

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

Brendan Nasby,
Appellant,
vs.
The State Of Nevada,
Respondent.

No. 70626

Dist. Ct. No. 98C154293-2

FILED

SEP 28 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY [Signature]
DEPUTY CLERK

NRAP RULE 40B. PETITION FOR REVIEW BY THE
SUPREME COURT

BRENDAN JAMES NASBY

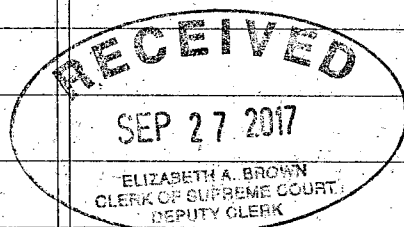
I.D. NO. 63618

LOVELOCK CORRECTIONAL CENTER

1200 PRISON ROAD

LOVELOCK, NEVADA 89419

(APPELLANT IN PRO SE)



17-33002

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JURISDICTION.

On July 12, 2017, the Court of Appeals' Order Of Affirmance was filed. On July 28, 2017, Appellant mailed his Petition For Rehearing to the Clerk of this Court. That petition was filed by the Clerk on August 2, 2017. On September 15, 2017, the Court of Appeals' Order Denying Rehearing was filed. On this 22nd day of September, 2017, Appellant mailed the instant Petition for Review By The Supreme Court to the Clerk of this Court.

This Court has jurisdiction to review decisions of the Court of Appeals on a ~~petition~~ petition for review.

ISSUES PRESENTED.

Issue One: The Court Of Appeals Failed To Address Nasby's Challenge To The 8th Judicial District Court's Jurisdiction.

Issue Two: The Court Of Appeals Exceeded Its Appellate Jurisdiction.

Issue Three: The Court Of Appeals Applied The Incorrect Law, Analysis, And Standard Of Review.

Issue Four: The Court Of Appeals' Factual Determinations Are Incorrect And Need To Be Corrected For The Record.

I. STATEMENT OF THE CASE

On January 5, 2016, Appellant Brendan James Nasby (hereinafter "Nasby") filed his 4th, and instant, post-conviction petition. Nasby also filed a Motion for Appointment of Counsel, a Motion to Extend Prison Copywork Limit, a Memorandum of Points and Authorities in Support of Petition, an Affidavit in Support of Petition, a Supplemental Memorandum of Points and Authorities in Support of Petition, and a Notice to the Clerk, Court, and all interested parties. On February 23, 2016, the State filed a response to Nasby's 4th petition. Nasby filed a Reply on March 10, 2016. On April 4, 2016, the court denied the petition. The district court filed a Finding of Facts, Conclusions of Law and Order on May 9, 2016, reflecting its oral pronouncement. The Clerk entered the Final Order on May 13, 2016. On May 18, 2016, Nasby filed a Motion to Alter or Amend Judgment NRCP 59(e). The State filed its response to Nasby's 59(e) motion on June 2, 2016. On June 8, 2016, the district court denied Nasby's 59(e) motion. On June 9, 2016, Nasby filed his Notice of Appeal. On June 30, 2016, the district court filed its order denying Nasby's 59(e) Motion. Nasby filed his Opening Appeal Brief on December 23, 2016. The Court of Appeals issued its Order of Affirmance on July 12, 2017. ~~On July 12, 2017, the Court of Appeals issued its Order of Affirmance.~~ On July 28, 2017, Nasby mailed his NRAP Rule 40 Petition For Rehearing to the Clerk of this Court. That petition was filed on August 2, 2017. On September 15, 2017, the Court of Appeals denied Nasby's Petition For Rehearing. What followed is the instant Petition For Review.

II. SUMMARY OF THE ARGUMENT

In this Petition For Review, Nasby presents four issues, in which, he presents a question of first impression of general statewide significance, he addresses the decision of the Court of Appeals which conflicts with prior decisions of this Court and the ^{U.S.} ~~United States~~ Supreme Court, and his case involves fundamental issues of statewide public importance. (NRAP Rule 40 B(a)(1)(2)(3)). Nasby also identifies when the Court of Appeals has overlooked or misapprehended a material fact in the record or a material question

1 of law in the case, and when the Court of Appeals has overlooked, misapplied or
2 failed to consider a statute, procedural rule, regulation or decision directly
3 controlling a dispositive issue in the case. (N.R.A.P. Rule 40(c)(2)(A)(B)) See

