

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

Brendan Nasby,
Appellant,

Sup. Ct. No. 73412

vs.

The State Of Nevada,
Respondent.

Dist. Ct. No. 98C154293

FILED

JAN 22 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY J. H. Smith
DEPUTY CLERK

APPELLANT'S OPENING BRIEF

BRENDAN JAMES NASBY

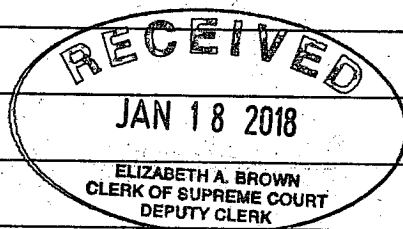
I.D. NO. 63618

LOVELOCK CORRECTIONAL CENTER

1200 PRISON ROAD

LOVELOCK, NEVADA 89419

(APPELLANT IN PRO SE)



18-02755

1	<u>TABLE OF CONTENTS</u>	
2		PAGE(S)
3	<u>TABLE OF AUTHORITIES</u>	iii - v
4	Cases	iii - iv
5	Statutes And Rules	iv - v
6	Constitutional Amendments	v
7	<u>JURISDICTION</u>	vi
8	<u>STATEMENT OF PRESUMPTIVE ASSIGNMENT UNDER NRAP 17</u>	vi
9	<u>QUESTIONS PRESENTED</u>	vii
10	<u>I. STATEMENT OF THE CASE</u>	1 - 7
11	<u>II. STATEMENT OF FACT</u>	7 - 18
12	A. Overview	7 - 8
13	B. State's Case And Nasby's Presentation Of Evidence Which Demonstrates His Actual Innocence	8 - 18
14	<u>III. SUMMARY OF ARGUMENT</u>	18 - 20
15	<u>IV. ARGUMENT</u>	20 - 29
16	Question One	20 - 22
17	Question Two	22 - 28
18	A.	22 - 25
19	B.	25 - 26
20	C.	26 - 27
21	D.	27 - 28
22	Question Three	28 - 29
23	Question Four	29
24	<u>V. RELIEF SOUGHT</u>	29 - 30
25	<u>VI. CERTIFICATE OF COMPLIANCE</u>	30
26		
27		
28		

1 TABLE OF AUTHORITIES

2 CASES

PAGE(S)

3	<u>Alpha Energy Savers, Inc. v. Hansen</u> , 381 F.3d 917 (9th Cir. 2004)	28
4	<u>Borough of Duryea, Pa. v. Guarnieri</u> , — U.S. —, 130 L.Ed.2d 408, 131 S.Ct. 2488 (2011)	27
5	<u>Calderon v. Thompson</u> , 523 U.S. 538 (1998)	29
6	<u>Cirac v. Lander Co.</u> , 95 Nev. 723, 602 P.2d 1012 (1979)	23
7	<u>City of Las Vegas v. Evans</u> , 129 Nev. —, 301 P.3d 944 (2013)	22
8	<u>Co. of Clark v. State</u> , 65 Nev. 490, 199 P.2d 137 (1948)	25
9	<u>Edgington v. Edgington</u> , 119 Nev. 577, 80 P.3d 1282 (2003)	22
10	<u>El Capitan Club v. Firemen's Fund Ins. Co.</u> , 89 Nev. 65, 506 P.2d 426 (1973)	25
11	<u>Graines v. State</u> , 116 Nev. 359, 998 P.2d 166 (2000)	23
12	<u>Galloway v. Truesdell</u> , 93 Nev. 13 (1967)	24
13	<u>Gamble v. Silver Peak Mines</u> , 35 Nev. 319, 133 P.936 (1912)	22
14	<u>Greenpeace Action v. Franklin</u> , 982 F.2d 1342 (1992)	27
15	<u>Haines v. Kerner</u> , 404 U.S. 59, 30 L.Ed. 2d 652, 92 S.Ct. 594 (1972)	29
16	<u>Haney v. State</u> , 185 P.3d 350 (2008)	24
17	<u>Harris v. State</u> , 329 P.3d 619 (2014)	24
18	<u>Henson v. Santander Consumer USA Inc.</u> , 582 U.S. —, 137 S.Ct. 1718 (2017)	23
19	<u>Hicks v. Oklahoma</u> , 447 U.S. 343 (1980)	25, 27
20	<u>Hobbs v. State</u> , 127 Nev. 234, 251 P.3d 177 (2011)	22
21	<u>Kress v. Corey</u> , 65 Nev. 1, 189 P.2d 352 (1948)	25
22	<u>Laboa v. Calderon</u> , 224 F.3d 972 (9th Cir. 2000)	25, 27
23	<u>Landreth v. Malik</u> , 221 P.3d 1265, 125 Nev. Adv. Rep. 61 (2004)	20
24	<u>Loughrin v. U.S.</u> , 573 U.S. —, 134 S.Ct. 2384 (2014)	23
25	<u>Mazzan v. Warden</u> , 112 Nev. 833, 921 P.2d 920 (1996)	29
26	<u>McConnell v. State</u> , 125 Nev. 246, 212 P.3d 309 (2009)	22, 23
27	<u>NCAA v. Jones</u> , 97 Nev. 56, 624 P.2d 10 (1981)	27
28	<u>Nev. Mgt. Co. v. Jack</u> , 75 Nev. 232, 338 P.2d 71 (1959)	25

1	<u>Pellegrini v. State</u> , 117 Nev. 860, 34 P.3d 519 (2001)	29
2	<u>Re Smith</u> , 35 Nev. 80 (1912)	21
3	<u>Rohlfing v. 2nd Jud. Dist. Ct.</u> , 106 Nev. 902, 803 P.2d 659 (1990)	29
4	<u>S. E. C. v. McCarthy</u> , 322 F.3d 650 (9th Cir. 2003)	24
5	<u>Shapiro v. Welt</u> , 133 Nev. Adv. Rep. 6 (2017)	28
6	<u>Sheriff v. Andrews</u> , 129 Nev. Adv. Op. 51, 286 P.3d 262 (2012)	24
7	<u>State v. Catania</u> , 120 Nev. 1030, 102 P.3d 588 (2004)	22
8	<u>State, ex rel. Orsborn v. Fogliani</u> , 82 Nev. 300, 417 P.2d 148 (1966)	22, 28
9	<u>State v. Sustacha</u> , 108 Nev. 223, 826 P.2d 959 (1992)	29
10	<u>Steel v. Steel</u> , 1 Nev. 27 (1865)	21
11	<u>Stoll v. Gottlieb</u> , 305 U.S. 165 (1938)	21
12	<u>U.S. v. W.T. Grant Co.</u> , 345 U.S. 629, 97 L.Ed 1303 (1953)	27
13	<u>Voigt v. Savel</u> , 70 F.3d 1552 (9th Cir. 1995)	28
14	<u>Warden v. Peters</u> , 429 P.2d 549 (1967)	20
15	<u>Watson Bounds v. 8th Jud. Dist. Ct.</u> , 131 Nev. Adv. Op. 79, 358 P.3d 228 (2015)	22
16		
17	<u>STATUTES AND RULES</u>	20, 21
18	NRS 3.220	26, 29
19	NRS 30.030	18, 25
20	NRS 30.080	26
21	NRS 30.100	26
22	NRS 34.360	4, 5, 19, 20, 22, 23, 24, 25, 27, 28, 29
23	NRS 34.370	25
24	NRS 34.470	26
25	NRS 34.500	26
26	NRS 34.680	18
27	NRS 34.720	4, 18, 19, 21, 23, 24, 25, 27
28	NRS 34.724	18, 20, 22, 23, 24, 27, 28

1	NRS 34.726	6, 23
2	NRS 34.800	6, 22
3	NRS 34.810	3, 6, 22
4	NRS 34.830	19, 21, 24, 25
5	NRS 41.637	28
6	Title 28 U.S.C.S. § 2254	2, 4
7	D.C.R. 18(1)	5
8	NRAP 28	30
9	NRAP 32	30
10	NRCP 54	27
11	NRCP 60	5, 6, 30

12

13 CONSTITUTIONAL AMENDMENTS

14	1st Amendment, U.S. Const.	20
15	4th Amendment, U.S. Const.	3
16	5th Amendment, U.S. Const.	3
17	6th Amendment, U.S. Const.	3
18	14th Amendment, U.S. Const.	3, 20
19	Art. I § 5, Nev. Const.	22
20	Art. I § 8, Nev. Const.	3
21	Art. 6 § 6, Nev. Const.	26

22

23

24

25

26

27

28

JURISDICTION.

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

On May 15, 2017, the 8th Jud. Dist. Ct. denied Appellant's Petition For Writ Of Habeas Corpus. An Order to that effect was filed on June 20, 2017. On June 27, 2017, Appellant filed his Notice of Appeal. On June 29, 2017, the district court clerk filed the Case Appeal Statement. On July 7, 2017, the Clerk of this Court filed Appellant's Notice of Appeal. This Court's Order Directing Transmission Of Record was filed on September 15, 2017.

Appellant asserts that this appeal is from a final order or judgment denying his Petition For Writ of Habeas Corpus and denying Appellant's associated motions, which were included in the same Order/Judgment.

STATEMENT OF PRESUMPTIVE ASSIGNMENT UNDER NRAP 17.

This matter is presumptively retained by the Supreme Court under: 1) NRAP 17(a)(1) and NRAP 17(b)(1) as this matter involves a conviction for a Category A felony; 2) NRAP 17(a) 13 as this matter raises as a principal issue a question of first impression involving the U.S. and Nev. Const., as well as common law; and 3) NRAP(a)(14) as this matter raises as a principal issue a question of statewide public importance.

QUESTIONS PRESENTED.

Question One: Did The 8th Judicial District Court Exceed Its Jurisdiction When It Applied The Post-Conviction Provisions Of Ch. 34 To Nasby's Petition, Without Nasby First Making The Prerequisite Request For Relief?

Question Two: If Nasby Does Not Request Relief From His Conviction Or Sentence, Does He Have A 1st & 14th Amendment Right, As Well As A Statutory Right, To Prosecute A Writ Of Habeas Corpus Under NRS 34.360, To Inquire Into The Cause Of His Unlawful Imprisonment, By Way Of Presenting Questions Of Law Which Challenge The Validity Of His Conviction Or Sentence?

Question Three: Did The 8th Jud. Dist. Ct. Exceed Its Jurisdiction When It Changed The Holdings Made By The 11th Jud. Dist. Ct.?

Question Four: Does Nasby Make A Showing Of Actual Innocence?

