

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

Brendan James Nasby,

Appellant,

vs.

The State Of Nevada,

Respondent.

Sup. Ct. No. 70626

Dist. Ct. No. 98C154293-2

FILED

DEC 23 2016

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APPELLANT'S OPENING BRIEF

BRENDAN JAMES NASBY

I.D. NO. 63618

LOVELOCK CORRECTIONAL CENTER

1200 PRISON ROAD

LOVELOCK, NEVADA 89419

(APPELLANT IN PRO SE)

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JURISDICTION.

The Supreme Court has appellate jurisdiction over final orders or judgments in the district courts.

On April 4, 2016, the 8th Jud. Dist. Ct. denied Appellant's 4th Post-Conviction Petition for Writ of Habeas Corpus. An Order to that effect was filed on May 9, 2016. The Clerk of the Court entered the "final order" on May 13, 2016. On, or about, June 9, 2016, Appellant filed his Notice of Appeal. The court clerk filed the case appeal statement on June 15, 2016. On June 22, 2016, the Clerk of the Supreme Court filed Appellant's Notice of Appeal.

Appellant asserts that this appeal is from a final order or judgment denying his Petition for Writ of Habeas Corpus and denying his Motion for Appointment of Counsel, which are both in the same Order/Judgment. This Court's Order Directing Transmission of Record was filed on August 30, 2016.

STATEMENT OF PRESUMPTIVE ASSIGNMENT UNDER NRAP 17.

This matter is presumptively retained by the Supreme Court under NRAP 17(a)(13); NRAP 17(a)(14); NRAP 17(b)(1) as this matter involves a conviction for a Category A felony.

ISSUES PRESENTED.

Issue One: The 8th Judicial District Court Lacked Jurisdiction And Authority.

Issue Two: Nasby's Due Process Rights Were Violated Because The Change In Law Announced In Byford v. State, Was Not Applied To His Case On Direct Review, And He Is Actually Innocent Of 1st Degree Murder.

Issue Three: Nasby Is Being, And Has Been, Denied Meaningful Access To The Court.

Issue Four: The District Court Abused Its Discretion And Errored In Not Appointing Counsel, And For Failing To Address And Grant Nasby's Motion To Extend Prison Copy-work Limit.

Issue Five: The District Court Abused Its Discretion And Erroneously Denied Nasby's 59(e) Motion.

I. STATEMENT OF THE CASE.

On August 11, 1998, Appellant, Brendan Nasby (hereinafter, "Nasby") was charged by Criminal Complaint with Conspiracy to Commit Murder and Murder with use of a Deadly Weapon. Case No. C154293. Nasby, represented by counsels "Joseph S. Sciscento" and "Frederick A. Santacroce", proceeded to trial. After a trial by jury in the 8th Jud. Dist. Ct., which began on October 13, 1999, Nasby was found guilty of Conspiracy to Commit Murder and First Degree Murder with use of a Deadly Weapon. 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 Murder, and one life sentence with the possibility of parole for Count II - Murder with use of a deadly weapon, plus an equal and consecutive term of life with the possibility of parole for the use of a deadly weapon. The Judgment of Conviction was filed on December 2, 1999. Nasby appealed to this Court, which upheld his sentence and conviction in an affirming opinion filed on February 7, 2001. Sup. Ct. No. 35319. On January 30, 2002, Nasby filed a petition for writ of habeas corpus (post-conviction) with the 8th Jud. Dist. Ct. On February 2, 2004, the 8th Jud. Dist. Ct. appointed "Anthony Sgro" to represent Nasby. After an evidentiary hearing, and further argument, the district court denied Nasby's petition on March 27, 2006. Nasby appealed the denial of his petition. Sup. Ct. No. 47130. This Court upheld the lower court's denial on June 18, 2007. On August 14, 2007, Nasby filed a Federal Petition for Writ of Habeas Corpus (2254) in the U.S. Dist. Ct., Dist. of Nev. Fed. Dist. Ct. No. 3:07-cv-00304-LRH. On May 13, 2011, the Federal district court granted Nasby a stay so that he could return to State Court to exhaust unexhausted claims. Nasby filed a 2nd post-conviction petition in the 8th Jud. Dist. Ct. on February 15, 2011. Case No. C154293-2. On June 17, 2011, the court denied Nasby's 2nd petition. On February 8, 2012, this Court affirmed the denial of Nasby's 2nd petition. Sup. Ct. No. 53579. On November 7, 2014, the Federal district court entered an order denying Nasby's federal petition. On November 21, 2014, Nasby filed a notice of appeal in the federal court, 9th Cir. No. 14-17313. On December 9, 2014, Nasby filed his third post-conviction petition in the 8th Jud. Dist. Ct. Case No. 98C154293-2. On March 30, 2015, the district court denied Nasby's

1 3rd petition. Nasby appealed the denial of his 3rd petition on March 17, 2015. On Sept-
2 ember 11, 2015, this Court affirmed the denial of Nasby's 3rd petition. Sup. Ct. No. 67580.
3 On October 30, 2015, the 9th Circuit granted Nasby's Application for a Certificate of App-
4 ealability on several issues, among other things. On January 5, 2016, Nasby filed his 4th,
5 and instant, post-conviction petition. Nasby also filed a Motion for Appointment of Coun-
6 sel, a Motion to Extend Prison Copywork Limit, a Memorandum of Points and Authorities
7 in Support of Petition for Writ of Habeas Corpus, an Affidavit in Support of Petition for
8 Writ of Habeas Corpus, a Supplemental Memorandum of Points and Authorities, and a Not-
9 ice to the Clerk, Court, and all interested parties. On February 23, 2016, the state filed a
10 response to Nasby's 4th petition. Nasby filed a Reply on March 10, 2016. On April 4, 2016, the
11 court denied the petition. The district court filed a Finding of Facts, Conclusions of Law
12 and Order on May 9, 2016, reflecting its oral pronouncement. The Clerk entered the
13 final Order on May 13, 2016. On May 16, 2016, Nasby filed a Motion to Alter or
14 Amend Judgment N.R. Civ.P. 59(e). The state filed its response to Nasby's 59(e) motion
15 on June 2, 2016. On June 8, 2016, the district court denied Nasby's 59(e) motion. On,
16 or about, June 9, 2016, Nasby filed his Notice of Appeal. The Court Clerk filed the Case
17 Appeal Statement on June 15, 2016. The Clerk of the Supreme Court filed Nasby's Notice
18 of Appeal on June 22, 2016. On June 30, 2016, the district court filed its order
19 denying Nasby's 59(e) Motion. On August 30, 2016, this Court filed its Order
20 Directing Transmission of Record. What followed is the instant Opening Appeal
21 Brief.

22 II. STATEMENT OF FACTS.

23 A. Overview.

24 At Nasby's trial, one of Nasby's co-defendants, Jeremiah Deskin (hereinafter "Deskin"), testified
25 that on the night of July 16, 1998, around 10:00 PM, Nasby, Deskin, Tommie Burnside, and Jatee
26 Burnside, all members of the LA Crazy Rider gang, were at Nasby's home. Deskin, Jatee
27 Burnside, and Tommie Burnside drove to Michael Beasley's home at approximately
28 10:00 PM. Michael Beasley (hereinafter, "Beasley") also a member of the LA Crazy

1 Rider gang, would ultimately be shot and killed in the desert that night. Deskin and
2 the Burnside Brothers, found Beasley at his home. Deskin and the Burnside lured
3 Beasley to go shoot a new gun and smoke marijuana. Deskin testified that after
4 picking up Beasley, the four men drove back to Nasby's home and picked Nasby
5 up, before they all drove out to the desert. (T.T. Vol. III, pg. 94, lines 8-11). Deskin
6 testified that, once the group arrived at the desert, he saw Nasby shoot Beasley.
7 (T.T. Vol. III, pg. 101, lines 19-20). Deskin then testified that after the shooting, he,
8 the Burnside, and Nasby drove back to Nasby's home. (T.T. Vol. III, pg. 104,
9 lines 2-5). Nasby has always maintained that he was not in the desert and
10 that he was not involved in the murder.

11 Police interviewed Jotee Burnside and Tommie Burnside, who both told police that the
12 shooter was Damien Von Lewis aka "Sugar bear." Charles Damien Von Lewis was also
13 a member of the LA Crazy Riders. (T.T. Vol. I, pg. 109, line 3; pg. 110, line 17; pg. 128, lines
14 2-8). After hearing about the statement Deskin gave and the plea deal he received,
15 the Burnside then negotiated deals with the State, changed their statements, and
16 implicated Nasby in the shooting. On July 22, 2000, the Burnside both signed
17 affidavits stating that their testimony at Nasby's trial was given under duress. See:
18 (Affidavits of Tommie & Jotee Burnside, attached to Nasby's initial prose 2002
19 petition). At trial, both Burnside testified that they did not know Beasley would
20 be killed in the desert that night. (T.T. Vol. I, pg. 86-141).