4 Also - In Re Dunleavy, 104 Nev. 784, 769 P.2d 1217 (1988).

5 1st, Nasby turns to the Court of Appeal's failure to address an issue in his
6 Opening Brief. In Nevada, an Order is not final unless it addresses and disposes

7 ~~of every issue presented. In his Opening Brief, Nasby challenged the jurisdiction~~
8 of every issue presented. In his Opening Brief, Nasby challenged the jurisdic-
9 tion of the 8th Judicial District Court to, not only review his habeas petition, but
10 to try and convict him and adjudicate him guilty of 1st degree murder under an
11 inapplicable law (Kazalyn).

12 2nd, Nasby addresses how the Court of Appeals exceeded its appellate jurisdic-
13 tion by making factual determinations regarding the element of deliberation, and aff-
14 firming the district court's order based on determinations not made in the district
15 court's decision.

16 3rd, Nasby addresses the Court of Appeal's misapplication of law, analysis, and re-
17 view standard. The Court of Appeals failed to recognize the actual claim that Nasby
18 raised in his habeas petition, which was that Byford was not applied on direct re-
19 view. Because Nasby objected to the Kazalyn instruction at trial, and raised
20 the issue on Direct Appeal, he has preserved the issue for Direct Review. It was
21 not until Nika, *infra* was decided, that Nasby was entitled to Byford's application
22 on Direct Review. The Court of Appeals applied a habeas analysis to Nasby's claim
23 when, in fact, he was entitled to a Direct Review analysis. Under Direct Review
24 standards, the burden is on the State (which they did not attempt to meet), and
25 Nasby's claim maintains a presumption of prejudice. Chapman, *infra*. Thus,
26 Nasby need only demonstrate good cause for the delay in his filing (which
27 he has done), while prejudice is presumed. Nasby also addresses the fact
28 that everything this Court based its decision on in rejecting his Byford

1 issue on Direct Appeal, was completely overruled by this Court's Nika decision.
2 The Court of Appeals's erection of an entirely new barrier, which was not present at
3 the time of Direct Review, violates ex post facto.

4 Finally, Nasby ~~the~~ addresses the Court of Appeals's incorrect description of fact-
5 ual occurrences, regarding the element of deliberation, and request that those in-
6 correct facts be corrected for the record.

7 III. SUPPORTING FACTS AND ARGUMENT.

8 Issue One: The Court of Appeals Failed To Address Nasby's Challenge To The 8th 9 Judicial District Court's Jurisdiction.

10 In Nevada, an order is not final unless it addresses and disposes of every issue
11 presented, and a challenge to the court's jurisdiction is not waivable and can be rais-
12 ed for the first time on appeal. Colwell v. State, 118 Nev. 807, 912; 59 P.3d 463, 467
13 (2002). Without conflict of authority, it has been well settled that when an inferior
14 court erroneously determines that it has jurisdiction, its judgments and orders
15 will be set aside by the higher courts. Gamble v. Silver Peak Mines, 35 Nev. 319; 133
16 P.936 (1912).

17 Issue One, of Nasby's Opening Brief, contained a challenge to the 8th Judicial Dist-
18 rict Court's jurisdiction. See - (Appellant's Opening Brief (hereinafter "A.O.B."), pg. 17). The
19 Court of Appeals failed to address this issue in its Order of Affirmance. Even after Nasby
20 pointed out this failure in his Petition For Rehearing (See - Petition For Rehearing (herein-
21 ~~after~~ after "P.F.R."), pg. 3), the Court of Appeals again failed to address this issue. As the
22 Court of Appeals, nor this Court, can pass on a challenge to jurisdiction, Nasby respect-
23 fully request this Court now address this issue. Issue One of Nasby's A.O.B is as
24 follows:

25 The 8th Judicial District Court Lacked Jurisdiction And Authority.

26 Subject-matter jurisdiction is not waivable, and a court's lack of such jurisdiction
27 can be raised for the first time on appeal. Colwell, *supra*. There are 3 essential elements
28 necessary to render convictions valid. These are, that the court must have jurisdic-

1 ion over the subject matter, the person of the defendant and authority to render the
2 particular judgment. If either of these elements is lacking, the judgment is fat-
3 ally defective, and the prisoner held under such judgment may be released on
4 habeas corpus. Ex Parte Webb, 24 Nev. 238, 242 (1898).