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 possibility of parole for use of a deadly weapon. The Judgment of Conviction was filed on December 2, 1999. Nasby appealed to this Court. On Direct Appeal, Nasby raised the following: 1) Mr. Nasby's Conviction For Open Murder And Conspiracy To Murder Must Be Reversed As He Was Denied A Fair And Impartial Trial In That The State Used Coerced Testimony To Obtain The Conviction; 2) Mr. Nasby's Conviction For Open Murder And Conspiracy To Commit Murder Must Be Reversed Because There Was No Corroborating Evidence; 3) The Trial Court Erred By Failing To Provide A Cautionary Instruction To The Jury Regarding Accomplice Testimony; 4) The Trial Court Erred In Failing To Instruct The Jury On "Willfulness, Deliberation, And Premeditation." (Instr. 12); and 5) The Trial Court Erred In Denying The Defense Motion For A Mistrial Because Of The State's Use Of Inadmissible Evidence In His Opening Statement. This Court upheld Nasby's sentence and conviction in an affirming opinion filed on February 7, 2001. Sup. Ct. No. 353K1. On January 30, 2002, Nasby filed a petition for writ of habeas corpus (post-conviction) with the 8th Jud. Dist. Ct., in which, he raised 5 grounds for relief. Among them were: Ground 2 - Cumulative Effect Of Several Instances Of Prosecutorial Miscconduct Violated Petitioner's Right To Due Process Under The U.S. Const.: A) The State Violated Petitioner's 6th Am. Right To Counsel When They Placed A Jail House Informant In Close Proximity To Petitioner In Order To Gain Incriminating Information Against Him; B) Trial Court Erred In Delaying The Decision To Admit Evidence Of Prior Bad Acts; C) State Violated Petitioner's Right To Due Process Under The U.S. Const. When It Introduced Evidence Of Petitioner's Prior Bad Acts; D) State Violated Petitioner's Due Process Rights Under The U.S. Const. When It Prevented Defense Witness From Testify-

ing; E) Prosecutor & Trial Court Violated Petitioner's Due Process Rights Under The U.S. Const.
When They Vouched For The Credibility Of State Witness & Referred To Things Not In Evid-
ence; F) Prosecutor Violated Petitioner's Due Process Rights Under The U.S. Const. When It Present-
ed Scripted, And False Testimony, As Well As Conflicting Theories Of The Case. Failure To Give
Accomplice Instruction Violated Petitioner's U.S. Const. Rights; G) Prosecutor Violated Pet-
itioner's Due Process Rights Under The U.S. Const. When It Withheld The Whereabouts of
Charles Vonhewois, Failed To Investigate, And Inflamed The Passions Of The Jury During
Closing Argument, and Ground 5: Ineffective Trial And Appellate Counsel Violated Petition-
er's 6th Am. Right To Counsel Under The U.S. Const. On February 2, 2004, the 8th Jud. Dist. Ct. appoint-
ed "Anthony Sgro" to represent Nasby. After an evidentiary hearing, and further argument, the district
court denied Nasby's petition on March 27, 2006. The court determined that Nasby's prosecutorial
misconduct claims were procedurally barred and that because trial & appellate counsel were
not ineffective, there was no good ~~cause~~ cause to overcome the bar. 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 dist-
rict court granted ~~Nasby~~ Nasby a stay so that he could return to State Court to exhaust un-
exhausted claims. Nasby filed a 2nd post-conviction petition in the 8th Jud. Dist. Ct. on February
16, 2011. Case No. C154293-2. In that petition Nasby raised the following: Gr. One - The Court
Erroneously Allowed Introduction of Prior Bad Acts; Gr. 2 - The Conviction For Murder And
Conspiracy To Commit Murder Was Obtained Where There Was No ~~conv~~ Corroborating Evidence;
Gr. 3 - Trial Court Erred By Failing To Provide A Cautionary Instruction To The Jury Regard-
ing Accomplice Testimony; and Gr. 4 - The Trial Court Failed To Instruct The Jury On Willful-
ness, Deliberation, and Premeditation; Instruction (12). On June 17, 2011, the court denied
Nasby's 2nd petition. On February 9, 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 3rd post-conviction petition in the

1 8th Jud. Dist. Ct. Case No. 98C154293-2. In that petition, Nasby raised six grounds for
2 relief. They were as follows: Gr. 1 - Petitioner's 6th Am. Right To Counsel Was Violated By
3 Post-Conviction Counsel's Ineffectiveness And Fraud; Gr. 2 - Petitioner's U.S. Const. Due
4 Process Rights Were Violated When Judge Reviewing Initial Post-Conviction Petition Did Not
5 Sua Sponta Recuse Himself; Gr. 3 - Ineffective Counsel On Direct Appeal Violated Petition-
6 er's 6th And 14th Am. Rights; Gr. 4 - The Cumulative Effect Of Prosecutorial Miscond-
7 uct Violated Petitioner's Rights Under The 4th, 5th, 6th, And 14th Am. To The U.S. Const.
8 And Art. I, Sect. 8 of The New Const.; A) Petitioner's Claims Are Not Barred By NRS
9 34.810(1); B) The State Violated Petitioner's Due Process Rights Under The U.S. Const. When
10 The Prosecutor Prevented A Defense Witness From Testifying; C) The Prosecutor Violated
11 Petitioner's Due Process Rights Under The U.S. Const. When He Vouched For The Credibility
12 Of State Witnesses; D) The Prosecutor Violated Petitioner's Due Process Rights Under The U.S. Const.
13 When He Referred To Things Not In Evidence; E) The Prosecutor Violated Petitioner's Due Process
14 Rights Under The U.S. Const. When He Misstated The Law In Closing Argument; F) The Prosecutor
15 Violated Petitioner's Due Process Rights Under The U.S. Const. When It Presented Scripted, And
16 False Testimony, As Well As Conflicting Theories Of The Case; G) The Prosecutor Led Petition-
17 er To Believe That Mr. Vanhewis Would Be A Prosecution Witness; H) The State Violated Petitioner's
18 6th Am. Right To Counsel When They Placed A Jail House Informant In Close Proximity To Pet-
19 itioner In Order To Gain Incriminating Information Against Him; Gr. 5 - The Court Erron-
20 eously Allowed The Introduction Of Prior Bad Acts Evidence And Failed To Properly Instruct The
21 Jury On Multiple Critical Issues In Violation Of The 4th, 5th, 6th, And 14th Am. Of The U.S.
22 Const.; Gr. 6 - Ineffective Trial And Appellate Counsel Violated Petitioner's 6th Am. Rights To
23 Counsel Under The U.S. Const.. On March 30, 2015, the district court denied Nasby's 3rd petition.
24 Nasby appealed the denial of his 3rd petition on March 17, 2015. On September 11, 2015, this Court aff-
25 rmed the denial of Nasby's 3rd petition. Sup. Ct. No. 67580. On January 5, 2016, Nasby filed his 4th
26 post-conviction petition. On April 4, 2016, the court denied the petition. Nasby filed his Notice
27 of Appeal on June 9, 2016. On July 12, 2017, the Court of Appeals issued its Order of Affirmance.
28 On August 2, 2017, Nasby's Petition For Rehearing was filed. It was denied on September

1 15, 2017. On September 28, 2017, Nasby filed his Petition For ~~Review~~ Review By The
2 Nevada Supreme Court. It was denied on November 29, 2017. Sup. Ct. No. 70626. ~~About~~
3 ~~the~~ December 18, 2017, Nasby filed his motion to stay remittitur pending application
4 to the Sup. Ct. of the U.S. for a writ of certiorari. To date, remittitur has not been
5 issued regarding Nasby's 4th post-conviction petition. On April 10, 2017, the 9th Cir. Ct. of App-
6 eals Reversed the federal district court's denial of Nasby's 2254 petition, and Remanded that
7 petition back to the federal district court. That petition is currently pending in the federal
8 district court.

9 On January 26, 2016, Nasby filed his "In Re" "Petition For Writ Of Habeas Corpus (NRS 34.360-
10 Constitutional Questions/Questions of Law)" in the 11th Jud. Dist. Ct. Case No. PI 16-1002.
11 With that petition, Nasby also filed a "Motion For Appointment Of Counsel" and a "Motion To Extend
12 Prison Capiwork Limit". In that petition, Nasby only requested the court answer his pre-
13 sented questions of law and/or address any other observable legal questions and violations sua
14 sponta. See - (Petition, pg 44, lns. 19-23). Nasby also argued that, because he affirmately
15 asserted that he does not request relief from his conviction or sentence, and does not
16 challenge the computation of time that he has served, then NRS 34.720 prevents the appli-
17 cation of any of the post-conviction provisions to his petition. See - (Petition, pg 2, lns. 6-
18 8; pg 3, lns. 27-28; pg 4, lns. 1; pg 23, lns. 7-9). On August 11, 2016, the 11th Jud. Dist. Ct. issued its
19 "Order Transferring Petition". In that order, the court acknowledged that Nasby "filed a Pet-
20 ition For Writ Of Habeas Corpus (NRS 34.360- Constitutional Questions/Questions of
21 Law)". See - (~~Review~~ Order Transferring Petition, pg. 1, lns. 15-17). The court then made its
22 holdings, and held that: (1) Nasby filed a "Petition For Writ Of Habeas Corpus (NRS 34.
23 360- Constitutional Questions/Questions of Law)" See - (Order Transferring Petition, pg. 1,
24 lns. 17-23); ⁽²⁾ then immediately differentiates between this 34.360 petition and Nasby's
25 post-conviction habeas corpus petitions, when the court identifies the "(4) state post-con-
26 viction Habeas Corpus petitions" that Nasby has filed. See - (Order Transferring Petition, pg. 1,
27 lns. 22-24). The 11th Jud. Dist. Ct. clearly did not identify Nasby's petition as a petition
28 for post-conviction relief, but explicitly held that Nasby filed this 34.360 petition.

1 The court then held that: (3) the reason the court was transferring the petition was be-
2 cause making "a determination on the adequacy of procedures taken by the 8th Judicial
3 District Court during the Petitioner's trial in 1999 would result in the Court committing a
4 violation of "DCR 18(1), and "should therefore be properly heard by the district court of the
5 county in which the trial and sentencing occurred." See (Order Transferring Petition, pg. 2,
6 Ins. 3-10). The court then: (4) refused to "answer the Petitioner's "Questions of Law", all of
7 which stem from the Petitioner's original trial, as it would result in this Court producing an
8 Advisory Opinion as to the Eighth Judicial District's management of the trial in 1999."
9 Finally, the court: (5) left Nasby's Motion For Appointment of Counsel and Motion To Extend
10 Prison Copywork Limit, "pending for the Eighth Judicial District to determine as the
11 Court sees fit." See (Order Transferring Petition, pg. 2, Ins. 14-16).

12 Based on the 11th Jud. Dist. Ct.'s transfer order, the 8th Jud. Dist. Ct. Clerk filed Nasby's
13 "In Re" Petition For Writ Of Habeas Corpus (NRS 34.360 - Constitutional Questions/Questions
14 of Law), gave it a civil case number (Case No. A-16-741719-W), and it was assigned
15 to Judge Bell in Department 7. On March 16, 2017, without notification or explanation,
16 Judge Kephart in Dept. 19, issued an "Order For Petition For Writ Of Habeas Corpus",
17 altering several components of, or relating to, Nasby's petition. In Judge Kephart's order, the
18 petition was assigned to him in Department 19, was assigned Nasby's criminal and post-convict-
19 ion case number (Case No. 98C154293-2), and although Nasby's petition is only "In Regards" to
20 Nasby v. State - 98C154293-2, the order did not reflect that — as it was not entitled "In Re:
21 Nasby v. State." Finally, and most importantly, Judge Kephart's order identifies Nasby's petition
22 as a petition for post-conviction relief. See (Order For Petition For Writ Of Habeas Corpus).