21 On August 4, 1998, the police executed a search warrant on Nasby's residence. (T.T. Vol. IV,
22 pg. 48, lines 14-21). Nasby was arrested at that time. At the time of Nasby's trial,
23 the law announced in Kazalyn v. State, 108 Nev. 67, 75, 82 P.2d 573, 583 (1992), applied
24 to 1st degree murder cases. Kazalyn, as applied, only required that premeditation
25 be proven, while deliberation and willfulness automatically inferred.

26 In Nasby's trial, no references to his state of mind were made, no testimony regarding
27 deliberation was presented, and no arguments of deliberation were ever made by the
28 State. In instructing the jury on premeditation at Nasby's trial, the court used the

1 Kazalyn instruction (Kazalyn, supra). See - (Jury Instruction No. 12). Defense
2 counsel objected to this instruction, instead offering, Defense "A". (J.T. Vol. VI, pg 3).
3 The court rejected Defense "A". (J.T. Vol. VI, pg 5). The jury was also given an
4 instruction for 2nd degree murder, which stated that, "all murder that is not first
5 degree, is Second Degree." See - (Jury Instruction No. 18).

6 B. The Verdict.

7 The jury ultimately concluded Nasby was guilty of Conspiracy to Commit Murder, and
8 1st degree Murder with the use of a deadly weapon.

9 C. Direct Appeal.

10 Nasby appealed his conviction to this Court. Before Nasby's Opening Brief was filed,
11 this Court decided Byford v. State, 994 P.2d 700, 116 Nev. 215 (2000). In Byford, 116

12 Nev. 215 at 235-36, this Court said: "In sum, the Kazalyn instruction and Powell and its
13 progeny do not do full justice to the phrase "willful, deliberate, and premeditated."
14 Deliberation remains a critical element of the mens rea necessary for first-degree
15 murder, connoting a dispassionate weighing process and consideration of consequences
16 before acting." In order to establish first-degree murder, the premeditated killing must also have been done deliberately, that is, with coolness
17 and reflection." Brown, 436 S.W.2d at 539; see also LaFare & Scott, Criminal Law
18 §7.7(a), at 643.

16 Because deliberation is a distinct element of mens rea for first-degree murder, we
17 direct the district courts to cease instructing juries that a killing resulting
18 from premeditation is "willful, deliberate, and premeditated murder." Further, if
19 a jury is instructed separately on the meaning of premeditation, it should also be
20 instructed on the meaning of deliberation."

19 In Nasby's Opening Brief, on direct appeal, Nasby raised the claim that, "The Court
20 Failed To Instruct The Jury On Willfulness, Deliberation, and Premeditation. (Instr. 12)".

21 In this claim, Nasby argued that the decision in Byford applied to his case. In response to

22 this claim, this Court said: "Finally, Nasby asserts that the trial court erroneously used
23 instructions similar to those used in Kazalyn v. State, 108 Nev. 67, 75-76, 825
24 P.2d 578, 583-84 (1992), rather than the instructions adopted by this court in
25 Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000).

24 This court, in Byford, considered the Kazalyn instruction and set forth more
25 preferable instructions for future cases. In Bridges v. State, 116 Nev. —, 6
26 P.3d 1000 (2000), this court held that, because Bridges was tried prior to the Byford decision, additional instruction pursuant to Byford was not required. Furthermore, in
27 Garner v. State, 116 Nev. —, 6 P.3d 1013 (2000), this court held that "with convictions pre-
28 dating Byford, neither the use of the Kazalyn instruction nor the failure to give
instructions equivalent to those set forth in Byford provides grounds for relief."
116 Nev. at —, 6 P.3d at 1025.

Nasby's argument is without merit. Nasby was tried prior to the decision in

1 Byford. As such, the Byford instructions were not required and the instructions that
2 were given were sufficient."

3 Nasby v. State, Docket No. 35319 (Order of Affirmance, Feb. 7, 2001, pg. 6-7).

4 D. Previous Post-Conviction Relief And Pertinent Supreme Court Rulings.

5 On January 30, 2002, Nasby filed a petition for writ of habeas corpus (post-convict-
6 ion) with the 8th Ind. Dist. Ct. Ground 3 of that petition was: "Petitioner's Right To
7 Due Process Under The U.S. Constitution Was Violated When The Court Failed To Instr-
8 uct The Jury On Willfulness, Deliberation, and Premeditation (Instr. 12)." The dist-

9 rict court dismissed this claim, per the law of the case doctrine, and denied the pet-
10 ition on March 27, 2006. An order to that effect was filed on, or about, April 26, 2006.

11 Nasby appealed the denial of the petition to this Court. This Court upheld the denial on
12 June 18, 2007. See - (Nasby v. State, Docket No. 47130).

13 This Court, in Nika v. State, 134 Nev. 1272, 118 P3d 939 (2008), said that Byford ann-
14 ounced a change of law, that the change applies to cases that were not ~~not~~ final when
15 Byford was decided as a matter of due process, that the Court erred in Garner v.
16 State, and overruled Garner to the extent that Garner declined to apply Byford to
17 cases pending on direct appeal.

18 After being granted a stay of proceedings in Nasby's federal habeas action, Nasby
19 filed a 2nd post-conviction habeas petition, in the 8th Ind. Dist. Ct. on February 18,
20 2011, in which, Nasby's Ground 4 was: "The Trial Court Failed To Instruct The Jury On
21 Willfulness, Deliberation, and Premeditation; Instruction (12)." In this ground, Nasby
22 argued that Byford applied to his case. The district court denied the petition as time ~~was~~
23 and procedurally barred, and subject to laches. While he was housed at Ely State Prison,
24 Nasby did not know of, nor did the State provide an adequate method for him to know of,
25 this Court's decision in Nika. Because of this, Nasby did not, and could not, present an
26 argument of "cause and prejudice" which included the Nika decision. Nasby appeal-
27 ed the denial. On February 8, 2012, this Court affirmed the denial of Nasby's 2nd
28 petition. In this Court's order, the Court not only acknowledged the inadequate law
library at Ely State Prison, but addressed the issue of meaningful access to the court,

1 when it said: "Appellant also argued that he had good cause to excuse the procedural
2 bars because of inadequate access to an itself-inadequate law library at Ely
3 State Prison. Appellant's claim did not demonstrate good cause because it failed
4 to explain why he could not have raised the instant claims in his prior pro-
5 ceedings. Notably, appellant was represented by appointed counsel in both his
6 direct appeal and his first, timely post-conviction petition for a writ of hab-
7 eas corpus and thus had "meaningful" access to the courts through "assist-
8 ance from persons trained in the law." Bounds v. Smith, 430 U.S. 817, 828
9 (1977), limited by Lewis v. Casey, 518 U.S. 343 (1996)."
10 Nasby v. State, Docket No. 58579 (Order of Affirmance, Feb. 9, 2012, pg. 2).

11 Nasby was not represented by counsel when he filed his 2nd petition. In fact, Nasby has
12 not been represented by counsel since "Anthony Sgro, Esq." in 2007. Since this Court's 2008
13 decision in Nika, Nasby has never had the assistance of someone trained in the law.

14 On December 9, 2014, Nasby filed his 3rd post-conviction petition. In it, he raised 6 gr-
15 ounds, none of which included the Byford issue. The district court denied Nasby's 3rd peti-
16 tion. Nasby appealed. On September 11, 2015, this Court affirmed the denial.

17 E. The Instant Petition.

18 Nasby was informed, by inmate "Kevin Sutton" at Lovelock Corr. Center, about this Court's dec-
19 ision in Nika v. State, between the months of August and November of 2015. See (Memora-
20 ndum In Support of Petition, hereinafter "Memo", pg. 8, lines 10-14; Reply To State's Response, herein-
21 after "Reply", pg. 11, lines 8-11; Motion To Alter or Amend A Judgment N.R.C.P. 59(e), hereinafter
22 "59(e) Motion", pg. 29, lines 4-5; and Exhibit C attached to 59(e) Motion, pg. 2, lines 8-11).

23 Upon researching the Nika case, Nasby filed his 4th post-conviction petition on Janu-
24 ary 5, 2016.

25 Along with his 4th petition, Nasby also filed a Motion For Appointment of Counsel, a Motion
26 to Extend Prison Copywork Limit, a Memorandum In Support of Petition, an Affidavit In Supp-
27 ort of Petition, a Supplemental Memorandum In Support of Petition, and a Notice to the
28 Clerk, Court, and all Interested Parties.