5 In October of 1999, Nasby was convicted of 1st degree murder under NRS 200.030
6 (1)(a) as announced in Kazalyn v. State, 108 Nev. 67, 82 P2d 578 (1992). This Court, in
7 Byford v. State, 994 P2d 700, 116 Nev. 215 (2000), ordered the district courts to cease apply-
8 ing the law of Kazalyn, which governed NRS 200.030(1)(a), and announced a change in that
9 law. Nasby raised his Byford issue on direct appeal, but this Court applied Garner v.
10 State, 116 Nev. —, 6 P.3d 1013 (2000) in its affirmance. In Garner, this Court said that
11 Byford did not apply to cases pending on ~~now~~ direct appeal. This Court, in Nika v. State,
12 124 Nev. 1272, 198 P3d 939 (2008), overruled Garner and ruled that, as a matter of
13 due process, the change in law announced in Byford did apply to cases pending on
14 direct appeal when Byford was decided. It is well established in Nevada that "the ex-
15 pression of one thing is the exclusion of another." Galloway v. Truesdell, 83 Nev. 13, 25-26
16 (1967). Thus, if the change in law announced in Byford applied to Nasby's case, the re-
17 sult must be, that the law of Kazalyn did not apply. This Court, by way of Nika, retro-
18 actively divested the 8th Judicial District Court of jurisdiction over NRS 200.030
19 (1)(a) under the law of Kazalyn, and divested the district court of its authority to
20 try, convict, and adjudicating Nasby guilty of 1st degree murder under the law
21 of Kazalyn. The 8th Judicial District Court, having issued a judgment of conviction for
22 the crime of 1st degree murder under the inapplicable law, makes Nasby's judgment of
23 conviction not merely voidable, but infact void. Ex Parte Siebold, 100 U.S. 371, 376-
24 77 (1880), e.g., Ex Parte Rosenblatt, 19 Nev. 439, 442 (1887). Therefore, there is no legal
25 cause for Nasby's imprisonment, and release from his current confinement is requir-
26 ed. Id.

27 Because Nasby's conviction is void, the 8th Judicial District Court, not only lacked
28 authority and jurisdiction to issue the judgment of conviction in Nasby's case, but

1 as a result, it also lacks jurisdiction to review this claim, as the district court
2 can never have jurisdiction over a void judgment. Ex Parte Rosenblatt, at 441. See
3 Also - Ex Parte Davis, 33 Nev. 309, 312-13 (1910).

4 Issue Two: The Court Of Appeals Exceeded Its Appellate Jurisdiction.

5 The Appellate Court's jurisdiction is restricted to questions of law alone (Hosier
6 v. State, 121 Nev. 409, 117 P3d 212 (2005)), and its review is restricted to the de-
7 cisions and determinations of the lower court. Burden v. Zant, 510 U.S. 132, 126
8 LEd 2d 611, 114 S.Ct. 654 (1994) (court held that court of appeals mistakenly up-
9 held denial of habeas relief, where denial was based on finding not made by
10 the district court.).

11 The Court of Appeals made a determination that Nasby "cannot demonstrate
12 actual prejudice" and "Accordingly", concluded the district court did not err
13 by denying Nasby's petition as procedurally barred. See (Order Of Affirmance,
14 pg. 4-5). However, the district court did not determine that Nasby could not demonstrate
15 prejudice. It only determined that Nasby "has failed to demonstrate good cause" on
16 actual innocence. See - (Finding Of Fact, Conclusions Of Law And Order, pg. 5-7). The dist-
17 rict court never made an analysis of prejudice, because it stopped its analysis
18 at determining that Nasby lacked good cause.

19 Although the Court of Appeals stopped short of determining that Nasby actually did dem-
20 onstrate good cause, when it said: "Even assuming inadequate access to legal materials
21 constituted good cause" (Order Of Affirmance, pg. 4), — if the Court felt it necess-
22 ary to apply an actual prejudice analysis, without one being done in the district court,
23 one would assume that the Court of Appeals disagreed with the lower court's determination
24 regarding good cause. If this is true, the Court should have remanded Nasby's habeas
25 petition back to the district court with instructions to make an actual prejudice
26 analysis. Instead, the Appellate Court further exceeded its jurisdiction, by making
27 factual determinations, much of which are incorrect, regarding a necessary element
28 of first degree murder (deliberation). See - (Order of Affirmance, pg 4).