23 On April 4, 2017, Nasby filed a "Motion For Reconsideration (NRCP 60(b))", in which, Nasby challenged
24 the court's mistaken identification of Nasby's petition, informed the court that Nasby's petition
25 was outside the scope of a post-conviction petition, informed the court that it lacked jurisdiction
26 to change the 11th Jud. Dist.'s holding that determined that the petition was a 34.360 petition,
27 and requested that, in order for the correct law to be applied, the court reconsider, correct, and/or
28 amend, its "Order For Petition For Writ Of Habeas Corpus." See (Motion For Reconsideration (NRCP

1 60(b)). The State responded to Nasby's Reconsideration Motion on April 19, 2017. On
2 April 25, 2017, the State responded to Nasby's petition, in which, the State requested the
3 district court construe Nasby's petition as a petition for post-conviction relief and dis-
4 miss the petition under NRS 34.726, 34.500, and 34.810. On April 26, 2017, the district
5 court denied Nasby's Motion For Reconsideration. On May 15, 2017, the district court denied
6 Nasby's petition as procedurally time-barred and successive, under NRS 34.726, 34.500,
7 and 34.810. See - (Finding Of Facts, Conclusions Of Law And Order). On May 10, 2017, prior to
8 the court's ruling, Nasby filed a "Reply To The State's Response To Petition For Writ Of Habeas Corpus".
9 In his Reply, Nasby argued that the State was simply urging the Court to exceed its jurisdic-
10 tion". See - (Reply To State's Response To Petition). To date, no Court has addressed Nasby's pend-
11 ing "Motion For Appointment Of Counsel" or his "Motion To Extend Prison Copywork Limit",
12 originally filed in the 11th Jud. Dist. Ct.
13 On June 27, 2017, Nasby filed his "Notice of Appeal". In that Notice, Nasby listed all 3 case
14 numbers attached to his petition (8th Jud. Dist. Ct. Case No. 98C154293-2; Original 8th Jud. Dist.
15 Ct. No. A-16-741719-W; and 11th Jud. Dist. Ct. No. PI 16-1002). Although Nasby only filed
16 this one instant petition, the 8th Jud. Dist. Ct. Clerk filed two separate Case Appeal Statements
17 — one for No. A-16-741719-W and another for No. 98C154293-2. Apparently, Case No. A-16-
18 741719 was, not only still pending in Judge Bell's Dept. 7, but that petition was listed as a
19 "Civil Writ of Habeas Corpus", with no previous appeals attached to it. The case appeal state-
20 ment listed that there was no decision made in the district court, that it was commenced on
21 August 16, 2016, and the petition was listed as "Nasby v. State". In the other case appeal
22 statement for No. 98C154293-2, it was listed that this case was no longer pending in Judge Kephart's
23 Dept. 19. This case appeal statement stated that this petition was listed as a "Writ of Habeas
24 Corpus", with several previous appeals attached to it, that a decision was made in the district
25 court, that it was commenced on October 21, 1998, and listed as "State v. Nasby". On July 7,
26 2017, the Clerk of this Court filed both appeals (No. A-16-741719-W as Sup. Ct. No. 73414 and
27 No. 98C154293-2 as Sup. Ct. No. 73412). On September 25, 2017, this Court dismissed appeal No.
28 73414, as no decision had been made on the petition. On September 15, ~~2017~~ 2017, this Court

1 filed its Order Directing Transmission Of Record, on appeal No. 73412. On November 15, 2017,
2 Nasby filed, in the 8th Jud. Dist. Ct., a "Motion For Action On Petition" regarding Case
3 No. A-16-741719-W. No action has been taken on that motion as of yet. What followed
4 is the instant Opening Appeal Brief.

5 II. STATEMENT OF FACTS.

6 Nasby hereby incorporates the facts supplied in his "Statement Of The Case".

7 A. Overview: At Nasby's trial, it was represented to the jury that, on the night of July 16, 1998,
8 around 10:30 p.m., Nasby, Jeremiah Deskin (hereinafter, "Deskin"), Tommie Burnside, and Jatee Burnside,
9 members of the L.A. Crazy Riders gang, were at Nasby's home. Deskin, and the Burnside brothers, drove to
10 Michael Beasley's home at approximately 10:00 p.m.. Michael Beasley (hereinafter "Beasley"), also a member
11 of the L.A. Crazy Riders, would ultimately be shot and killed in the desert that night. Deskin and the
12 Burnside's found Beasley at his home. Deskin and the Burnside's lured Beasley to go for a ride under the
13 pretense that they would drive into the desert to shoot a new gun and smoke marijuana. Beasley
14 asked his aunt to watch his son, while he went with his friends.

15 Deskin, and only Deskin, testified tentatively that in June of 1998, some conversation took place in which
16 Nasby asked the gang members whether Beasley should be killed. This conversation allegedly took place
17 approximately one month prior to Beasley's death. When directly asked whether he had a say about Beas-
18 ley being killed, Deskin ~~admitted~~ stated, "No. I was never asked." (J.T. Vol. III, pg. 78-79). Deskin testified that
19 after picking up Beasley, the four men drove back to Nasby's home and picked him up, and then went into
20 the desert. (J.T. Vol. III, pg. 94, Ins. 8-11). Once the group arrived at the desert, Deskin testified that he saw
21 Nasby shoot Beasley. (J.T. Vol. III, pg. 101, Ins. 19-20). Then Deskin, the Burnside's, and Nasby drove back
22 to Nasby's house. (J.T. Vol. III, pg. 104, Ins. 2-5). Nasby has always maintained that he was not in the desert
23 and that he was not involved in the murder. For the two weeks between the murder and Nasby's arrest,
24 rumors ~~were~~ were being spread and repeated about Nasby being the one who killed Beasley. These rumors
25 continued to spread up until Nasby's trial, over a year later. (J.T. Vol. IV, pg. 23; Vol. V, pg. 21-22; Vol. VI, pg.
26 155-60; Vol. III, pg. 230-31). This would explain how different people could tell similar stories which all, however,
27 contain blatant falsities that are belied by the record.

28 Police interviewed both Burnside brothers, who told the police that the shooter was Damien Ven Lewis.

1 aka "Sugar Bear" Charles Damien Von Lewis (hereinafter "Von Lewis"), was also a member of the L.A.
2 Crazy Riders. (I.T. Vol. V, pg. 104, ln. 3; pg. 110, ln. 17; pg. 128, lns. 12-13). After negotiating deals with the State
3 the Burnside's changed their statements and implicated Nasby in the shooting, although they did not
4 testify that they witnessed Nasby shoot anyone. (I.T. Vol. V, pg. 86-141).

5 On August 4, 1998, the police executed a search warrant on the Nasby residence. (I.T. Vol. IV, pg. 148).
6 Nasby was arrested at that time. Nasby voluntarily showed Dt. Buczek a nine millimeter pistol.
7 (I.T. Vol. IV, pg. 153, lns. 9-16). Nasby told the officers that he had purchased the weapon after the death of
8 Beasley from an individual named "Sugar Bear." (I.T. Vol. IV, pg. 154, lns. 11-21). In fact, Dt. Buczek stated
9 that Nasby was cooperative with him and not disruptive or violent in any way. (I.T. Vol. IV, pg. 154,
10 lns. 3-5).

11 The weapon was later identified as the murder weapon. (I.T. Vol. I, pg. 29, ln. 8-13). At the scene of the
12 crime, in addition to bullet casings, the crime scene analyst impounded 3 Winston cigarette
13 butts and photographed 3 footwear impressions. (I.T. Vol. V, pg. 244, ln. 1-3; pg. 245, ln. 13-22; pg. 246
14 ln. 12-20). When police executed the search warrant at Nasby's home, the crime scene analyst impounded
15 and photographed approximately 7 pairs of shoes. (I.T. Vol. IV, pg. 74, ln. 10-20). The shoes seized from Nasby's
16 home did not match the footwear impressions at the scene of the murder. (I.T. Vol. IV, pg. 97, ln. 16-21).
17 The crime scene analyst also retrieved multiple cigarette butts from Nasby's home. They were Kool,
18 Benson & Hedges, and a generic brand. No Winston cigarettes were found in Nasby's residence. (I.T.
19 Vol. IV, pg. 75, ln. 12; pg. 76, ln. 1). DNA tests were run on the Winston cigarettes recovered from the scene of
20 the murder, and there was no match to Nasby, the Burnside's, Deskin, or Beasley. (I.T. Vol. IV, pg. 161, ln.
21 1-2). Von Lewis was never tested for a match. The presence of an unknown suspect's DNA at the crime
22 scene, can not be ignored.

23 B. State's Case And Nasby's Presentation Of Evidence Which Demonstrates His Actual Innocence: On
24 October 11, 1999 through October 13, 1999, Nasby's trial took place. 17 witnesses were called by the State. The
25 following summarizes the evidence put forth by the State to support its case-in-chief. Also included, is
26 the presentation of evidence which demonstrates Nasby's actual innocence. This evidence is either
27 a part of the record or presented in Nasby's petition.

28 Jeremiah Deskin, a co-defendant in the matter, testified that there was a meeting a month prior to the kill-

1 ing, in which Nasby asked the members of the gang whether or not Beasley should be killed. When asked
2 whether or not he had a say about Beasley being killed, Deskin replied, "No, I was never asked." When
3 asked what the response was from the other gang members at the meeting, he responded that everyone
4 else pretty much said that Beasley should not be killed. (I.T. Vol. III, pg. 77-79). Deskin testified that he
5 did not remember who said, on July 16, 1993, that the group was going to go out to the desert and
6 shoot Beasley. (I.T. Vol. III, pg. 82-83). Deskin testified that Nasby would forgive a \$100 debt if Deskin
7 picked up Beasley. (I.T. Vol. III, pg. 82, ln. 10-15). Later in Deskin's testimony, he is caught in 2 lies. One re-
8 garding the testimony about why he participated in the crime being because he owed Nasby \$100 debt
9 and the other lie is about whether or not he was in a Vegas gang which rivals Nasby's gang. (I.T. Vol. III, pg.
10 132-134). Deskin testified that someone told him that they were going to say that they were going to pick up
11 Beasley to smoke some weed and do some target shooting with Beasley's new gun, but he doesn't know who
12 told him that. (I.T. Vol. III, pg. 84). Deskin is the only witness to testify that he witnessed Nasby shoot Bea-
13 sleigh. Deskin, and only ~~be~~ Deskin, testified that once the group was in the desert, and while Beasley was
14 looking for something they could use as target practice, Nasby moved up from behind Beasley and shot
15 him from behind; Beasley fell down to one knee, Nasby moved closer to him and shot him again; Nasby
16 and his co-defendants then got back into the car, but as the car was starting to turn around, Nasby exited
17 the car, walked over to Beasley, stood over his head, and shot him a third time, this time in the
18 head. (I.T. Vol. III, pg. 101-102). The fatal flaw in Deskin's testimony, is that it is belied by the record
19 evidence. Beasley was only shot twice. Thus, Deskin could not have witnessed Nasby shoot Beasley
20 three times. If it had been rapid fire (Boom, Boom, Boom); maybe Deskin could have been mistaken
21 about how many times Beasley was shot; but Deskin testified that he witnessed Nasby shoot Beasley
22 three distinct times. Dr. Robert Jordan was the coroner, and testified that Beasley was only shot
23 twice — once in the back, exiting the chest, and once in the head. Two shots = 3 wounds. (I.T. Vol.
24 III, pg. 167 & 186). Deskin's testimony is blatantly false. For his false testimony, Deskin received
25 a significantly lighter sentence — Probation, with a suspended sentence of one to three years.
26 Tommie Burnside, a co-defendant, not only testified that there was never an agreement to
27 kill Beasley (I.T. Vol. II, pg. 103-104), but that there was also no plan to pick up Beasley so
28 that he could be taken into the desert and shot. (I.T. Vol. II, pg. 92-93). In fact, Tommie Burn-

1 side testified that the plan was only to go to the desert to do some target shooting
2 and while there, Beasley was shot. (T.T. Vol. V, pg. 112-113). Tommie Burnside testified that
3 his brother Jatee, Nasby, ~~the~~ Beasley, Deskin, and himself drove to the mountains. He
4 testified that Beasley was shot and that he, his brother, and Deskin did not shoot Beasley. He also
5 testified that on August 4, 1998, he gave a prior inconsistent statement implicating Sugar Bear as
6 the shooter and as the person who planned to kill Beasley. (T.T. Vol. V, pg. 111, ln. 12-14) (T.T. Vol.
7 V, pg. 112, ln. 7-17). He received 12-32 months for his involvement.

