In addition,
6 meritless, successive and untimely petitions clog the court system and undermine the finality
7 of convictions." Lozada v. State, 110 Nev. 349, 358, 871 P.2d 944, 950 (1994). Nasby filed
8 his first petition on January 30, 2002, which was denied on March 27, 2006, and affirmed by
9 the Nevada Supreme Court on June 18, 2007. Nasby, No. 47130. Thus, this Court finds
10 Nasby's petition is successive and must be dismissed pursuant to NRS 34.810(2).

11 This Court also finds Nasby has failed to demonstrate good cause and actual innocence
12 to overcome the mandatory procedural bars. To show good cause, a petitioner must
13 demonstrate to this Court that the delay was not his fault, and that the petitioner would be
14 unduly prejudiced if the petition was dismissed as untimely. NRS 34.726(1). A petitioner
15 must establish an impediment external to the defense that prevented timely filing. Hathaway,
16 119 Nev. at 252, 71 P.3d at 506. Moreover, this Court may excuse a failure to show cause
17 when prejudice for failing to consider the claim would amount to a fundamental miscarriage
18 of justice. Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996); see Pellegrini,
19 117 Nev. at 887, 34 P.3d at 537 (petitioner must make a colorable showing that he is actually
20 innocent of the crime committed and demonstrate that it was more likely than not that no
21 reasonable juror would have convicted him absent a constitutional violation).

22 As grounds for good cause, Nasby presents this Court with a letter from his appellate
23 attorney in order to demonstrate that he had absolutely no control over his direct appeal and
24 that his counsel failed to raise a number of claims that he wanted raised on appeal.
25 Nonetheless, Nasby fails to provide this Court with an impediment external to his defense.
26 Indeed, Defendant was aware of the claims raised, and claims that were not raised, in his direct
27 appeal as early as the filing of his first petition. Nasby even claimed appellate counsel was
28 ineffective for failing to raise all meritorious claims in his first petition. The Nevada Supreme

1 Court rejected Defendant's claims for failing to provide any cogent argument or legal authority
2 for how appellate counsel's performance was deficient and prejudiced him. Nasby, 47130 at
3 8. Simply put, Nasby has been litigating ineffective assistance of counsel claims for the last
4 ten years. A letter merely establishing a preliminary communication between him and his
5 attorney does not constitute good cause, even if this Court is to accept the claim that Nasby
6 only now discovered this letter.¹

7 To the extent Nasby claims actual innocence, this Court is without jurisdiction to
8 entertain the claims. In affirming the denial of Nasby's first post-conviction petition, the
9 Nevada Supreme Court rejected many of the claims now raised. "The law of a first appeal is
10 law of the case on all subsequent appeals in which the facts are substantially the same." Hall
11 v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975), quoting Walker v. State, 85 Nev. 337,
12 343, 455 P.2d 34, 38 (1969). "The doctrine of the law of the case cannot be avoided by a more
13 detailed and precisely focused argument subsequently made after reflection upon the previous
14 proceedings." Hall, 91 Nev. at 316, 535 P.2d at 799. Under the law of the case doctrine, issues
15 previously decided on direct appeal may not be reargued in a habeas petition. Pellegrini v.
16 State, 117 Nev. 860, 888, 34 P.3d 519, 538 (2001).

17 Lastly, the State affirmatively pleaded laches pursuant to NRS 34.800 in the instant
18 matter. NRS 34.800 creates a rebuttable presumption of prejudice to the State if "[a] period
19 exceeding five years [elapses] between the filing of a judgment of conviction, an order
20 imposing a sentence of imprisonment or a decision on direct appeal of a judgment of
21 conviction and the filing of a petition challenging the validity of a judgment of conviction..."
22 This Court finds Nasby has failed to overcome the presumption of prejudice to the State and
23 thus his petition is dismissed pursuant to NRS 34.800.

24 //

25 //

26
27 ¹ To the extent Nasby relies on Martinez v. Ryan, 132 S.Ct. 1309 (2012), to establish good cause, this Court finds his reliance misplaced.
28 The Nevada Supreme Court has held that Martinez does not apply to Nevada's statutory post-conviction procedures. See Brown v.
McDaniel, 331 P.3d 867 (Adv. Op. No. 60 2014).

1 ORDER

2 THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief
3 shall be, and it is, hereby denied.

4 DATED this 23rd day of March, 2015.

5 Will Kyte
6 DISTRICT JUDGE
7 

8 STEVEN B. WOLFSON
9 Clark County District Attorney
Nevada Bar #001565

10 BY  For

11 CHRISTOPHER BURTON
12 Deputy District Attorney
Nevada Bar #012940

13 CERTIFICATE OF SERVICE

14 I certify that on the 18th day of March, 2015, I mailed a copy of the foregoing proposed
15 Findings of Fact, Conclusions of Law, and Order to:

16 BRENDAN JAMES NASBY #63618
17 LOVELOCK CORRECTIONAL CENTER
18 1200 PRISON ROAD
19 LOVELOCK, NV 89419

20 BY 

21 R. JOHNSON
22 Secretary for the District Attorney's Office

23
24
25
26
27
28 WR/CB/rj/M-1



Clerk of the Courts
Steven D. Grierson

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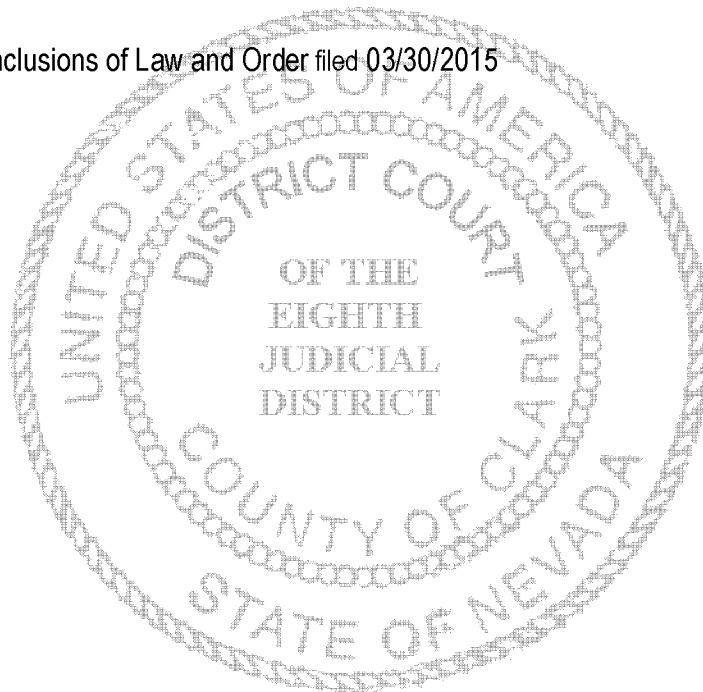
March 31, 2015

Case No.: C154293-2

CERTIFICATION OF COPY

Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, does hereby certify that the foregoing is a true, full, and correct copy of the hereinafter stated original document(s):

Findings of Fact, Conclusions of Law and Order filed 03/30/2015



now on file and of

In witness whereof, I have hereunto set my hand and affixed the seal of the Eighth Judicial District Court at my office, Las Vegas, Nevada, at 2:57 PM on March 31, 2015.


STEVEN D. GRIERSON, CLERK OF THE COURT