29 Nasby's 4th petition contained this one ground: "Petitioner's Due Process Rights, Under
30 The 5th, 6th, And 14th Amendments, Were Violated Because The Change In Law Announc-
31 ed In Byford v. State, Was Not Applied To Petitioner's Case On Direct Review,
32 And He Is Actually Innocent Of 1st Degree Murder." In this petition, Nasby

1 argued that this Court's decision in Nika made Byford applicable to his case, and
2 that once Byford is applied, he can demonstrate that his conviction was, not only
3 obtained in violation of his constitutional rights, but also that he is actually
4 innocent of 1st degree murder. Nasby also pointed out that this Court's overruling
5 of Garner v. State, 6 P.3d 1013 (2000) effectively overruled its prior decision
6 in his case on direct appeal as well. Nasby's petition also argued that the Kaza-
7 lyn instructions given at his trial, caused an impermissible burden shifting,
8 and relieved the State of its burden to prove every element of the crime. As
9 good cause, Nasby first asserted that he was denied his fundamental right of meaning-
10 ful access to the court. See - (Memo, pg. 6-10; Reply, pg 9-12; 59(e) Motion, pg. 11-12,
11 pg. 18, pg. 26-31). As its method of providing Nasby access to the court, Nevada cho-
12 se to provide Nasby a law library. When Nika was decided, Nasby was housed at
13 Fly State Prison. Nasby was still at Fly State Prison when he filed his 2nd petition in
14 2011. When Nasby filed his 3rd petition in 2014, he was housed at Lovelock Corr.
15 Center. Nasby asserted in his Memo, his Reply, and his 59(e) Motion, that he has
16 been denied access to a law library and the ability to even know of the Court's
17 holding in Nika. The paging system used at Nevada's prison law libraries requires in-
18 mates to be clairvoyant and know, before hand, exactly what resources are available
19 in order to request and receive them. If an inmate does not know about a resource be-
20 fore hand, he can not request it. See - (Exhibits A, B, & C, attached to 59(e) Motion). In
21 Nasby's case, the State provided him with no way of knowing, beforehand, of the Nika deci-
22 sion, and consequently, no way of requesting and reviewing the Nika case, and consequently, no
23 way of presenting the instant claim to the Court. Nasby also asserted that this Court admitted
24 its error in previously rejecting his claim in prior actions, which constitutes an external
25 force that excuses the filing of a successive petition. Nasby then asserted that constitution-
26 al due process requires the availability of habeas relief when this Court interpreted, ~~and~~ clari-
27 fied, and unblurred the provisions of the 1st degree murder statute for the first time, in
28 Byford, and announced a change in the law, all of which, caused the exclusion of the acts

1 Nasby was said to have committed, from the scope of the 1st degree murder statute.
2 See = (Memo., pg. 6, lines 17-26 & pg. 10, lines 25-28 & pg. 11, lines 1-6 & pg. 11, lines 25-28 & pg. 13,
3 lines 1-7; Sup. Memo., pg. 5, lines 9-12; Reply, pg. 8, lines 9-21 & pg. 9, lines 5-9; 59(e)
4 Motion, pg. 15-17).

5 Nasby went further, demonstrating the exception to cause and prejudice, and pleaded
6 actual innocence. Nasby presented two pieces of evidence that were not available, or
7 were omitted from trial, which demonstrate that he is actually innocent of the charge he
8 was convicted of. The first, was Nasby's sworn affidavit in support of petition, in af-
9 which, Nasby swore that he did not willfully, deliberately, and with premeditation,
10 kill Michael L. Beasley. See = (Affidavit In Support of Petition; Reply, pg. 7-8; 59(e)
11 Motion, pg. 13 & 20). This affidavit went undisputed. The trial record, as well as any ev-
12 idence in the State's possession, fail to dispute the facts of the affidavit as well. The
13 second piece of evidence was the "Byford Instructions" or "Deliberation Instructions"
14 or "Deliberation Definition" adopted in Byford. See = (Sup. Memo., pg. 3, lines 15-19; 59(e)
15 Motion, pg. 20, lines 20-26). As the constitutional violations that probably resulted in
16 the conviction of one who is actually innocent, Nasby presented arguments for the viciat-
17 ions listed on page 7, lines 23-28 and page 8, lines 1-4 of this brief. See = (Memo,
18 pg. 11-13; Sup. Memo., pg. 2-5; Reply, pg. 8, lines 9-24). In demonstrating that it is "more
19 likely than not" that no reasonable jurist would have found him guilty beyond a reasonable
20 doubt, absent the constitutional violations, Nasby pointed out the State's lack of evidence
21 of deliberation presented at trial and the fact that jurors are presumed to follow the
22 instructions that they are given, and if the jury had not been given the Kazalyn
23 instructions, but instead properly instructed on every element of 1st degree murder, it is
24 more likely than not that no reasonable jurist would have found Nasby guilty beyond a
25 reasonable doubt of 1st degree murder without the State proving deliberation. See =
26 (Sup. Memo., pg. 3, lines 22-28; 59(e) Motion, pg. 25-26 & pg. 14, lines 1-6).

27 F. Motion For Appointment Of Counsel.

28 In Nasby's Motion For Appointment Of Counsel, Nasby not only argued that he met all the

1 criteria of NRS 34.750 in order to merit appointment of counsel, but also that his fund-
2 amental constitutional right to meaningful access to the court required that the court
3 remedy his denial of meaningful access by appointing counsel. Supporting his argu-
4 ments, Nasby presented a list of facts. These facts were as follows: 1) Petitioner is
5 unable to afford counsel. See - Application To Proceed Informa Pauper is on file. 2) The
6 substantive issue and procedural requirements of this case are difficult and incompre-
7 hensible to Petitioner. 3) Nasby, due to his incarceration, is unable to undertake the
8 ability, as an attorney would or could, to investigate crucial facts involved within
9 the petition, or otherwise proceed with discovery. 4) Petitioner is sentenced to 48 to
10 120 months, 20 yrs. to Life, and 20 yrs. to Life. 5) Petitioner is limited in his access
11 to legal materials. 6) The merits of the issue presented are of constitutional dimension.
12 7) Petitioner does not have the current legal knowledge and ability, as an attorney would
13 have, to properly present the case to the Court. 8) Appointed counsel would be of serv-
14 ice to the Court, Petitioner, and respondents by sharpening the issue in this case,
15 shaping the examination of potential witnesses and ultimately shortening the time
16 of Prosecuting this case. 9) Petitioner does not have physical access to the prison law lib-
17 rary. Petitioner only has access to the prison law library via institutional mail, using a
18 computer paging system, which delays the reception of needed legal materials. 10) The
19 prison has very limited research materials, which are often already checked out by
20 other inmates, are not in stock, or the law library is doing inventory, which means that,
21 at that time, no materials will be checked out and the law library is closed. 11) Prison
22 legal assistants are not permitted to assist or give legal advice to inmates at Love-
23 lock Correctional Center. Thus, Petitioner does not have the assistance of persons
24 trained in the law or even the basic assistance of inmates in position to access
25 the law library. 12) The ends of justice will best be served in this case by the appoint-
26 ment of professional and competent counsel to represent Petitioner. 13) Federal courts
27 in Nevada have previously stated that the paging system and conditions in regards
28 to law libraries at Nevada prisons are inadequate and may be unconstitutional.

1 See - Nasby v. McDaniel, 2011 U.S. Dist. LEXIS 52317, and Koerschner v. Warden,
2 508 F. Supp. 2d 949, 859 (D. Nev. 2007).

3 Nasby also asserted that, even though he has no right to counsel on post-conviction,
4 the failure to appoint counsel would result in the continued denial of his right to mean-
5 ingful access to the court. See - (Reply, pg. 13-14; 59(e) Motion, pg. 30-31). Nasby fur-
6 ther supported the request for counsel with his Motion To Extend Prison Copywork
7 Limit, wherein it, Nasby presents the fact that the State is preventing him from
8 making photo copies of documents, and thus preventing him from complying with
9 service requirements. This Motion was not addressed by the Court nor opposed
10 by the State. Nasby wished to file 3 Petitions for Writs of Mandamus, regarding
11 the denial of his Motion For Appointment of Counsel, the denial of his 59(e) Motion,
12 and the district court's failure to address and grant his Motion To Extend Prison
13 Copywork Limit — however, the inability to serve the required copywork, pre-
14 vented the filing of the Mandamus petitions. See - N.R.A.P. 21(a)(4). See Also -
15 (Motion To Extend Prison Copywork Limit; Reply, pg. 14; 59(e) Motion, pg. 30-31).

16 G. State Responses, Nasby's Reply, District Court Orders, and Nasby's 59(e) Motion.
17 Time and again, the State's Response To Petition (hereinafter "Response"), and like-
18 wise, the Court's Findings Of Fact And Conclusion Of Law and Order (hereinafter "Findings")
19 refer to Nasby's presentation of Nika as his representation of "good cause" and his rep-
20 resentation of "new evidence" to support his cause & prejudice argument and his fun-
21 damental miscarriage of justice exception argument. See - (Findings, pg 5-6; Response,
22 pg 7-18). These facts are incorrect.

23 The only assertion Nasby made, regarding Nika, was that this Court's 2008 Nika
24 decision made the change in law announced in Byford, applicable to Nasby's case
25 and that it further acknowledged and overruled its error in Garner. See - Memo,
26 pg. 7, lines 18-21; pg. 10, lines 25-28; pg. 11, lines 1-6; pg. 12, lines 18-28; pg. 13, lines 1-4;
27 Sup. Memo, pg. 5, lines 3-16; Reply, pg. 6, lines 5-24; 59(e) Motion, pg. 9-10). Nasby
28 never claimed that Nika is "new evidence", made him "actually innocent", or was,

1 by itself, "good cause" to overcome the bar. In response to the question "why" his in-
2 stant petition was filed more than 1 year following the filing of a decision on direct
3 appeal, Nasby answered, that the authority relied upon in this petition did not ex-
4 ist 1 year following a decision on direct appeal. See - (Petition Form, pg. 5, lines
5 23-28). In Nasby's answer to that question, he also directed the court to see
6 his Memorandum in Support, which clearly argues cause and prejudice. See-
7 (Petition Form, pg. 5, line 28; 59(e) Motion, pg. 10, lines 7-18).