1 As Nasby had a jury trial, a jury ought to determine if the State proved deliberation
2 — not an appellate court. U.S. v. Gaudin, 515 U.S. 506, 515, 132 LEd2d 444, 453 (1995).
3 In fact, Nasby has a 6th Amendment Right to have all facts regarding the elements
4 of the crime charged, determined "by an impartial jury of the State and district
5 wherein the crime shall have been committed" (U.S. Const. Amend. 6) See Also—
6 Gaudin, at U.S. 518-19; LEd2d 455. An appellate court certainly exceeds its jurisd-
7 iction if it becomes the fact finder. Id. at ~~518-19~~ U.S. 523-24; LEd2d 458-59.
8 Also — Hosier, *supra*.

9 Because the appellate court exceeded its jurisdiction, Nasby request this Court
10 vacate the Court of Appeal's affirmance of the district court's order and remand
11 for further proceedings and analysis. See — (P.F.R., pg. 3-4).

12 Issue Three: The Court Of Appeals Applied The Incorrect Law, Analysis, And Standard
13 Of Review.

14 The Court of Appeals reviewed Nasby's habeas petition as if his Byford claim was one
15 for habeas review. Although Nasby did raise the Byford issue in two prior habeas pet-
16 itions, the actual issue that Nasby raised in this habeas petition, was that Byford
17 v. State was not applied to his case on Direct Review. See — (A.O.B, pg. 18).

18 On Direct Review, the only explanation for Nasby's Byford issue lacking merit, given
19 by this Court, was that Byford did not apply to Nasby's case because Nasby was tried prior
20 to the decision in Byford, and thus, the Byford instructions were not required. This
21 Court cited Garner v. State as authority. This Court's ruling in Nasby's case, on
22 direct review, is completely overruled by Nika v. State, but now — the Court
23 of Appeals erects an entirely different barrier, which did not exist at the time
24 Nasby timely raised and preserved the issue. However, the Due Process Clause of
25 the U.S. Constitution protects Nasby from this Court applying law that is detrimental
26 to him *ex post facto*. Stevens v. Warden, 114 Nev. 1217, 1221; 969 P2d 945, 948 (1998). Thus,
27 the appropriate analysis to be applied to Nasby's Byford issue, is one for Direct Review
28 — not collateral review.

1 Because Nasby objected to the Kazalyn instruction at trial and raised the
2 issue on Direct Appeal, Nasby preserved this issue for Direct Appellate Review.
3 Under Direct Review Standards, the burden is not on Nasby to demonstrate prejudice.
4 Nasby has the presumption of prejudice; especially in light of the U.S. Supreme
5 Court's rulings in Welch, infra and Montgomery, infra. The burden, under
6 Direct Appellate Review Standards, is on the State to prove that the erroneous
7 jury instructions could not have contributed to the conviction. Chapman v. Cali-
8 fornia, 386 U.S. 18, 23-24; 17 LEd2d 705, 710 (1967). See Also - the analysis of
9 Welch v. U.S., 578 U.S. —, 194 LEd2d 387, 400-01 (2016) and Montgomery v. Loui-
10 siana, 136 S.Ct. 718, 732-735; 193 LEd2d 549, 618-21 (2016) and compare to By-
11 ford v. State, 116 Nev. 215, 234; 994 P2d 700, 713 (2000). The State has never even
12 attempted to meet its burden.

13 Since actual prejudice is presumed in this case, Nasby need only meet the
14 good cause requirement of NRS Ch. 34 — which he has done, although the Court of
15 Appeals had not actually determined whether or not Nasby did demonstrate good
16 cause. See - (P.F.R., pg. 4-6).