8 Jatee Burnside, a co-defendant, testified that he traveled with his brother and Deskin, to pick up
9 Beasley at his home. (T.T. Vol. V, pg. 121, ln. 15-18). He testified that he, Nasby, his brother, Deskin,
10 and Beasley traveled to the desert. (T.T. Vol. V, pg. 122, ln. 10-12). He testified that he had given
11 another version of the story to the police on August 4, 1998, in which he implicated Sugar
12 Bear as the shooter. He received a sentence of 12-32 months for his involvement. (T.T. Vol.
13 V, pg. 134, ln. 9-13). He also testified that he did not know that Beasley would be killed. (T.T. Vol.
14 V, pg. 135).

15 Both Burnside brothers originally told police that Van Lewis killed Beasley. After hearing about
16 the deal the State made with Deskin for his story (T.T. Vol. V, pg. 132-133 & pg. 142-143), the Burnsides
17 changed their statements and implicated Nasby. In making deals with the Burnsides, the
18 State allowed the Burnsides to plead guilty to "Accessory To Murder" in exchange for their
19 new statements. See - (Petition, Exh. F "Information" filed regarding Burnsides). The State
20 promised the Burnsides they would not have to testify against Nasby. See - (Petition, Exh. A.
21 Affidavits of Tommie & Jatee Burnside), leading the Burnsides to believe that their new state-
22 ments and the facts they plead to, lacked consequences for them or Nasby. They were made to
23 believe their new statements only benefited them, and effected no one else. After the Burnsides
24 were granted parole, but before their release, they were called by the State to testify at Nasby's
25 trial. Prior to testifying, the State threatened to file contempt charges against them and revoke
26 their paroles, if they did not testify against Nasby. (T.T. Vol. V, pg. 113 & 139). Also See - (Petition,
27 Exh. A). Having arrested and charged ^{the Burnsides} with murder after giving their statement implicating Van
28 Lewis, and then giving them their deals based on their new statements implicating Nasby

1 the state effectively informed the Burnsides as to what story they believed to be true (or just
2 benefit their case against Nasby). Thus, if the Burnsides testified to a story different than
3 the one they pled to, the State could have, and likely would have, charged them with perjury
4 and revoked their paroles, along with held them in contempt, as the State had threatened
5 to do. The Burnsides signed affidavits stating that their testimony was given under duress
6 and their final statements were given under false pretence and promises made by
7 the State. See (Petition, Exh. A). The State forced the Burnsides' testimony to reflect what
8 was stated in the "Information", with the promise that the statements would not effect Nas-
9 by. The Burnsides were ~~forced~~ manipulated by the State and then forced to testify in a
10 particular fashion, and only asked questions in a cryptic fashion at Nasby's trial, or face
11 further incarceration. The Burnsides were never asked if they saw Nasby shoot Beasley
12 or if they saw who shot Beasley. Instead, the prosecutor finished their testimony for
13 them, in closing argument. (T.T. Vol. VI, pg. 65-66).

14 Brittany Adams, a member of the L.A. Crazy Riders, testified that on August 4, 1998, she gave a state-
15 ment to police where she explains that Von Lewis confessed to her that he had killed Beasley (T.T. Vol. IV, pg.
16 167-168). After being charged with 3 major felonies that included a life sentence, Adams testified at
17 Nasby's trial to witness intimidation and that Nasby insisted that she make her August 4, 1998,
18 statement to police, in exchange for a plea deal which reduced her 3 major felonies to a misdeme-
19 nor battery. (T.T. Vol. IV, pg. 186-188).

20 Crystal Bradley was a member of the L.A. Crazy Riders gang. She testified that on July 17, 1998,
21 Nasby confessed to her that he had shot Beasley three times (T.T. Vol. IV, pg. 43-44). Again, Beasley
22 was only shot twice. In fact, Bradley's testimony almost mirrors the false testimony of
23 Mr. Deakin. She further testified that she called Tanisha Banks and told her what Nasby
24 allegedly confessed to her. (T.T. Vol. IV, pg. 48, ln. 5-10). This is how this version of the story
25 of Beasley's death began to spread.

26 Tanisha Banks, former girl friend of Beasley and mother of his child, testified that she was
27 beaten up by Brittany Adams on August 1, 1998, and that Adams told her to keep her mouth shut
28 about Nasby. (T.T. Vol. IV, pg. 22, ln. 1-22).

1 John R. Holmes, an inmate from the Clark County Detention Center, who was arrested for an unrelated
2 robbery with the use of a deadly weapon, testified that he spoke to Nasby while incarcerated,
3 and Nasby admitted that he killed Beasley (J.T. Vol. I, pg. 21-2, ln 21-23). Approximately one year
4 after Nasby's trial, John Holmes' girlfriend and child's mother, "Lauran Palma", began writing
5 Nasby in prison. Many times in these letters, Ms. Palma speaks of how Holmes "fabricated"
6 stories to make Nasby "look like the bad guy", how Holmes "set up" Nasby, and how he did all
7 of those things just so he could get out on house arrest (which is exactly what happened). See
8 (Petition, Exh. G - Correspondence Between Nasby & John Holmes' Girlfriend, "Lauran Palma").
9 A video which trial counsel, and the prosecutor, refused to show the jury, shows Von Lewis threaten-
10 ing Beasley with a gun, that happens to be the same caliber (9mm) as Nasby's gun, though obviously
11 a different color from Nasby's gun. See (Video presented in Petition, pg. 11, ln 22-26). Also See (Ev. Hearing
12 Trans., pg. 13-15 & 39-41). Since Nasby was not present when Beasley was killed, he could not say whether or not
13 his gun was used to kill Beasley - especially since Von Lewis also owned ~~out~~ another 9mm gun, as shown
14 in the video. See (Von Lewis' 9mm presented in Petition, pg. 11, ln 27-28; pg. 12, ln 1; pg. 26, ln 7-13). What Nasby
15 did show, is that the bullets tested by forensic examiner Torrey Johnson, are either: 1) a false mat-
16 ch to Nasby's gun, 2) were not the same bullets recovered from Beasley's body, or 3) that the bul-
17 ets which killed Beasley were actually fired from Von Lewis' other 9mm, and overall, 4) the handling
18 of the bullets that killed Beasley call into question whether the ballistics test regarding the alleged
19 murder weapon is even reliable. See (Petition, pg. 11-13; pg. 26-30).
20 Torrey Johnson, a criminalist who worked in the forensic laboratory, testified that he worked in the fire-
21 arm detail. Mr. Johnson testified that the bullets collected by Sherree Normann and said to have come
22 from the victim's body, were fired by the gun recovered from Nasby's home (J.T. Vol. I, pg. 71-72). The TWO
23 BULLETS tested by Mr. Johnson were photographed prior to ballistics examination, and both bullets
24 were whole bullets, entirely intact, but mushroomed. See (Photographs taken of bullets before testing, inclu-
25 ded in Johnson's report, presented in Petition, pg. 12, ln 2-5; pg. 26, ln 17-22). This evidence is also contradicted
26 by the coroner Dr. Jordan. Dr. Robert Jordan stated in his report and at Nasby's Preliminary Hearing,
27 that he pulled bullet fragments from the head of the victim, and described the bullet as "disintegrated",
28 and at Nasby's trial, Dr. Jordan described the bullet as "multiple fragments of core and jacket" (J.T.

1 Vol. III, pg. 189-194). In regards to the gun shot to the body, Dr. Jordan testified that, "no bullet
2 was recovered." (I.T. Vol. III, pg. 189-194). And, although a "John L. Stallings" apparently discovered a bullet
3 et between the victim's shirt and skin (I.T. Vol. III, pg. 189-200), prior to anyone else arriving at the
4 the coroner's office and without the coroner being aware of it when he filed his report, the bullet Mr.
5 Stallings discovered was never sealed into evidence bags or otherwise collected and tested. The only
6 names listed on the evidence bags which contained the bullets tested by Mr. Johnson, core Johnson's
7 and Sherer Norman's (I.T. Vol. III, pg. 208).

8 Sherer Norman, Senior Crime Scene Analyst, testified as to her documentation of the autopsy.
9 In regards to the gunshot wound to the back exiting the chest, she testified that during the
10 autopsy, she also discovered a bullet between the victim's shirt and skin (I.T. Vol. III, pg. 214, ln.
11 10-13). Ms. Norman testified that Dr. Jordan pulled a bullet from the victim's head and that
12 she placed that bullet, along with the bullet she discovered, in evidence bags, then sealed and
13 signed ~~those~~ those bags. (I.T. Vol. III, pg. 206-210). There was an entrance wound and an exit
14 wound in both Beasley's body and shirt. See - (Photographs of Beasley's shirt presented in Petition, pg.
15 12, ln. 22-23 & pg. 26, ln. 23-28, pg. 27, ln. 1-11). Dr. Jordan was also present when Beasley's clothes were removed
16 (I.T. Vol. III, pg. 177-178). Dt. Buczek and Dt. Thousen also assisted with the autopsy (I.T. Vol. III, pg. 178).