8 Nasby did not "procrastinate for over 14 years before filing an untimely successive petit-
9 ion" as the State, and District Court assert in their Response and Findings. In regards
10 to this claim, Nasby, on direct appeal, argued that the decision in Byford applied
11 to him. See - (Nasby v. State, No. 35319, Order of Affirmance, Feb. 7, 2001; Memo,
12 pg. 6-7; pg. 12, lines 14-17; Sup. Memo, pg. 5, lines 9-15; Reply, pg. 5-6). Nasby also
13 presented this issue, as Ground 3, in his initial timely post-conviction petition.
14 See - (Petition Form, pg. 3-B, lines 8-10). In regards to the failure to raise the
15 instant claim 1 year from this Court's Nika decision, the State, and the district court,
16 stated in their Response and Findings, "Defendant does not attempt to offer an explain-
17 ation for the near 8-year delay and he has not overcome the threshold requirement of
18 good cause and his attempt to rest on the merits of his claims is fatally flawed."
19 See - (Findings, pg. 6, lines 21-23; Response, pg. 8, lines 2-4). This statement is incor-
20 rect. In the State's Response, and likewise, the court's Findings, Nasby is quoted as stating
21 that he "was not made aware, nor had the ability to know of the Nevada Supreme Court's
22 ruling in Nika." See - (Response, pg. 7, lines 9-11; Findings, pg. 6, lines 1-2). This state-
23 ment is an "attempt to offer an explanation for the near 8-year delay", and his
24 pleadings assert a denial of his right to meaningful access to the courts. See -
25 (Memo, pg. 6-11; Reply, pg. 9-12). Although Nasby asserted cause through his showing of
26 the denial of meaningful access to the court, the state conveniently failed to ack-
27 nowledge this showing, and consequently, the Court failed to acknowledge or remedy
28 the denial of Nasby's fundamental right of meaningful access to the court. See -

1 (59(e) Motion, pg. 10-12; pg. 26-31).

2 The State's Response, and likewise, the court's Findings, go on to say, "Even if the 2008
3 Nika decision represented good cause (which the State adamantly contests), Defendant
4 fails to explain why he did not raise these claims in his 2nd or 3rd petitions." A review of
5 Nasby's pleadings show that he did raise this issue, again, in his 2nd petition. See -
6 (Petition Form, pg. 4-B, lines 7-8; Memo, pg. 7, lines 22-28; pg. 8, lines 1-9; Reply, pg. 6,
7 lines 16-18). Due to the lack of access to an already inadequate law library at Ely State
8 Prison and Nasby not being given the assistance of someone trained in the law, he was
9 denied meaningful access to the courts, and thus was never made aware, nor had the ability
10 to know, of this Court's Nika ruling. Therefore, although, in his 2nd petition, Nasby
11 argued that Byford applied to his case, he did not include the Nika decision and argu-
12 ment. For the same reasons, Nasby did not re-raise the issue in his 3rd petition. It
13 wasn't until he was made aware of the Nika decision by another inmate, that Nasby
14 immediately filed his 4th petition. See - (Exh. C of 59(e) Motion; 59(e) Motion, pg. 12-13).

15 The State's Response, and likewise, the court's Findings, repeatedly state that Nasby
16 relies on Nika to establish his actual innocence, that Nasby attempts to make Nika
17 new evidence, and that Nasby "fails to assert a factual claim of innocence and in-
18 stead, insists on pursuing a procedurally-barred legal claim." See - (Response, pg. 7, lines
19 9-23; Findings, pg. 6, lines 1-14). These statements are also incorrect. Nasby consistent-
20 ly stated that Nika made Byford applicable to his case, and it was the Byford instruct-
21 ions, and Byford decision, that made Nasby actually innocent, as it mandated dist-
22 rict courts "cease instructing juries that a killing resulting from premeditation is
23 willful, deliberated, and premeditated murder," and further unblurred the scope of
24 the 1st degree murder statute to the point that it clarified, and excluded, the crime
25 the state proved Nasby guilty of. See - (Memo, pg. 10, lines 20-24; pg. 13, lines 15-19;
26 Sup. Memo, pg. 4, lines 4-16; pg. 5, lines 3-8; Reply, pg. 8, lines 11-24). The new evidence
27 that supports Nasby's actual innocence was two pronged. First, Nasby's undisputed
28 affidavit, and 2nd, the actual "Byford Instructions" or "Deliberation Instructions"

1 that were adopted in Byford. See (Memo, pg. 6, lines 14-26; pg. 11, lines 25-28; pg. 12,
2 lines 1-7; Reply, pg. 8, lines 11-15). Furthermore, Nasby does not insist on pursuing a pro-
3 cedurally-barred legal claim. In establishing a fundamental miscarriage of justice except-
4 ion, Nasby insisted that the improper, and unauthorized, jury instructions (Kazalyn In-
5 structions) given to the jury at his trial, were a constitutional violation that probably
6 resulted in the conviction of one who is actually innocent. See (Memo, pg. 11-13; Sup. Memo,
7 pg. 2-5; Reply, pg. 8, lines 9-24). And, because jurors are presumed to follow the instruct-
8 ions that they are given, reasonable jurist would not find Nasby guilty of 1st degree
9 murder without the State proving all necessary elements constituting 1st degree murder.
10 See, (Memo, pg. 12, lines 5-13; Sup. Memo, pg. 2-4; Reply, pg. 8, lines 9-24). See Also - (File)
11 Motion, pg. 13-14).

12 The State's Response, and likewise, the court's Findings, fail to acknowledge and fail to
13 apply Nasby's "Affidavit In Support Of Petition", filed on January 5, 2016. See - (Findings,
14 pg. 3, lines 11-15; Response, pg. 3, lines 15-18). Nasby addresses the State's failure to ackn-
15 owledge his affidavit in his Reply. See - (Reply, pg. 3, lines 7-18). Nasby also points out
16 the State's failure to dispute the facts established in his affidavit. See - (Reply, pg.
17 7, lines 23-26; pg. 8, lines 1-21). Still, the court failed to acknowledge, and failed to
18 apply, Nasby's affidavit in support of petition. See Also - (File) Motion, pg. 14, lines
19 7-19).

20 The State's Response, and likewise, the Court's Findings, state that, "Defendant had until
21 March 6, ~~2002~~ 2002 to file his Petition. However, Defendant waited almost 14 years until
22 January 5, 2016, to file." See - (Findings, pg. 4, lines 5-8; Response, pg. 4, lines 17-21).
23 This statement is incorrect. The State's and the court's own statements regarding
24 Nasby's successive petition, both later state that: "Defendant filed his first post-
25 conviction petition on February 1, 2002, which was denied on March 27, 2006,
26 and affirmed by the Nevada Supreme Court on June 18, 2007. Notably, Defend-
27 ant filed a second petition on February 18, 2011, which was denied as pro-
28 cedurally barred on May 11, 2011. On December 9, 2014, Defendant filed his
third petition, which was denied on February 25, 2015, as untimely, success-
ive, and an abuse of the writ without a showing of good cause and
prejudice." See (Findings, pg. 4, lines 22-28; Response, pg. 5, lines 13-19).

1 Nasby did not "wait" 14 years to file his petition. Nasby pointed out to the court
2 that, the issue raised in his instant petition, was raised on direct appeal, in his 1st post-con-
3 viction petition, his 2nd petition, and now his 4th petition. See - (Petition Form, pg. 3-B, lines
4 8-10; pg. 4-B, lines 7-8; pg. 6, lines 13-15; Memo, pg. 6-8, pg. 12, lines 14-17; Sup. Memo, pg. 5,
5 lines 9-18; Reply, pg. 5-6). After all of the above showings, the State's Response and court Find-
6 ings, still incorrectly stated these facts. See Also - (59(e) Motion, pg. 14-15).

7 In Nasby's 59(e) Motion, Nasby pointed out how the State and the court, failed to apply the
8 appropriate law to Nasby's pleadings. 1st, Lozada v. State, 110 Nev. 353 (1994) and Evans v. State,
9 117 Nev. 614 (2001) were not applied, when this Court held that its own error in rejecting a
10 claim in an earlier habeas petition "constitutes an external force which excuses the filing
11 of a successive petition" for purposes of NRS 34.726 and NRS 34.810(2). See - (Memo,
12 pg. 6, lines 27-28; pg. 7, lines 1-21; pg. 10, lines 25-28; pg. 11, lines 1-6; Sup. Memo, pg. 5,
13 lines 9-18; Reply, pg. 5-7; 59(e) Motion, pg. 15-16). And, Clem v. State, 119 Nev. 615, 81 P3d
14 521 (2003) was not applied, when this Court held that "Constitutional due process requires
15 the availability of habeas relief when a State's highest court interprets for the first time
16 and clarifies the provisions of a state criminal statute to exclude a defendant's acts
17 from the statute's reach at the time the defendant's conviction ~~was~~ became final."
18 See - (Memo, pg. 6, lines 17-26; pg. 10, lines 25-28; pg. 11, lines 1-6; pg. 11, lines 25-28; pg.
19 12, lines 1-7; Sup. Memo, pg. 5, lines 9-12; Reply, pg. 8, lines 9-21; pg. 9, lines 5-9; 59(e)
20 Motion, pg. 16-17).