17 Issue Four: The Court Of Appeals' Factual Determinations Are Incorrect And Need
18 To Be Corrected For The Record.

19 In the Court of Appeals' factual determinations, regarding the element of deliberat-
20 ion, the Court determined facts that are incorrect and disproven by the record. Al-
21 though the victim in this case was only shot twice, the Court of Appeals determined
22 the following list of factual occurrences: "Once in the desert and while the ~~the~~ victim
23 was looking for something they could use as target practice, Nasby moved up from
24 behind the victim and shot the victim from behind. The victim fell down to one knee,
25 Nasby moved closer to the victim, and shot the victim again. Nasby and his codef-
26 endants then got back into the car, but as the car was starting to turn around,
27 Nasby exited the car, walked over to the victim, stood over the victim's head, and
28 shot the victim a third time, this time in the victim's head." See - (Order of App-

1 irmanance, pg. 4). Obviously, whatever source the Court of Appeals relied on to make
2 these factual determinations, is unreliable, as the Court's entire list of occurrences
3 results in the victim being shot three times, when in fact, the victim was only shot
4 twice. See - (Trial Transcripts, Vol. III, pgs. 162-199, regarding how many times the
5 victim was shot). Perhaps an evidentiary hearing in the district court would
6 be appropriate. See - (P.F.R., pg. 6).

7 IV. RELIEF SOUGHT.

8 wherefore, Nasby request this Honorable Court: ① Address Issue One of Nasby's
9 Opening Brief regarding the challenge to the District Court's Jurisdiction; ② Vacate
10 the Order of Affirmance and enter an order addressing whether or not the district
11 court properly determined that Nasby failed to demonstrate good cause; ③ De-
12 clare that Nasby's Byford issue has a presumption of prejudice; ④ Remand this
13 case back to the district court for correction of factual determinations; ⑤ Grant
14 Nasby all of the relief sought in his Opening Brief (See - A.O.B., pg. 28); and
15 ⑥ Anything else this Court deems full and fair.

16 V. CERTIFICATE OF COMPLIANCE

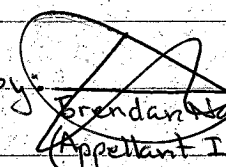
17 1. I hereby certify that this brief complies with the formatting requirements of NRAP
18 32(a)(4) and NRAP 32(a)(8) because: This petition has been prepared in proportionally
19 spaced handwriting.

20 2. I further certify that this petition complies with the page limitations of
21 NRAP 40 B(d) because, excluding the parts of the petition exempted by NRAP 32(a)
22 (7)(C), it does not exceed 10 pages.

23 3. Finally, I hereby certify that I have read this appellate brief, and to the best of
24 my knowledge, information, and belief, it is not frivolous or interposed for any im-
25 proper purpose. I further certify that this petition complies with all applicable Nevada
26 Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every asser-
27 tion in the petition regarding matters in the record to be supported by a reference to
28 the page and volume number, if any, of the transcript or appendix where the

1 matter relied on is to be found. I understand that I may be subject to sanct-
2 ions in the event that the accompanying petition is not in conformity with the
3 requirements of the Nevada Rules of Appellate Procedure.

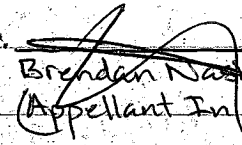
4 Dated this 23rd day of September, 2017.

5 Respectfully Submitted By:  Brendan Nasby #63618
6 (Appellant In Pro Se)

7 VI. VERIFICATION.

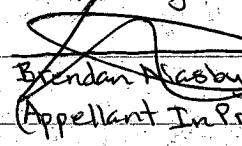
8 Under penalty of perjury, the undersigned declares that he is the appellant
9 "Nasby" named in the foregoing "NRAP Rule 40B. Petition For Review By The
10 Supreme Court" and knows the contents thereof; that the pleading is true of
11 his own knowledge, except as to those matters stated on information and belief,
12 and as to such matters he believes them to be true.

13 Dated this 23rd day of September, 2017.

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

16 VII. CERTIFICATE OF SERVICE BY MAIL.

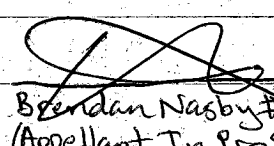
17 I, Brendan Nasby, hereby certify that on this 23rd day of September, 2017, I mailed
18 a true and correct copy of the foregoing "NRAP Rule 40B. Petition For Review By The Sup-
19 reme Court" addressed to: Clark County D.A.; P.O. Box 552211; Las Vegas, NV 89155-2211.

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

22 VIII. AFFIRMATION PURSUANT TO NRS 239B.030.

23 The under signed does hereby affirm that the preceding "NRAP Rule 40B. Petition For Re-
24 view By The Supreme Court" does not contain the social security number of any person.

25 Dated this 23rd day of September, 2017.

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

28