17 Dr. Robert Jordan, the Clark County Coroner/Medical Examiner on July 18, 1998, testified
18 that he conducted the autopsy and that Beasley died from gunshot wounds to the head and
19 back exiting the chest (I.T. Vol. III, pg. 170, ln. 9-10). Dr. Jordan testified that Beasley was shot twice.
20 (I.T. Vol. III, pg. 167 & pg. 186). Dr. Jordan's testimony mirrored his report. He testified that he pulled
21 from the head of the victim, bullet fragments, and described the bullet as ~~multiple~~ "multiple
22 fragments of core and jacket" (I.T. Vol. III, pg. 143), and in regards to the gunshot to the back exiting
23 the chest, he repeated what was in his report: "no bullet was recovered." (I.T. Vol. III, pg. 189-194). Dur-
24 ing Dr. Jordan's testimony, the prosecutor had him read a report written by John L. Stallings,
25 where Mr. Stallings reports that before the autopsy or before anyone else arrived
26 at the coroner's office, he discovered a bullet between the victim's skin and shirt (I.T. Vol. III
27 pg. 197-200). Mr. Stallings was not present during the autopsy (I.T. Vol. III, pg. 197-200), nor was
28 Stallings called to testify, or planned to be called, despite having reported that he discovered what

1 appears to be a 3rd bullet that was not collected or tested. See - (State's Witness List presented
2 in Petition, Exh. B). There was never another mention about Mr Stallings or the bullet he dis-
3 covered. Nor was ^{there} ~~ever~~ ^a mention about why Dr Jordan did not know about the bullets that
4 Stallings and Norman discovered, until he was testifying at trial. Further, common
5 sense is tested by the facts that establish that, even though there is an entrance wound
6 and an exit wound in both Beasley's body and shirt, that the bullet went through the shirt,
7 traveled through his body, exit his chest, went through the shirt again, and then turned it-
8 self around tucked itself between the victim's skin and shirt. Also testing common
9 sense, are the facts that establish that once the body arrived at the coroner's office, fully
10 clothed, Ms. Norman, while removing Beasley's clothes, discovers a bullet, seals it into evidence
11 bags, all in front of Dr. Jordan — yet, the bullet eludes discovery by the man in charge of
12 the autopsy and of investigating the cause of death and circumstances of that death. Then,
13 at trial, it is revealed that Mr Stallings also discovered a bullet, prior to the autopsy.
14 James Carroll, Sergeant for LVMPD, testified that he arrived at the scene in his patrol car and
15 found Beasley dead. He sealed off the area and called for detectives (I.T. Vol. III, pg. 10, ln 16-22).
16 Kelly Nail, Crime Scene Analyst, testified that he found shiny cartridges and 3 Winston Cigar-
17 ette butts that appeared new. He also found the partial footwear impressions. He photographed the
18 scene and the victim. There were no finger prints found on the shell casings. (I.T. Vol. III, pg. 57-58)
19 James Burzek, a homicide detective, arrested Nasby and testified that Nasby told him where
20 the gun was in his home (I.T. Vol. IV, pg. 153, ln 7-11). Nasby told the officer that he had purchased the gun
21 following Beasley's death from Sugar Bear. (I.T. Vol. IV, pg. 154, ln 11-21). He testified that DNA was
22 run on the Winston cigarettes recovered at the scene and that there was NO match to Nasby
23 the Burnsides, Deakin, or the victim. (I.T. Vol. IV, pg. 161, ln 1-12). Van Lewis' DNA was never
24 tested for a match.
25 Randall McPhail, crime scene analyst, testified that he impounded a Browning style Ingles nine
26 millimeter semi-automatic handgun and 2 empty magazines. He also impounded 7 pairs of shoes from
27 Nasby's home and 3 different brands of cigarettes; Koal, Benson & Hedges, and a no-name brand. He
28 testified that no Winston cigarettes were found. (I.T. Vol. IV, pg. 74, ln 15-23; pg. 75, ln 14-24). He also

1 testified that no prints were recovered from the firearm and that there was no match made
2 from the 7 pairs of shoes to the footwear impressions at the scene. (T.T. Vol. IV, pg. 97).
3 Fred Boyd, latent print examiner, testified that he found no prints on the gun or magaz-
4 ines. (T.T. Vol. IV, pg. 116-117). He also testified that the 7 shoes from Nasby's home, did not
5 match the footprints at the scene. Further, no other shoes were sought for testing,
6 including all of the other co-defendants' shoes or Von Lewis'. (T.T. Vol. IV, pg. 136).
7 The DNA and footprints recovered from the scene of the crime did not match Nasby and could
8 not place him at the scene of the crime. However, had Von Lewis been tested, it's likely that his
9 DNA and footprints would have matched and put him at the scene of the crime, gutting
10 the State's entire case against Nasby. See: (Von Lewis' DNA & Footprints presented in Petition,
11 pg. 13, 30-31). When asked why tests were not done on Von Lewis and why Von Lewis was never taken
12 into custody for this crime, although most of the witnesses who later exchanged their testimony
13 for plea deals originally told police that Von Lewis killed Beasley, Dt. Buczek and Dt. Thowsen
14 both testified at Nasby's preliminary hearing and months later at trial that they could
15 not locate Von Lewis for DNA testing or questioning. Detectives even testified that a locator
16 "SCOPF" was put out on Von Lewis, which would require any law enforcement who came in contact
17 with him, to detain him for questioning by Dt. Buczek and Dt. Thowsen, but still, they could not
18 locate Von Lewis. (T.T. Vol. IV, pg. 157-158 & Vol. V, pg. 262-264). Proving Detectives perjured themselves
19 at trial, is the State's witness list and the statement Von Lewis gave to "Ray Stefan", a deputy district
20 attorney while at the Major Violator's Unit. See: (Petition, Ex. B: State's Witness List & Ex. D: State
21 ment of Charles Von Lewis). Von Lewis was in custody several times between Nasby's arrest and trial
22 Von Lewis was even in custody during the Detectives' testimony. A review of the State's several
23 witness lists, show Von Lewis at his home, and then in custody for other crimes and demonstrates
24 that the prosecution was aware of the Detectives' false testimony. Still, the prosecutor
25 presented the false testimony and never corrected the testimony for the jury.
26 Thomas Thowsen, a homicide detective, testified that he was in charge of the crime scene investigation
27 As the investigation unfolded, Metra received a call from Taneshia Banks who told police that Nasby
28 was threatening her not to testify. These alleged threats were reported in September of 1998 and

1 allegedly made by Nasby over the phone from the Clark County Detention Center (CCDC). At the
2 time, in September of 1998, police were unable to pin-point exactly what unit the call was made
3 from, although the number on Ms. Banks' caller I.D. was affirmed as a number from the county
4 jail. A recording of the alleged threats could have easily been produced, as ALL phone calls made
5 from CCDC are recorded. See - (Phone Recording presented in Petition, pg. 14, 12-14 & pg. 16-18).
6 Dt. Thowson testified that, a day before his testimony, he checked with his associate once more, to
7 see if he could attempt to pin-point where in the jail, the call was made from. Dt. Thowson test-
8 ified that his associate was now able to locate where the call was made from and that it was
9 made from a unit next to Nasby's unit. (J.T. Vol. II, pg. 258). Despite the fact that inmates at
10 CCDC did not have access to phones in other units or outside of their own units, and despite
11 the fact that Ms. Banks admitted that she also had another friend in CCDC who would call her
12 (J.T. Vol. I, pg. 29-30) ~~Nasby's lawyer~~ Nasby's lawyer asked Dt. Thowson why this information about the call
13 coming from a phone in a unit next to Nasby's, could not be discovered earlier. Thowson's respon-
14 se was that when he first requested his associate to locate where the call was made from, his
15 associate was mistakenly searching phone records from September of 1999. Dt. Thowson testified
16 that once he corrected his associate and had him search through records from September of 1998,
17 his associate was able to pin-point the location of the call. (J.T. Vol. I, pg. 254-261). It bears
18 pointing out that it was "September of 1998" when Dt. Thowson first requested his associate locate where
19 the call was made from, and at that time, the future phone records ~~that~~ of "September 1999" that
20 Dt. Thowson testified his associate was mistakenly searching through, did not yet exist. To even
21 mistakenly search through future records that don't exist would require a psychic ability.
22 Still, no correction of this testimony was made. Further, the fact that the reported call came
23 from a unit other than Nasby's, proves that the reported threats did not happen, as Nasby
24 could not have made the call. Still, testimony that Nasby made the call and threats was heard by the
25 jury with no correction. (J.T. Vol. I, pg. 23-26).
26 Colleen Warner, was not only an alibi witness, but a defense witness who planned to testify that
27 following the death of Beasley, she saw Van Lewis give Nasby the gun allegedly used to kill Beasley.
28 See - (Petition, Exh. E - Affidavit of Colleen Warner). Before her testimony could be taken in open

1 ~~in~~ court, the prosecutor showed Ms. Warner a letter Nasby had allegedly written which
2 said some harsh things about her. As a result, Warner left the courtroom and refused to testify
3 for the defense. See (Petition, Exh. E). The trial court had previously found that those disparag-
4 ing comments must be redacted from the letter if it ~~were~~ were to be used on rebuttal. In discus-
5 sioning the letter, the prosecutor announced his intention that he "would like to present [the letter,
6 ~~therefore~~ to Ms. Warner] and see how she feels about him at this point." (T.T. Vol. I, pg. 12). And
7 the court indicated that the prosecutor should not show the letter to Ms. Warner, stating, "I
8 don't know about that." (T.T. Vol. I, pg. 12). Nevertheless, the prosecutor did as he intended
9 and showed her the letter, insuring that she would not testify. Ms. Warner's own affidavit makes
10 clear: (1) that she planned to testify in Nasby's defense; (2) that she did not testify specifically
11 because the prosecutor showed her the letter. See (Petition, Exh. E). But this court does not
12 even need Warner's affidavit, because: (a) the letter is discussed openly in court; (b) the
13 prosecutor indicated his intention to influence the witness; (c) the trial court indicated the
14 prosecutor should not do that; (d) there is no question that Warner was a material defen-
15 se witness; and (e) that she did not testify after being shown the letter. If Nasby
16 could have explained away his possession of the alleged murder weapon with Warner's testimony,
17 there was no other physical evidence connecting Nasby to the murder: Nasby's fingerprints
18 were not on the shell casings or the gun; Nasby's shoeprints were not at the scene; the cigar-
19 ettes found at the scene did not match Nasby's; and the DNA recovered from the scene
20 puts someone other than Nasby, his co-defendants, and the victim at the scene of the
21 crime.

22 Also directly pertaining to Nasby's guilt or innocence, is the prosecutor's reference to fact
23 not in evidence. The Burnsides did not testify that they witness anyone shoot Beasley, but the
24 prosecutor, in closing arguments, completed their testimony when he told the jury that he had
25 special inside information about Jeter and Tommie Burnside that was not presented in their
26 testimony. The prosecutor assured the jury that he knew that the only reason the Burn-
27 sides did not expressly implicate Nasby is because they did not want to be labeled as snit-
28 ches. (T.T. Vol. II, pg. 65-66).

1 Other facts, pertaining to the grounds of the petition, were presented in that petition.

2 III. SUMMARY OF ARGUMENT.

3 In this Appeal Brief, Nasby presents four questions, much of which, require statutory interpretation. Nasby
4 relies on the plain language of the statutes and the force and meaning given to each word and phrase;
5 especially the difference in meaning between 1) a "challenge to the validity of a conviction or sentence"
6 and 2) a petitioner's "request for relief" from a conviction or sentence. Although Nasby's petition
7 may challenge the validity of his conviction, he does not request relief from that conviction. He merely
8 request, what amounts to, a declaratory judgment. Although a declaratory judgment, in Nasby's case,
9 may entitle him to relief from his conviction — the law does not require that he request relief in
10 order for the court to grant it. The only thing a request for relief does, is activate the application of
11 the post-conviction provisions. Post-conviction provisions are unnecessary to terminate the controversy
12 in Nasby's petition, and the plain language of NRS 34.720, clearly mandates that the post-conviction
13 provisions — including NRS 34.724's exclusive remedy language — not be applied to Nasby's petition.
14 The State made a comment that, "Defendant thinks he has found a loophole that, by carefully wording
15 the title of his habeas petition and claims, permits him to circumvent the procedural bars." See - (State's
16 Response To Rule 60(b) Motion, pg. 4, ln. 10-11). To be clear, Nasby is attempting to do, nothing other than,
17 what the plain language of the law allows him to do, but the State would have the Court deny Nasby
18 what the law clearly provides him a right to.