21 The State's Response, and likewise, the Court's Findings, state that, "To invoke the pre-
22 sumption, the statute requires the State plead laches in its motion to dismiss the petition.
23 NRS 34.800(2)." (emphasis added). See - (Findings, pg. 7, lines 22-23; Response, ~~pg. 9,~~
24 lines 1-2). The State did not file a "motion to dismiss" or a joined "motion to dismiss
25 and response," although the State's Response argues for dismissal. See - (Response, pg. 1,
26 lines 15-17, lines 21-22, line 25; pg. 3, line 18). Although NRC 12(h) 2 states "an object-
27 ion of failure to state a legal defense to a claim may be made in any pleading permitted or
28 ordered under Rule 7(a)", when Nasby made this objection, it was not addressed by the

1 court. See - (Reply, pg. 1-5). Nasby also argued that laches is defeated by the States
2 denial of his right to meaningful access to the courts. See - (Memo, pg. 7-10; Reply,
3 pg. 9-12; 59(e) Motion, pg. 17-18; pg. 29-30).

4 Along with the errors of law and fact upon which the judgment is based listed in
5 his 59(e) Motion, Nasby also filed his 59(e) Motion so that he may present previously
6 unavailable evidence to further support his assertion of the denial of his right to
7 meaningful access to the courts. 1st, was the affidavit of "Peter Quinn Elvik", who
8 during the years of 2012-2014, was a law clerk at Ely State Prison's law library. 2nd,
9 was the affidavit of "Timothy H. Johnson", who during the years of 1995-2011 was a
10 law clerk at Ely State Prison's law library and also a legal assistant at Lovelock Corr.
11 Center during February 2014 - May 2014. Both affidavits demonstrate how the
12 State interfered with Nasby's right to meaningful access to the court. Nasby also attach-
13 ed his own affidavit, which swears to, and explains, the reason why these affidavits
14 were previously unavailable, as Nasby did not meet either of the men until after the
15 filing of his 4th petition. See - (59(e) Motion, pg. 19; Exh. A, B, C attached to 59(e) Motion).

16 In Nasby's 59(e) Motion, Nasby presented a need to prevent manifest injustice by dem-
17 onstrating his actual innocence and the denial of meaningful access to the courts. See -
18 (59(e) Motion, pg. 19-31). The State responded to Nasby's 59(e) Motion on June 2, 2016, ar-
19 guing, in sum, that NRC P do not apply to criminal cases, and "As there is no mechan-
20 ism available for Defendant to "amend or alter" the district court's Findings of Fact,
21 Conclusions of Law and Order, his Motion should be denied." See - (State's Response To
22 59(e) Motion, pg. 3-4). On June 8, 2016, the district court denied Nasby's 59(e)
23 Motion "based on the pleadings." See - (Order Denying 59(e) Motion).

24 III. SUMMARY OF THE ARGUMENT.

25 There are a few overarching errors that affect all of the issues in this appeal. 1st,
26 and foremost, is the district court's lack of jurisdiction and lack of authority to try and
27 convict Nasby of 1st degree murder under an inapplicable law, and consequently, the district
28 court's lack of jurisdiction to review this claim due to Nasby's conviction being void. The dist-

1 rict court can never have jurisdiction over a void judgment. Nasby was convicted und-
2 er the law announced in Kazalyn. ~~Then~~ Per Nika, the law announced in Byford applied
3 to Nasby's case — Not Kazalyn. Thus, Nasby's judgment of conviction is void for lack of
4 jurisdiction and lack of authority. This Court must not affirm the district court findings,
5 as the district court had no authority to issue them. Accordingly, this Court must order
6 habeas corpus relief. Also, when on direct appeal, Nasby argued that Byford applied to his
7 case. In its order of affirmance, this Court, using Garner as authority, said that Byford
8 did not apply to Nasby's case because his conviction predates Byford, and thus, Nasby's claim
9 lacked merit. The pertinent authority relied upon in Garner was later overruled by Nika.
10 Consequently, if the authority relied upon ~~to~~ to deny Nasby's appeal was overruled, so
11 too, is this Court's affirmance of Nasby's conviction overruled.

12 Kazalyn blurred the distinction between 1st and 2nd degree murder and confused
13 the jury in Nasby's case as to what constitutes 1st degree murder. The blurred distinction
14 caused the jury to convict Nasby of 1st degree murder without the State proving deliberation,
15 which is a necessary element of 1st degree murder. Had Byford been applied at Nasby's
16 trial, the distinction between 1st and 2nd degree murder would not have been blurred, and
17 instead, would have caused the jury to find Nasby not guilty of 1st degree murder due
18 to the State's failure to prove deliberation. The Kazalyn instructions, which were
19 presented to Nasby's jury, also relieved the State of its burden to prove every ele-
20 ment of 1st degree murder and unconstitutionally shifts the burden, creating a mandatory
21 presumption.

22 Interwoven throughout his current, and prior, post-conviction attempts, is the State's denial
23 of meaningful access to the courts. In regards to Nika, which is the decision that actually
24 activates Byford's application to this case, ~~the~~ the State's chosen method of providing Nasby
25 meaningful access to the courts, is inadequate and prevented him from discovering the Nika
26 ruling and from filing a petition within one year of this Court's decision in Nika.

27 Nasby also presented 2 pieces of evidence that were not, but should have been, pre-
28 sented to the jury at his trial, both of which demonstrate his actual innocence.

IV. ARGUMENT.

Issue One. The 8th Judicial District Court Lacked Jurisdiction And Authority.

A challenge to jurisdiction can be raised at anytime. Meinhold v. Clark Co. School Dist., 89 Nev. 56 at 59. There are 3 essential elements necessary to render convictions valid. These are, that the court must have jurisdiction over the subject matter, the person of the defendant and authority to render the particular judgment. If either of these elements is lacking, the judgment is fatally defective, and the prisoner held under such judgment may be released on habeas corpus. Ex Parte Webb, 24 Nev. 238 at 242.

Nasby was convicted of 1st degree murder, in October 1999, under the law announced in Kazalyn (1992). This Court, in Byford (2000), ordered the district courts to cease applying the law of Kazalyn and announced a change in that law. Nasby raised this issue on direct appeal but this Court applied Garner (2000) in its affirmance. In Garner, this Court said that Byford did not apply to cases pending on direct appeal. This Court, in Nika (2008), overruled Garner and ruled that, as a matter of due process, the change in law announced in Byford did apply to cases pending on direct appeal when Byford was decided. Thus, if the change in law announced in Byford applied to Nasby's case, the result must be, that the law of Kazalyn did not apply. This Court, by way of Nika, retroactively divested the 8th Judicial District Court of its authority, and jurisdiction, to try and convict Nasby of 1st degree murder under the law of Kazalyn. The 8th Judicial District Court, having issued a judgment of conviction for the crime of 1st degree murder under the inapplicable law, makes Nasby's judgment of conviction not merely voidable, but in fact void. Ex Parte Siebold, 100 U.S. 371 at 376-77, e.g., Ex Parte Rosenblatt, 19 Nev. 439 at 442. Therefore, there is no legal cause for Nasby's imprisonment, and release from his current confinement is required. Id.

Because Nasby's conviction is void, the 8th Judicial District Court, not only lacked authority and jurisdiction to issue the judgment of conviction in Nasby's case, but as a result, it also lacks jurisdiction to review this claim. Ex Parte Rosenblatt, supra at 441. See Also - Ex Parte Davis, 33 Nev. 309 at 312-13.

1 Issue Two: Nasby's Due Process Rights Were Violated Because The Change In Law
2 Announced In Byford v. State, Was Not Applied To His Case On Direct Review, And He
3 Is Actually Innocent Of 1st Degree Murder.

4 In instructing the jury on premeditation at Nasby's trial, the trial court used the
5 Kazalyn instruction (Kazalyn v. State, 108 Nev. 67, 75, 82 P3d 578, 583 (1992)). See - (Jury
6 Instruction No. 12). Defense Counsel objected to this instruction, instead offering, Defen-
7 se "A". (T.T. Vol. VI, pg. 3). The court rejected Defense "A". (T.T. Vol. VI, pg. 5).

8 In Byford v. State, this Court held that, "it is clear from the statute that all 3 elements,
9 willfulness, deliberation, and premeditation must be proved beyond a reasonable doubt be-
10 fore an accused can be convicted of first degree murder." Byford directed district courts
11 to "cease instructing juries that a killing resulting from premeditation is willful, deliber-
12 ate, and premeditated murder." Id. ~~There is~~ This is exactly what the jury was
13 instructed to think in Nasby's trial. In Byford, this Court recognized that Kazalyn
14 blurred the distinction between 1st and 2nd degree murder. On direct appeal, Nasby
15 asserted that the trial court failed to instruct the jury on ~~willfulness~~ willfulness, deliber-
16 ation, and premeditation by using the Kazalyn instructions, instead of using instru-
17 ctions similar to those adopted by this Court in Byford. This Court affirmed Nasby's
18 conviction, stating that because his conviction predates Byford, Byford did not
19 apply to his case, citing Garner v. State as authority. However, in Nika v. State (2008),
20 this Court acknowledged that Garner erroneously afforded Byford complete prospectivity.
21 It further overruled that portion of Garner, and stated that, as a matter of due process,
22 Byford applies to those cases pending on direct appeal. Nasby's case was pending on direct
23 appeal when Byford was decided. Thus, if Byford applied to Nasby's case, as a matter of
24 due process, the failure to apply Byford violated Nasby's due process rights. Further, if
25 the authority relied upon to deny Nasby's appeal (Garner) was overruled, so too, is
26 this Court's affirmance of Nasby's conviction overruled.

27 To add, this Court's acknowledged error in affording Byford complete prospectivity,
28 and its erroneous application of Garner to Nasby's case, "constitutes an external force
which excuses the filing of a successive petition" for purposes of NRS 34.226 and NRS

1 34, §10(2). Lozada v. State, 110 Nev. 353 (1994); Evans v. State, 117 Nev. 644 (2001). This
2 Court has also held that "when a holding in a defendant's direct appeal is overruled
3 in a subsequent case, the doctrine of the law of the case should not be applied, because "to
4 do so would unfairly impose a legal application upon [the defendant] which we expressly over-
5 ruled, citing to our published opinion disposing of his direct appeal." Mitchell v. State,
6 149 P.3d 33 at 36 (2006).

7 To make a showing that he has suffered a fundamental miscarriage of justice sufficient
8 to defeat the statutory procedural bars, Nasby must meet the following 3 requirements: 1st,
9 he must present factual evidence that was not available, or was omitted from trial,
10 which demonstrates that he is actually innocent of the charge he was convicted of. And, he
11 must make a showing of a constitutional violation that has "probably" resulted in the
12 conviction of one who is actually innocent. And 3rd, he must demonstrate that it is
13 "more likely than not" that no reasonable jurist would have found him guilty beyond a rea-
14 sonable doubt, absent the constitutional violation. Schlup v. Delo, 513 U.S. 298 at 327-28;
15 Clem v. State, 119 Nev. 615, 61 P.3d 521 (2003).

16 A. Evidence: 1st, Nasby presented his sworn affidavit in support of petition, in which,
17 Nasby swore that he did not willfully, deliberately, and with premeditation, kill Michael L. Beasley.
18 As Nasby did not testify at trial, his sworn statement is evidence that the jury did not hear.
19 The fact that the State did not dispute the facts set forth in Nasby's affidavit, requires the
20 Court to accept them as true established facts. The trial record, as well as any evidence
21 in the State's possession, fail to dispute the facts of Nasby's affidavit or otherwise, prove
22 that Nasby killed Michael L. Beasley deliberately. Thus, Nasby is innocent of deliberation,
23 and consequently, innocent of 1st degree murder. See - (Affidavit In Support Of Petition).
24 — 2nd, Nasby presented the actual "Byford instructions" or "Deliberation Instructions"
25 or "Deliberation definition" adopted in Byford v. State. See - (Memo, pg. 6, lines 19-24; Sup.
26 Memo, pg. 3, lines 15-19). As Nasby's conviction was not final at the time Byford was decided,
27 these instructions should have been given to his jury but were not.

28 "Although [a] prototypical example of 'actual innocence' ... is the case where the State has con-

1 victed the wrong person of the crime," Sawyer, 112 S.Ct. at 2519, one is also act-
2 ually innocent of the crime has the "right" person but he is not guilty of the crime
3 with which he is charged. See Schlup, 115 S.Ct. at 864 (noting prisoner interest in
4 relief "if he is innocent of the charge for which he was incarcerated" (quot-
5 ing Kuhlman v. Wilson, 477 U.S. 436, 452, 91 L.Ed.2d 364, 106 S.Ct. 2616 (1990) (plurality
6 opinion))). . . . Although Jones is responsible for the victim's death in the sense
7 that he was the causative agent that inflicted the mortal wounds, his alleged in-
8 capacity to form the predicate deliberative intent, without which he could not
9 have been found guilty of capital murder, differentiates his claim from
10 one of mere legal "innocence."
11 Jones v. Delo, 56 F.3d 978 at 833 (8th Cir. 1995).

12 The fact that deliberation is a necessary element of 1st degree murder, the omission
13 of the Byford or Deliberation instructions means that the distinction between 1st and 2nd
14 degree murder was blurred and the State failed to prove the element of deliberation.
15 This is supported by the silence of the record regarding the element of deliberation.
16 Nasby's affidavit, along with the Byford Instructions, support Nasby's actual innocence,
17 as he can not be guilty of 1st degree murder without being guilty of deliberation.

18 B. Constitutional Error: Although this Court recognized that the Kazalyn instruction
19 blurs the distinction between 1st and 2nd degree murder, Nasby asserts that it does more than
20 "blurs" the distinction; it totally blinds the jury to the prosecutor's obligation of proving every
21 element of the crime of 1st degree murder, thus violating Nasby's due process rights. U.S. v.
22 Baudin, 515 U.S. 506, 522-23 (1995). Further, the Kazalyn instruction creates a mandatory re-
23 buttable presumption that violates the due process clause of the constitution. Sandstrom v.
24 Montana, 442 U.S. 510, 99 S.Ct. 2450 (1979); Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965 (1985). It
25 forces Nasby to disprove premeditation, willfulness, and deliberation. For the instruction orders
26 the jury to presume the murder was willful, deliberate, and premeditated murder, if it finds
27 the killing resulted from premeditation. Byford, *supra*. Consequently, only premeditation
28 need be proven to find Nasby guilty of all the elements of 1st degree murder, because the
29 others are presumed proven once the instruction is satisfied. Here, Nasby argues that his
30 rights were violated in two ways. 1st, the State was not obligated to prove, nor did it prove,
31 every element of the crime, and 2nd, the instruction unconstitutionally shifts the burden,
32 creating a mandatory presumption. Yates v. Eratts, 500 U.S. 39, 111 S.Ct. 1984 (1991).

33 Nasby was convicted by a jury who was told that, to convict him of 1st degree murder, only

1 premeditation need be proven. "Jurors are presumed to follow the instructions that they
2 are given." U.S. v. Olano, 507 US 725, 740 (1993). A habeas petitioner is not entitled to re-
3 lief unless he can show that the error had a substantial and injurious effect or influe-
4 nce in determining the jury's verdict. If jurors are presumed to follow the instructions
5 that they are given, then the court instructing the jury that the State need only prove
6 premeditation in order to prove him guilty of 1st degree murder, had a substantial and
7 injurious effect or influence in determining the jury's verdict.

8 It is common knowledge that the prosecution can not present only evidence of a theft, in
9 order to obtain a conviction for robbery. This would be illegal. Nashby asserts that the
10 something happened in his case. The jury in Nashby's case was given an instruction for 2nd
11 degree murder, ~~that~~ stating that all murder that is not first degree, is 2nd degree. See - (Jury
12 Instruction No. 18). 1st degree murder requires that all 3 elements be proven beyond a reason-
13 able doubt in order to convict. However, in Nashby's trial, jury instruction No. 12 (the Kazdyn
14 instruction), only requires that premeditation be proven, while deliberation and willfulness
15 are automatically inferred. Nashby was convicted of 1st degree murder, while only evidence
16 of a lesser offense was presented at trial. However, jury instruction No. 12 does not allow
17 the jury to find Nashby guilty of the lesser offense. In Re Winslow, 397 US 356, 364, 90
18 S.Ct. 1068, 25 LEd2d 368 (1970) ("the Due Process Clause protects the accused against conviction
19 except upon proof beyond a reasonable doubt of every fact necessary to constitute the
20 crime with which he is charged"). Also see - Chambers v. E.K. McDaniel, 549 F3d 1191 (9th
21 Cir. 2008); U.S. v. Gaudin, 515 US 506, 132 LEd2d 444, 115 S.Ct. 2310 (1995).

22 Because the jury, in Nashby's case, was given the Kazdyn instruction, it is unknown if the
23 State, without ~~proving~~ providing evidence or argument, proved that the murder was deliberately
24 committed, to the satisfaction of the jury, because the jury was not instructed on deliberation,
25 but was instead, instructed to only require proof of premeditation. This creates grave doubt as
26 to harmlessness. O'Neal v. McAninch, 513 U.S. 432, 130 LEd2d 947, 115 S.Ct. 992 (1995), e.g.,
27 Robertson v. Cain, 324 F3d 297 (5th Cir. 2003).