19 In a habeas action, the post-conviction provisions do not authorize the court to grant, or refuse to
20 grant, habeas corpus relief. The court's power to grant, or refuse to grant, habeas relief comes from the
21 General Provisions (NRS 34.360 to 34.680, inclusive) and the Constitution. Therefore, Nasby not requesting
22 relief from his conviction or sentence, does not divest the court of its power to grant, or refuse to
23 grant, such relief. NRS 34.720 and 34.724, authorize and govern how a petitioner must "request relief"
24 from his conviction or sentence. They do not govern or authorize the court to grant relief. Since
25 Nasby does not request such relief, post-conviction provisions are not only inapplicable, but unnecessary
26 to terminate the controversy.

27 Per NRS 30.030, declaratory judgments can be made "whether or not further relief is or could
28 be claimed." NRS 30.030 further states that "No action or proceeding shall be open to objection

1 on the ground that a declaratory judgment or decree is prayed for. "This Court has determin-
2 ed that the Uniform Declaratory Judgment Act can be implemented in other remedies/actions.
3 (Co. of Clark v. State, *infra*). Similar to the ~~the~~ different remedies available for jurisdictional
4 challenges, such as Certiorari, Mandamus, or Prohibition — if the jurisdictional challenge
5 would entitle a petitioner to release from incarceration, he must make that challenge in a habeas
6 petition. Because Nasby request a declaratory judgment, which may imply that his conviction
7 is invalid or entitle him to release from prison — he, too, must file a petition for writ of habeas corpus.
8 Nasby filed a habeas petition, not requesting relief from his conviction or sentence, but request-
9 ing only a declaratory judgment.

10 Per NRS 31.360, Every person unlawfully confined, under any pretense whatever, may prosecute a
11 writ of habeas corpus to inquire into the cause of such imprisonment. "Under any pretense what-
12 ever," clearly allows a "challenge to the validity of a conviction." And this Court has deter-
13 mined that the writ of habeas corpus has been expanded to allow the presentation of questions of law that
14 can not otherwise be reviewed. (State ex rel. Osborn v. Fogliani, *infra*). Nasby's questions of law can not
15 be reviewed in any other remedy, other than this habeas remedy.

16 Further, Nasby's ~~presented~~ petition presents questions of law that are matters of public concern, and as
17 Nasby's petition is a form of expression, it is also protected by the Speech Clause of the 1st Amend-
18 ment. (Borough of Duryea, P.A. v. Guarnieri, *infra*).

19 1st, Nasby ask this Court if the district court exceeded its jurisdiction when it applied post-conviction
20 provisions to his petition without him first making the prerequisite request for relief? The plain langu-
21 age of NRS 31.720 clearly states that the provisions of NRS 31.720 to 31.730, inclusive, apply only to peti-
22 tions for writs of habeas corpus in which the petitioner request relief from a conviction or sent-
23 ence or challenges the computation of time a petitioner has served. Nasby performed neither of
24 these prerequisites. Therefore, the district court lacked jurisdiction to apply the post-
25 conviction provisions to his petition, and because the district court improperly applied post-
26 conviction provisions, and exceeded its jurisdiction, this Court should vacate the district court's
27 order dismissing Nasby's petition.

28 2nd, Nasby ask this Court — if he does not request relief from his conviction or sentence —

1 Does he have a 1st & 14th Amend. right, as well as a statutory right, to prosecute a writ of
2 habeas corpus under NRS 34.360, to inquire into the cause of his unlawful imprisonment,
3 by way of presenting questions of law which challenge the validity of his conviction or sentence?

4 As previously stated, Nasby demonstrates that he does.

5 3rd, Nasby ask this Court if the 8th Jud. Dist. Ct. exceeded its jurisdiction when it changed the
6 holdings made by the 11th Jud. Dist. Ct.? In its Order Transferring Petition, the 11th Jud. Dist. Ct.
7 held, among other things, that what Nasby filed was in fact, a "Petition For Writ Of Habeas Corpus
8 (NRS 34.360 - Constitutional Questions/Questions of Law)" — not a Petition For Post-Conviction
9 Relief under NRS 34.724. See: (Order Transferring Petition, pg. 1, ln. 17-23). The 11th Jud. Dist. Ct.'s
10 determination that Nasby filed a 34.360 petition, was its actual holding and not merely dicta.
11 The 8th Jud. Dist. Ct. has no authority to reverse, change, or vacate the holdings of the 11th
12 Jud. Dist. Ct. Only an appellate court can do that in Nevada.

13 4th, Nasby ask this Court if he made a showing of actual innocence? Even if the Court applies the
14 inapplicable post-conviction provisions of Ch. 34 to Nasby's petition, construed liberally,
15 Nasby has still demonstrated the good cause and prejudice exception of actual innocence. In his
16 petition, Nasby presented evidence that demonstrates his actual innocence, constitutional violat-
17 ions that probably resulted in the conviction of one who is actually innocent, and demon-
18 strated that no reasonable jurist would have found him guilty beyond a reasonable doubt,
19 ^{absent} ~~without~~ the constitutional violations.

20 IV. ARGUMENT.

21 Question One: Did The 8th Judicial District Court Exceed Its Jurisdiction When It Applied The Post-
22 Conviction Provisions Of NRS Ch. 34 To Nasby's Petition, Without Nasby First Making
23 The Prerequisite Request For Relief?

24 This Question is to be reviewed in tandem with the facts and arguments supplied in

25 Question Two of this Brief.

26 The term, "jurisdiction", as usually applied to habeas corpus, is not limited to its traditional
27 meaning, and in such proceedings judicial acts may be annulled if they are determined to be
28 in excess of the court's powers. Warden v. Peters, 429 P.2d 549, 552 (1967). If a district court lack
subject matter jurisdiction, the judgment rendered is void (Landreth v. Malik, 721 P.3d 1265, 1267;
125 Nev. Adv. Rep. 61 (2009)), and "[w]henver a statute prescribes certain specific acts to be
done as prerequisites to acquiring jurisdiction or the enforcement of a legal remedy [such
as a post-conviction petition], such acts must be substantially performed in the manner

prescribed in order to give validity to the proceeding." Steel v. Steel, 1 Nev. 27, 31 (1865).

NRS 34.720. Scope of provisions.

The provisions of NRS 34.720 to 34.830, inclusive, apply only to petitions for writs of habeas corpus in which the petitioner: (1) Request relief from a judgment of conviction or sentence in a criminal case; or (2) Challenges the computation of time that the petitioner has served pursuant to a judgment of conviction.

In his petition, Nasby only requested the court answer his presented questions of law and/or address any other observable legal questions and violations sua sponte. See (Petition, pg. 44, ln. 19-23). Nasby also argued that, because he affirmatively asserted that he does not request relief from his conviction or sentence, and does not challenge the computation of time that he has served, then NRS 34.720 prevents the application of any of the post-conviction provisions to his petition. See (Petition, pg. 2, ln. 6-8; pg. 3, ln. 27-28; pg. 4, ln. 1; pg. 23, ln. 7-9). The district court acknowledged that Nasby sought a declaratory judgment (Findings, pg. 3, ln. 25-27), then acknowledged that Nasby asserted that he is not requesting relief from his sentence (Findings, pg. 4, ln. 7-8), and then also stated that Nasby was asking for an advisory opinion (Findings, pg. 4, footnote 2). As such, the district court concedes that Nasby did not request relief from his conviction or sentence; however, it still chose to apply the post-conviction provisions of Ch. 34 to his petition, despite the concession. However, a request for relief is a prerequisite for the application of post-conviction provisions. Thus, the district court clearly exceeded its jurisdiction when it acknowledged that Nasby did not request relief from his conviction or sentence and then still applied the post-conviction provisions to his petition.

The court derives its jurisdiction from the law, and the intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction. Re Smith, 35 Nev. 80, 103 (1912). To determine that a case is within the intention of a statute, its language must authorize the court to say so. Id. at 103-04.

The district court had no authority to apply post-conviction provisions to Nasby's petition, as NRS 34.720 mandates the complete opposite. Nor does the court have authority to construe his petition as a petition for post-conviction relief, because the statute does not authorize the court to do so, and "a court does not have the power, by judicial fiat, to extend its jurisdiction over matters beyond the scope of the authority granted to it by its creators." Stoll v. Gottlieb, 305 U.S. 165, 171 (1938).

Without conflict of authority, it has been well settled that when an inferior court erroneously determines that it has jurisdiction, its judgments and orders will be set aside by the higher court. Granade v. Silver Peak Mines, 35 Nev. 319; 133 P. 936 (1912). Because the 8th Jud. Dist. Ct. improperly applied NRS 34.726, 34.800, 34.810, and 34.724, and exceeded its jurisdiction, Nasby request this Court vacate the district court's order dismissing his petition.

Question Two: If Nasby Does Not Request Relief From His Conviction Or Sentence, Does He Have A 1st & 14th Amendment Right, As Well As A Statutory Right, To Prosecute A Writ Of Habeas Corpus Under NRS 34.360; To Inquire Into The Cause Of His Unlawful Imprisonment, By Way Of Presenting Questions Of Law Which Challenge The Validity Of His Conviction Or Sentence?

Nasby hereby incorporates the facts and arguments supplied in Question One of this Brief. "The privilege of the writ of habeas corpus, shall not be suspended." Nev. Const. Art. 1, § 5. A. NRS Ch. 34, guarantees Nasby's right to prosecute his NRS 34.360 Petition.

A "petition" by definition, is a formal written request presented to the court. What type of petition a petitioner files is not solely determined by the substance of his arguments or claims, but more importantly, it is determined by what the petitioner "request."

State, ex rel. Onsborn v. Fagliani, 82 Nev. 300, 417 P.2d 148 (1966) (The test of the availability of the writ of habeas corpus is no longer confined to one of jurisdiction, but has been expanded to allow the presentation of questions of law that cannot otherwise be reviewed, or that are so important as to render ordinary procedure inadequate and justify the extraordinary remedy. (emphasis added)).

However, if the petition does not "request relief," it can not be construed as a petition for post-conviction relief. Thus, even if the petition challenges the validity of a conviction or sentence, but does not request relief from that conviction or sentence — the post-conviction provisions must not be applied to that petition.

"Statutory interpretation is a question of law subject to de novo review." State v. Catania, 170 Nev. 1030, 1033, 102 P.3d 588, 590 (2004). Because a petition for writ of habeas corpus filed pursuant to NRS Ch. 34, is a creature of statute, resolution of this issue involves statutory interpretation. McConnell v. State, 125 Nev. 246, 247; 212 P.3d 309, 310 (2009). Because a court presumes that the statute's language reflects the legislature's intent, it must focus on the statute's plain language. Id. In assessing a statute's plain meaning, provisions are read as a whole with effect given to each word and phrase. City of Las Vegas v. Evans, 129 Nev. —; 301 P.3d 844, 846 (2012). "[W]hen a statute's language is clear and unambiguous, the apparent intent must be given effect as there is no room for construction." Edgington v. Edgington, 119 Nev. 577, 582-83; 80 P.3d 1282, 1286 (2003). This court "avoid[s] statutory interpretation that renders language meaningless or superfluous." Hobbs v. State, 127 Nev. 234, 237; 251 P.3d 117, 119 (2011), and "whenever possible ... will interpret a rule or statute in harmony with other rules or statutes," Watson Rounds v. 8th Jud. Dist. Ct., 131 Nev. Adv. Op. 79, 358 P.3d 228, 232 (2015) (quotation marks omitted). This

1 Court also construes "multiple legislative provisions... as a whole." Gaines v. State, 116 Nev. 359,
2 365, 998 P.2d 166, 169 (2000), and when that language is plain, "the court has no right to go
beyond it." Cirac v. Lander Co., 95 Nev. 723, 729; 602 P.2d 1012, 1015 (1979).