28 To add, if Nashby is presumed innocent, until proven guilty beyond a reasonable doubt

1 of every element of a crime, than the state's failure to prove, or even argue, deliberation,
2 means that his presumption of innocence still holds, and NASBY IS STILL PRESUMED
3 INNOCENT of deliberation because the element has never been proven. NRS 200.030
4 (1)(a) requires proof beyond a reasonable doubt before a conviction. It is unconstitut-
5 ional to force Nasby, to now, disprove deliberation when, in fact, it was never
6 proven to begin with. This is a bedrock example of unconstitutional burden shifting.

7 Had the distinction between 1st and 2nd degree murder been unblurred at Nasby's trial,
8 Nasby would have argued and directed the jury's attention to the state's failure to prove
9 deliberation. Unfortunately, the unblurring done by Byford did not occur until after
10 Nasby's trial. If Byford applies to Nasby's case, as Nika identifies, Nasby must be
11 given the benefit of Byford and the distinction between 1st and 2nd degree murder
12 must be unblurred for Nasby's jury. For this — Retrial is required.

13 C. More Likely Than Not, No Reasonable Jurist Would Find Nasby Guilty; Because the
14 State made no arguments, or presented any evidence, of deliberation at Nasby's trial
15 and jurors are presumed to follow the instructions that they are given (U.S. v. Olan, supra),
16 if the jury had been properly instructed on every element of 1st degree murder, it is
17 more likely than not that no reasonable jurist would have found Nasby guilty beyond a rea-
18 sonable doubt of 1st degree murder, without the State proving deliberation.

19 Nasby has shown all necessary requirements to establish a fundamental miscarriage
20 of justice exception to defeat a bar. At the minimum, an Evidentiary Hearing is re-
21 quired to determine Nasby's actual innocence.

22 Issue Three: Nasby Is Being, And Has Been, Denied Meaningful Access To The Court.

23 Nasby has a fundamental constitutional right to meaningful access to the courts,
24 which requires the State to assist in the preparation and filing of meaningful legal papers
25 by providing him with adequate law libraries or adequate assistance from persons
26 trained in the law. Bennards v. Smith, 430 US 817, 52 LEd 2d 76 (1977).

27 As its method of providing Nasby access to the court, Nevada chose to provide
28 him a law library. Nasby has not been represented by counsel since 2007. Therefore,

1 since this Court's ruling in Nika (2008), Nasby has never had the assistance of some-
2 one trained in the law. When Nika was decided, Nasby was housed in 'lock-down units'
3 at Ely State Prison. Nasby was still at Ely State Prison when he filed his 2nd petition
4 in 2011. When Nasby filed his 3rd petition in 2014, he was housed at Lovelock Corr-
5 ectional Center. In Nasby v. McDaniel, 2011 U.S. Dist. LEXIS 52317, the law
6 library at Ely State Prison was held to be inadequate and denied Nasby meaning-
7 ful access to the court. In, Keerschner v. Warden, 508 F.Supp.2d 849, 859 (D.
8 Nev. 2007) the law library at Lovelock Correctional Center and Ely State Prison,
9 as well as the paging system, as a whole, used at all Nevada prison law libr-
10 aries, were held to be inadequate. See Also - (Exh. A, B, C attached to 59(e) Motion).

11 In addressing the availability and presentation, of a specific case cite, such as Nasby's
12 presentation of Nika v. State and Byford v. State, the U.S. Supreme Court said: "More-
13 over, if the State files a response to a prose pleading, it will undoubtedly contain
14 seemingly authoritative citations. Without a library, an inmate will be unable to
15 rebut the State's argument. It is not enough to answer that the court will evaluate
16 the facts pleaded in light of the relevant law. Even the most dedicated trial judges
17 are bound to overlook meritorious cases without the benefit of an adversary
18 presentation. Cf. Gardner v. California, 393 U.S. 367, 369-370, 21 LEd 2d 601, 89
19 S.Ct. 550 (1969). In fact, one of the consolidated cases here was initially dis-
20 missed by the same judge who later ruled for respondents, possibly because
21 Younger v. Gilmore was not cited."
22 Bounds v. Smith, 430 U.S. 517 at 526.

23 The paging system used at Nevada's prison law libraries, requires Nasby to be clairvoy-
24 ant and to know, beforehand, exactly what resources are available in order to request and
25 receive them. If an inmate does not know about a resource, rule, statute, case, or the like,
26 beforehand, he cannot specifically request it. "It is unrealistic to expect a prisoner to
27 know in advance exactly what materials he needs to consult." Toussaint v. McCarthy,
28 801 F2d 1080 at 1110 (9th Cir. 1996) (quoting Williams v. Leeke, 584 F2d 1336 (4th Cir. 1978).

29 To simplify the argument, Nasby presents this question: How can John call Jane's
30 phone, if Jane's number is not listed, and Jane never gave John her phone number? Just
31 because Jane has a phone number that John can call, does not mean that John automatic-
32 ally knows Jane's phone number and can actually call her. — This is the logic behind
33 the paging system in which the State uses at Nevada's prison law libraries. The

1 State believes that Jane need only have a phone number that John can call, not that
2 Jane needs to provide a way to inform John of the number. If John has no way of dis-
3 covering Jane's phone number, consequently, John could never call Jane. Then, if
4 a 3rd party later gives John, Jane's phone number, and John immediately calls Jane,
5 it would be unreasonable for Jane to be upset and say to John: "You should have
6 called me sooner? What took you so long?"

7 In Nasby's case, the State provided him no way of knowing about the Nika ruling, and
8 consequently, no way of requesting and reviewing the Nika case, and consequently, no way
9 of presenting the instant claim to the Court in a timely fashion. See Also - (Exh. A, B, C att-
10 ached to 5f(e) Motion).

11 Nasby only found out about the Nika case months prior to filing his 4th petition and
12 only by word of mouth from another inmate. Had Nasby had adequate access to an adeq-
13 uate law library, he would have been able to browse through material, discovered the
14 Nika case, raised the current claim 8 years ago, and also been able to properly argue
15 cause and prejudice in his past petitions. Instead, Nasby's last 2 petitions were time
16 and procedurally barred, and he could not raise the Nika argument, and subsequently,
17 properly re-raise the Byford argument, until 8 years after Nika was decided.

18 Nasby is only required to practice due diligence; which he has done. Nasby does not
19 have the power, nor is it his duty, to find a way to provide himself meaningful access to the
20 courts. It is the State's affirmative duty to ensure Nasby's right to meaningful
21 access to the courts. It is the State's failure to provide this right which caused
22 the injury and prejudice. Where a petitioner defaults a claim as a result of the
23 denial of a constitutional right, the State, which is responsible for the denial as a
24 constitutional matter, must bear the cost of any resulting default and the harm
25 to State interests that habeas review entails. Coleman v. Thompson, 501 U.S. 722 at
26 754. Also in Coleman, at 756, the Court said: "The duty of the State under our cases
27 is..... only to assure the indigent defendant adequate opportunity to present his
28 claims fairly in the context of the state appellate process." (quoting, Ross v.
Moffitt, 417 U.S. 600 at 616).

1 This duty described in Ross, by way of Coleman, was later vindicated as the State's
2 duty to provide inmates fundamental right of meaningful access to the courts. Bounds
3 v. Smith, 430 U.S. 817, 828. The State cannot rely on a bar, where they themselves,
4 caused the injury in which they wish to now avoid. This would, effectively, allow the
5 State to violate every, and any, constitutional right of a convicted prisoner. For
6 the assertion of all other rights is dependant on an inmate's right to access
7 the court to petition for redress of grievances.

8 It is the Court's duty to apply the appropriate remedy for this petitioner's injuries.
9 Lewis v. Casey, 518 U.S. 343 at 349. In this case, the remedy would be to allow the
10 time and procedural bars to fall, for laches to fail, and to appoint counsel to
11 represent Nasby.

12 In Hathaway v. State, 119 Nev. 252 (2003), this Court said: ("Generally, 'good cause'
13 means a 'substantial reason; one that affords a legal excuse.'" In order to demonstrate
14 good cause, a petitioner must show that an impediment external to the defense prevent-
15 ed him or her from complying with the state procedural default rules. An impediment ex-
ternal to the defense may be demonstrated by showing "that the factual or legal basis
for a claim was not reasonably available to counsel, or that 'some interference by
officials' made compliance impracticable.")

16 The State denying Nasby his fundamental right to meaningful access to the court is "some int-
17 erference by officials" which constitutes such an impediment and establishes good cause and
18 a legal excuse. See - Egerton v. Cockrell, 324 F.3d 438-439 (5th Cir. 2003); Trujillo v. Williams,
19 465 F.3d 1210, 1226-27 (10th Cir. 2006); O'Keefe v. VanBoening, 52 F.3d 322 (9th Cir. 1996). Thus,
20 Nasby's petition should not have been barred.

21 Issue Four: The District Court Abused Its Discretion And Errored In Not Appointing Coun-
22 sel And For Failing To Address And Grant Nasby's Motion To Extend Prison Copywork Limit.