3 When interpreting NRS 34.720, this Court said that it was evident from Nevada's statutory
4 scheme that when a habeas corpus petition seeks relief from a conviction or sentence,
5 then a post-conviction petition for writ of habeas corpus is the exclusive remedy. McCon-
6 nell v. State, 125 Nev. 246, 247-48; 212 P.3d 309, 310 (2009). — Again, Nasby's petition does
7 not seek relief.

8 NRS 34.360. Persons who may prosecute a writ.
9 Every person unlawfully committed, detained, confined or restrained of his liberty, under any pre-
tense whatever, may prosecute a writ of habeas corpus to inquire into the cause of such imprison-
ment.

11 The purpose of NRS 34.360 petitions are to inquire into the cause of an unlawful imprisonment.
12 Nasby's petition does not request relief, but request an inquiry into the cause of his unlawful im-
13 prisonment by way of his presented questions of law, which require answers, and the term, "un-
14 der any pretense whatever," in NRS 34.360, clearly allows a challenge to the validity of a conviction or
15 sentence.

16 The legislature clearly intended a "request for relief" and a "challenge to the validity of a conviction
17 or sentence" to have two different functions in Ch. 34. This is why the language of the provisions are
18 different. The legislature clearly intended to allow Nasby to prosecute the petition he filed. The legis-
19 ature's specific verbiage in NRS 34.360 explicitly states that "Every person" unlawfully detained or
20 confined, under any pretense whatever, may prosecute a writ of habeas corpus to inquire into the cause
21 of such imprisonment. "Every person" includes Nasby. If the legislature intended to prevent Nasby from
22 prosecuting such a petition by way of NRS 34.724, it would have used, in NRS 34.720, the term, "applies
23 to all habeas corpus petition" or "applies to all petitions that challenge the validity of a conviction or
24 sentence", instead of its chosen term of applies only to petitions where the "petitioner request relief".
25 See (NRS 34.720).

26 But this Court must presume that a variation in language indicates a variation in meaning. See
27 generally Henson v. Santander Consumer USA Inc., 582 U.S. —, —, 137 S.Ct. 1718, 1723 (2017) ("And
usually at least, when we're engaged in business of interpreting statutes we presume differences
28 in language... convey differences in meaning."); Loughrin v. U.S., 573 U.S. —, —, 134 S.Ct. 2394,
2390 (2011) ("[W]hen [the Legislature] includes particular language in one section of a statute

1 but omits it in another... this Court presumes that [the Legislature] intended a difference in
2 meaning." (internal quotation marks and alteration omitted); S.E.C. v. McCarthy, 393 F.3d 650, 656
3 (9th Cir. 2003) ("[The Legislature's] explicit decision to use one word over another in drafting
4 a statute is material. It is a decision that is imbued with legal significance and should ~~not~~
5 ~~not be~~ not be presumed to be random or devoid of meaning." (internal citations omitted)). Also see - Sheriff v. Andrews, 179 Nev. Adv. Op. 51, 286 P.3d 262, 264 (2012) (inferring that
6 where the legislature "clearly knows how to prohibit" an act under one statute and does
7 not prohibit it under a second statute, the Legislature did not intend to prohibit it under a
8 second statute).

9 The Legislature did not intend to prohibit Nasby from filing a 34.360 petition which challeng-
10 es the validity of his conviction or sentence, because the plain language of the statute does not
11 prohibit such a filing. In fact, the exclusive remedy language of NRS 34.724, is among the post-
12 conviction provisions that the legislature clearly intended not be applied to petitions like
13 Nasby's.

14 Applying any of the post-conviction provisions to Nasby's petition, ultimately works to eliminate Nas-
15 by's statutory right to prosecute a 34.360 writ and subjects his petition to the exclusive-remedy
16 language in NRS 34.724. However, in as recently as 2014, this Court, in pertinent part, said: "Thus,
17 only remedy that [...] allows a person to raise a claim that is outside the scope of a post-
18 conviction petition for writ of habeas corpus is not subject to the exclusive-remedy lan-
19 guage in NRS 34.724(2)(b) regardless of whether the remedy is or is not incident to the proceed-
20 ings in the trial court." Harris v. State, 329 P.3d 619 (Nev. 2014), at footnote 1.

21 Because Nasby's petition does not request relief, Nasby's petition is "outside the scope of a
22 post-conviction petition for writ of habeas corpus." (NRS 34.720).

23 Nasby's interpretation of the habeas corpus provisions do no violence to any other provisions. How-
24 ever, construing Nasby's petition as a petition for post-conviction relief or applying any of the post-
25 conviction provisions to Nasby's petition, effectively results in rendering NRS 34.720 an insignificant,
26 meaningless, and nugatory provision. See - Haney v. State, 195 P.3d 350, 353 (2003); S.E.C. v. McCarthy, supra.

27 The phrase, "applies only", in NRS 34.720, mandates that NRS 34.720 to 34.830 inclusive, not be applied to
28 Nasby's petition, as "the expression of one thing is the exclusion of another." Galloway v. Truesdell,
83 Nev. 13, 25-26 (1967). If the legislature intended every petition that challenged the validity of a conviction
or sentence to be construed as a petition requesting relief, then there would be no need for the "request re-
lief" language of NRS 34.720, and would render it insignificant and meaningless.

29 In order for Nasby's petition to be a petition for post-conviction relief, Nasby must request that post-
conviction relief. Nasby's petition request only an answer to the presented questions of law — it does not

request relief from those answers. The possibility of any resulting entitlements following the inquiry are not dispositive of his petition. Neither is a "request for relief" dispositive for filing a petition under NRS 34.360. The only thing a "request for relief" is dispositive of — is the application of NRS 34.720 to 34.832 inclusive. NRS 34.360's plain language explains exactly who may prosecute a writ and for what purpose and NRS 34.370's plain language explains all that is required to properly file a 34.360 petition. — Request for relief are not required.

Failure to enforce this State law results in a violation of Nasby's State and Federal Due Process Rights. See: Hicks v. Oklahoma, 447 U.S. 343, 346 (1980), e.g., Laboa v. Calderon, 224 F.3d 972, 979 (9th Cir. 2000) ("State violates defendant's due process right to fundamental fairness if it arbitrarily deprives the defendant of state law enforcement").

B. The Uniform Declaratory Judgment Act also applies to this petition.

In Cowd. Clark v. State, 65 Nev. 490, 502-04, 199 P.2d 137, 142-43 (1948), this Court explained that declaratory judgments can be made, and sought, in other actions/remedies, such as Motions to dismiss, habeas corpus petitions, Mandamus, civil suits, etc. Had Nasby filed a simple motion for declaratory judgment which challenged the validity of his conviction or sentence, the court would have summarily dismissed the motion, explaining that, if a declaratory judgment would necessarily imply that a conviction or sentence is invalid, then a habeas corpus petition is the appropriate remedy. El Capitan Club v. Fireman's Fund Ins. Co., 84 Nev. 65, 506 P.2d 426 (1973). Here, Nasby did not file a motion for declaratory judgment, but a habeas corpus petition, requesting answers to his presented questions of law. Nasby did not request relief from his conviction or sentence, but only a declaratory judgment.

NRS 30.030, Scope. Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

According to NRS 30.030, a claim for relief is not dispositive for a declaratory judgment, and a petition may not be open to objection simply because a declaratory judgment is prayed for. The only requirements for declaratory judgment are: (1) there must exist a justiciable controversy, that is to say, a controversy in which a claim of right is asserted against one who has an interest in contesting it; (2) the controversy must be between persons whose interests are adverse; (3) the party seeking declaratory judgment must have a legal interest in the controversy, that is to say, a legally protectable interest; and (4) the issue involved in the controversy must be ripe for judicial determination. Kress v. Cerey, 65 Nev. 1, 169 P.2d 352 (1948); Nev. Mgt. Co. v. Back, 75 Nev. 232, 338 P.2d 71 (1959).

1 Nasby's habeas corpus petition meets all of the above requirements for a declaratory judgment. There-
2 fore as long as Nasby's petition meets those requirements, the 8th Jud. Dist. Ct. must review Nasby's petition-
3 even if he does not request relief, or if he in fact, request something other than relief from his conviction.
4 Such as a declaratory judgment.

5 The 8th Jud. Dist. Ct. asserted that Nasby requested an advisory opinion from the 11th Jud. Dist. Ct., and that advis-
6 ory opinions are improper. (Findings, pg. 4). The 11th Jud. Dist. Ct., in its Order Transferring Petition, refused to answer
7 Nasby's presented questions of law, "as it would result in [the] Court producing an Advisory Opinion as to the Eighth
8 Judicial District's management of the trial in 1999." (Transfer Order, pg. 2, ln 11-13). As the 11th Jud. Dist. Ct., per NRS 33.220,
9 could not settle the dispute and terminate the controversy in Nasby's case, NRS 30.080 allows the 11th Jud. Dist.
10 Ct. to "refuse to render, or enter a declaratory judgment or decree where such judgment or decree, if re-
11 ndered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding." (NRS 30.080).
12 However, whether or not Nasby initially requested the 11th Jud. Dist. Ct. give what amounts to an advisory opinion, is
13 of no import, because Nasby's petition was transferred to the 8th Jud. Dist. Ct., and the 8th Jud. Dist. Ct. has the authority
14 to settle the dispute and terminate the controversy by giving its ruling force (See - NRS 30.100, 34.470(2)
15 & 34.500), where the 11th Jud. Dist. Ct. did not have this authority (See - NRS 33.220). Thus, the 8th Jud. Dist.
16 Ct.'s answers to Nasby's presented questions, could not be an advisory opinion. Once the 8th Jud. Dist. Ct. ass-
17 umed jurisdiction of the petition, it had the authority, and the duty, to review its merits, enter a declara-
18 tory judgment, and settle the dispute or controversy. NRS 30.080 denies the 8th Jud. Dist. Ct. discretion to re-
19 fuse to render the declaratory judgment, because its judgment, if entered, would terminate the controversy.

20 C. The district court need not construe Nasby's petition as a petition for post-conviction re-
21 lief in order to dispose of the petition.