23 Nasby has no right to counsel on post-conviction. However, Nasby does have a right to
24 meaningful access to the courts. As pointed out in Nasby's Motion for Appointment of Coun-
25 sel, his Memorandum in Support, his Reply, his 59(e) Motion, the exhibits attached to
26 his 59(e) Motion, and throughout the instant brief - the law library, which is the State's
27 chosen method of providing Nasby access to the Court, is inadequate. Furthermore, as
28 shown in Nasby's motion to extend prison copywork limit, Nasby is not even permitted

1 to make legal copies. "Allegation that plaintiff was denied necessary copies and his action
2 was dismissed as a result stated a court access claim." Collins v. Goard, 438 F.Supp.2d 399,
3 417 (S.D.N.Y. 2006). So, on top of the law library being inadequate, the State is preventing
4 Nasby from complying with service requirements by refusing to let Nasby make legal
5 copies. See - (Motion To Extend Prison Copywork Limit). Nasby could not even file a
6 Petition For Writ of Mandamus regarding his Motion for Appointment of Counsel, his
7 Motion to Extend Prison Copywork Limit, or his 59(e) Motion. Thus, unless the State
8 had an alternative method of providing Nasby meaningful access to the courts, the dist-
9 rict court should have appointed Nasby counsel to represent him and addressed,
10 then granted, Nasby's Motion to Extend Prison Copywork Limit, to ensure Nasby
11 meaningful access to the courts.

12 It is the Court's duty to remedy the violation of Nasby's right to meaningful access
13 to the courts. Lewis v. Casey, 518 U.S. 343 at 344. Not appointing counsel and not addr-
14 essing Nasby's Motion to Extend Prison Copywork Limit, only resulted in the continued
15 denial of this right. Thus, this Court should find that the district court should have
16 ~~not~~ addressed Nasby's Motion To Extend Prison Copywork Limit and should have
17 given Nasby "someone trained in the law" by appointing counsel, to ensure Nasby
18 meaningful access to the courts.

19 Issue Fixes The District Court Abused Its Discretion And Erroneously Denied Nasby's
20 59(e) Motion.

21 As a preliminary matter, Nasby directs this Court's attention to the fact that he is
22 unable to file a petition for writ of mandamus regarding his 59(e) Motion, due to the
23 district court's failure to address and grant Nasby's Motion to Extend Prison Copywork
24 Limit. NRAP 21(a)(4) requires pro se petitioners to supply copies of the record pleadings to
25 this Court and the respondents. The State has prevented Nasby from making ~~copies~~ copies
26 and thus, prevented Nasby from complying with service requirements of NRAP 21(a)(4).
27 Collins v. Goard, supra. Nasby has no other speedy and adequate remedy, other than to
28 present the claim in this instant brief.

1 On May 9, 2016, the district court submitted its Finding of Fact, Conclusions
2 of Law and Order. On May 18, 2016, Nasby filed his Motion to Alter or Amend A
3 Judgment NRCP 59(e). On June 6, 2016, the State filed its Response to Nasby's
4 59(e) Motion.

5 The State's Response relied on its arguments that, 1) "the Nevada Rules of Civil
6 Procedure do not apply to criminal proceedings"; 2) "the district court has no jurisdic-
7 tion to review the substance of Defendant's instant Motion outside the confines of
8 NRS Chapter 34."; and 3) there is no mechanism available for Defendant to ~~am~~
9 "amend or alter" the district court's Findings of Fact, Conclusions of Law and Order.
10 See - (State's Response To 59(e) Motion).

11 On June 8, 2016, the district court denied Nasby's 59(e) Motion "without argument,
12 based on the pleadings and good cause appearing." However, if the district court's ruling
13 was based on the pleadings, and it agreed with the State's opposition, then its ruling
14 was in error and an abuse of discretion.

15 NRS 34.780 authorizes the application of NRCP to post-conviction habeas proceedings,
16 to the extent that they are not inconsistent with NRS 34.360 to 34.830.

17 Reviewing the substance of Nasby's 59(e) Motion would not be "outside the confines of
18 NRS Chapter 34," as the State argued, for NRS 34.780 allows it. As for the State's suggest-
19 ion that Nasby's habeas petition is "criminal" and thus NRCP do not apply — the State
20 is obviously mistaken. This Court, in Mazzan v. State, 863 P2d 1035 at 1036, said that
21 habeas corpus is neither civil nor criminal for all purposes and it is a special statutory
22 remedy which is essentially unique. This Court further said that, "This Court may look to gen-
23 eral civil or criminal rules for guidance only when the statutes governing habeas
24 proceedings have not addressed the issue presented." Id.

25 The issue of altering or amending a judgment is not addressed by Chapter 34, nor is
26 NRCP inconsistent with Chapter 34. Thus, contrary to the State's assertion, NRCP
27 59(e) is an available mechanism to alter or amend the district court's Findings of
28 Fact, Conclusions of Law and Order.

1 NRC P 59(e), sets forth the following: (e) Motion to alter or amend a judgment.
2 - A motion to alter or amend the judgment shall be filed no later than 10 days
3 after service of written notice of entry of the judgment.

4 There are 4 grounds for granting a Rule 59(e) motion: (1) the motion is necessary
5 to correct manifest errors of law or fact upon which the judgment is based; (2) the
6 moving party presents newly discovered or previously unavailable evidence; (3) the
7 motion is necessary to prevent manifest injustice; or (4) there is an intervening chan-
8 ge in controlling law.

9 As represented in the Statement of Facts submitted herein, Nasby requested Rule
10 59(e) relief to 1) Correct manifest errors of law and fact upon which judgment is based;
11 2) to Present previously unavailable evidence; and 3) To Prevent manifest Injustice. —
12 For these reasons, the district court was required to alter or amend its judgment. Failing
13 to do so was in error and an abuse of discretion.

14 V. RELIEF SOUGHT.

15 wherefore, Nasby request this Honorable Court: 1) Set Nasby's conviction aside;
16 2) Order Nasby's immediate release from his current unconstitutional confinement;
17 3) Remand Nasby's case to the 9th Jud. Dist. Ct. and Order his case be set for retrial;
18 4) Reverse the district court's denial of Nasby's petition; 5) Order the district court
19 grant the Writ; 6) Order an Evidentiary Hearing; 7) Grant Nasby the appointment
20 of counsel; 8) Grant Nasby's Motion to Extend Prison Copywork Limit; 9) Inform the
21 district courts, and all interested parties, that NRC P 59(e) is applicable in habeas
22 corpus proceedings; 10) Order that Nasby's 59(e) Motion should have been granted; and/
23 or 11) Anything else this Court deems full and fair.

24 VI. CERTIFICATE OF COMPLIANCE.

25 1. I hereby certify that this brief complies with the formatting requirements of
26 NRAP 32(a)(4) and NRAP 32(a)(8) because: This brief has been prepared in
27 proportionally spaced handwriting.

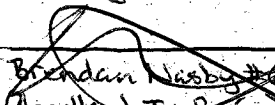
28 2. I further certify that this brief complies with the page limitations of

1 of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)
2 (c), it ~~is~~ does not exceed 30 pages.

3 3. Finally, I hereby certify that I have read this appellate brief, and to the best
4 of my knowledge, information, and belief, it is not frivolous or interposed for any improp-
5 er purpose. I further certify that this brief complies with all applicable Nevada
6 Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every
7 assertion in the brief regarding matters in the record to be supported by a reference
8 to the page and volume number, if any, of the transcript or appendix where the matt-
9 er relied on is to be found. I understand that I may be subject to sanctions in the
10 event that the accompanying brief is not in conformity with the requirements
11 of the Nevada Rules of Appellate Procedure.

12 Dated this 19th day of December, 2016.

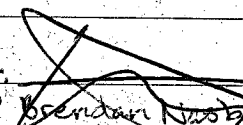
13 Respectfully Submitted,

14 By: 
15 Brendan Nasby #63618
(Appellant In Pro Se)

16 VII. VERIFICATION.

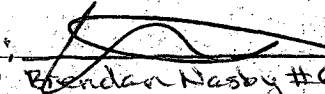
17 under penalty of perjury, the undersigned declares that he is the appellant, "Nasby"
18 named in the foregoing "Appellant's Opening Brief" and knows the contents thereof;
19 that the pleading is true of his own knowledge, except as to those matters stated on information
20 and belief, and as to such matters he believes them to be true.

21 Dated this 19th day of December, 2016.

22 By: 
23 Brendan Nasby #63618
(Appellant In Pro Se)

24 VIII. CERTIFICATE OF SERVICE BY MAIL.

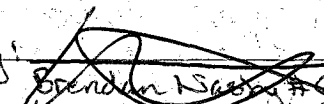
25 I, Brendan Nasby, hereby certify that on this 19th day of December, 2016, I
26 mailed a true and correct copy of the foregoing "Appellant's Opening Brief" address-
27 ed to: Clark County D.A.; P.O. Box 552211; Las Vegas, NV 89155-2211, ~~2016-12-19~~
28 ~~Clark County District Attorney, P.O. Box 552211, Las Vegas, NV 89155-2211~~

By: 
Brendan Nasby #63618
(Appellant In Pro Se)

IX, AFFIRMATION PURSUANT TO NRS 234B.030.

The undersigned does hereby affirm that the preceding "Appellant's Opening Brief" does not contain the social security number of any person.

Dated this 19th day of December, 2016.

By: 
Brendan Nasby #63618
(Appellant In Pro Se)