22 To the extent that the district court believed that it had to construe Nasby's petition as a petition for post-con-
23 viction relief in order to dispose of his petition, the above arguments, as well as the following, refute that be-
24 lief. In addition to the above arguments - NONE of the post-conviction provisions of Ch. 34 authorize the
25 court to actually settle the dispute or terminate the controversy. Therefore, if the court, following the inquiry
26 into Nasby's unlawful imprisonment, entered a declaratory judgment and determined that he is entitled to re-
27 lief, even though he did not request that relief, NRS 34.470(2); 34.500(1) to 9 inclusive; 30.100; and Art. 6 § 6 of
28 the Nev. Const. all authorize the court to dispose of the petition and terminate the controversy. The post-con-

1 conviction provisions that the legislature said must not apply to Nasby's petition, are not necessary to prop-
2 erly dispose of his petition. In addition, NRCP 54(c) mandates that: "every final judgment shall grant the re-
3 lief to which the party in whose favor it is rendered is entitled, even if the party has not demanded
4 such relief in the party's pleadings." (emphasis added). Nasby need not request relief in order for the
5 court to grant, or refuse to grant, such relief. Therefore, construing his petition as one requesting relief
6 is not only unnecessary, but unauthorized. NRS 34.720 and 34.724 authorize, and govern, how a petitioner must
7 "request relief" from a judgment of conviction or sentence. They do not govern the court's power to grant or deny relief.
8 However, per NRS 34.720, Nasby must request relief for the court to apply any of the post-conviction provi-
9 sions. — As long as a real controversy exist, meaning a justiciable dispute, and the case is based, and rest, upon ex-
10 isting facts or rights, there is a "case or controversy" and the claim, as is, is not a moot one. NCAA v. Jones, 97
11 Nev. 56, 57, 621 P.2d 10, 10-11 (1981). Nasby's case is based on actual facts and law involving his criminal conviction;
12 the State believes that they have Nasby lawfully imprisoned while Nasby asserts the contrary; Nasby is still
13 imprisoned due to that conviction, and a petition for writ of habeas corpus (NRS 34.362) is the appropri-
14 ate remedy to request an inquiry into his unlawful imprisonment. Furthermore, "a ^{public} ~~pet~~ interest in having the
15 legality of the practices settled, militates against a mootness conclusion." U.S. v. W.T. Grant Co., 345 U.S. 629, 632-33
16 97 LE2d 1303, 1309 (1953), e.g., Greenpeace Action v. Franklin, 982 F.2d 1342, 1349 (1992). Nasby's petition presents
17 a matter of public interest and concern. — Nothing warrants the district court's violation of NRS 34.720,
18 and its construing of Nasby's petition. Simply put — There was no need to construe Nasby's petition as one
19 requesting relief, other than to arbitrarily deny Nasby of State law enforcement. Hicks, supra; Laboe, supra.
20 D. Nasby's petition presents a matter of public concern and is protected by the Speech
21 Clause of the U.S. Constitution.

22 Answers to questions of law are not only of interest to Nasby, but the public at large. Answers to questions of law
23 serve to clarify and inform all interested parties, and the public, of what is and is not prohibited by law.
24 Petitions are a form of expression, and a petitioner who invokes the Petition Clause could invoke the
25 Speech Clause of the First Amendment as well. Borough of Duryea, P.A. v. Guarnieri, — U.S. —; 180 LE2d
26 2408, 418, 131 S.Ct. 2498 (2011). Individuals may also engage in litigation as a vehicle for effective
27 political expression and association, as well as a means of communicating useful information to the
28 public. Litigation on matters of public concern may facilitate the informed public participation
that is ~~the~~ a cornerstone of democratic society. It also allows individuals to pursue desired ends by
direct appeal to government officials charged with applying the law. Id. at 427. Petitions may allow the
public airing of disputed facts and promote the evolution of the law by supporting the develop-
ment of legal theories, and these and other benefits may not accrue if one class of knowledgeable

1 and motivated citizens is prevented from engaging in petitioning activity. Id. at 428.

2 The presented questions of law in Nasby's petition allege very serious acts of prosecutorial mis-
3 conduct. If Nasby is not permitted to prosecute his 34.360 petition, his claims cannot otherwise be
4 reviewed (State, ex rel. Orsborn v. Fogliani, supra), as the district court has barred them under the post-con-
5 viction provisions. However, not only does Nasby have a statutory right to prosecute his petition, but the
6 prosecution of his petition is also protected by the Speech Clause of the 1st Amend. District Attorneys
7 and their deputies are public servants, and the public has an interest in knowing about the unlawful
8 acts and practices of their State/County Prosecutors. Whether, or not, the Clark County District Attorn-
9 ey lawfully prosecutes Nevada's citizens, is a matter of public concern. Compare, e.g., Alpha Energy Sav-
10 ers, Inc. v. Hansen, 381 F.3d 917, 927 (9th Cir. 2004) (litigation seeking to expose... wrongful government
11 activity is, by its very nature, a matter of public concern) and e.g., Veigt v. Savell, 70 F.3d 1552, 1560
12 (9th Cir. 1995) (speech regarding how judge handled two internal personal matters was matter of public
concern because "[t]he public has an interest in knowing whether the court treats its job applicants
fairly"); Also Cf., Shapiro v. Welt, 133 Nev. Adv. Rep. 6 (2017) and NRS 41.637(4).

13 If Nasby's litigation would necessarily imply that his conviction was invalid or entitled him to
14 release from prison — then, his only available remedy to exercise his speech is this NRS 34.360
15 petition. Refusing to allow Nasby to prosecute a 34.360 writ, constitutes a prior restraint on his
16 speech, which offends our Constitution and must not continue.

17 Question Three: Did The 8th Jud. Dist. Ct. Exceed Its Jurisdiction When It Changed The Holdings Made By
18 The 11th Jud. Dist. Ct.?

19 The 8th Jud. Dist. Ct. exceeded its jurisdiction by changing the holdings made by the 11th Jud. Dist. Ct., when
20 it construed Nasby's petition as a petition for post-conviction relief. In its "Order Transferring Pet-
21 ition", the 11th Jud. Dist. Ct. HELD that what Nasby filed was, in fact, a "Petition For Writ Of Habeas
22 Corpus (NRS 34.360 - Constitutional Questions/Questions of Law)", and not a petition for post-convict-
23 ion relief under NRS 34.724. See - (Transfer Order, pg. 1, ln. 15-23). In fact, the 11th Jud. Dist. Ct. differentiates
24 between this petition and Nasby's post-conviction habeas corpus petitions, when it first holds that Nasby
25 "filed this Petition For Writ of Habeas Corpus (NRS 34.360 - Constitutional Questions/Questions of Law)" (Trans-
26 fer Order, pg. 1, ln. 17-23), and then immediately after, identifies the "(4) state post-conviction Habeas Corpus
27 petitions" that Nasby has filed (Transfer Order, pg. 1, ln. 22-24). The 11th Jud. Dist. Ct. did not identify Nasby's petition
28 as a petition for post-conviction relief, but explicitly held that Nasby filed this 34.360 petition.

1 Even the Clerk of the 8th Jud. Dist. Ct., based on the 11th Jud. Dist. Ct.'s transfer order, filed Nasby's peti-
2 tion as a 34.360 petition, gave it a case number consistent with that order (Case # A-16-741719-W),
3 and initially, did not file it under Nasby's criminal/post-conviction case number. See (Transfer Order,
4 pg. 1, ln. 9-14). — Per NRS 3.320, the 8th Jud. Dist. Ct. had no authority to review, change, reverse, or vacate the
5 holdings of the 11th Jud. Dist. Ct. This Court clarified NRS 3.320 in Rohlfing v. 2nd Jud. Dist. Ct., 106 Nev.
6 902, 906; 503 P.2d 659, 662 (1990), saying: "[t]he district courts of this state have equal and co-extensive jur-
7 isdiction; therefore, the various district courts lack jurisdiction to review the acts of other dist-
8 rict courts." Also see - State v. Sustacha, 108 Nev. 223, 225-26; 826 P.2d 959, 960-61 (1992).
9 The 11th Jud. Dist. Ct.'s determination that Nasby filed a Habeas Corpus Petition under NRS 34.360, was
10 not dictum, but the Court's actual holding. Based on the rulings in Rohlfing and Sustacha, the 8th Jud.
11 Dist. Ct. could not change or review the holdings of another district court. Only an appellate court
12 can do that in Nevada.

12 Question Four: Did Nasby Make A Showing Of Actual Innocence?

13 Even if the Court applies the inappropriate post-conviction provisions of NRS Ch. 34 to Nasby's
14 petition, construed liberally, he has still demonstrated that failure to consider the petition would result in a
15 fundamental miscarriage of justice. Mazzan v. Warden, 112 Nev. 833, 942, 921 P.2d 920, 922 (1996).

16 In order to demonstrate a fundamental miscarriage of justice, a petitioner must make a colorable showing of
17 actual innocence — factual innocence, not legal innocence. Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519,
18 537 (2001); see also Calderon v. Thompson, 523 U.S. 538, 559 (1998). To establish actual innocence, a petitioner
19 must demonstrate that, absent the constitutional violations, "it is more likely than not that no reasonable
20 juror would have convicted him." Calderon, 523 U.S. at 559 (quotation marks omitted).

21 In his petition, Nasby requested "1) Answer the Question of law presented herein; and/or 2) Address any
22 other observable legal questions and violations sua sponte." The Court is required to construe pro-se peti-
23 tions liberally. Haines v. Kerner, 404 U.S. 519, 30 L.Ed. 2d 652, 92 S.Ct. 594 (1972). Construing Nasby's petition liber-
24 ally, he has demonstrated a fundamental miscarriage of justice will result. As shown in the "Statement of Facts"
25 herein, Nasby presents a number of evidence that demonstrates his actual innocence; his petition presents
26 a number of constitutional violations that probably resulted in the conviction of one who is actually inno-
27 cent (See Petition, pg. 7-44); and absent these constitutional violations, it is more likely than not that
28 no reasonable jurist would have found Nasby guilty beyond a reasonable doubt.

27 V RELIEF SOUGHT.

28 wherefore, Nasby request this Honorable Court: 1) Vacate the district court's order dismiss-

1 ing Nasby's Petition; 2) Answer the presented Questions in this Brief; 3) Answer the presented
2 Questions in his Petition; 4) Address any other observable legal questions and violations sua
3 sponta; 5) In the alternative, determine that a fundamental miscarriage of justice will re-
4 sult if Nasby's petition is not heard; ~~and~~ 6) Rule that the district court abused its discretion
5 when denying Nasby's NRCF 60(b) Motion; and/or 7) Order Dist. Ct. to hear the petition.

6 VI. CERTIFICATE OF COMPLIANCE

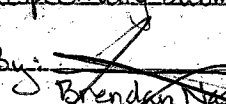
7 1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4) and
8 NRAP 32(a)(8) because: This brief has been prepared in proportionately spaced handwriting.

9 2. I further certify that this brief complies with the page limitations of NRAP 32(a)(7) be-
10 cause, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it does not exceed 30
11 pages.

12 3. Finally, I hereby certify that I have read this appellate brief, and to the best of my know-
13 ledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further
14 certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in parti-
15 cular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the re-
16 cord to be supported by a reference to the page and volume number, if any, of the transcript
17 or appendix where the matter relied on is to be found. I understand that I may be subject to
18 sanctions in the event that the accompanying brief is not in conformity with the require-
19 ments of the Nevada Rules of Appellate Procedure.

20 Dated this 16th day of January, 2018

21 Respectfully Submitted,

22 By: 
23 Brendan Nasby #63618
24 (Appellant In Pro Se)
25
26
27
28

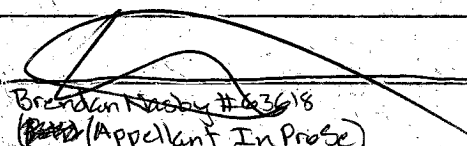
1 CERTIFICATE OF SERVICE BY MAIL

2 ~~and~~ I, Brendan Nasby, hereby certify that on this 16th day of January, 2018, I
3 mailed a true and correct copy of the foregoing "Appellant's Opening Brief" addressed to:

4 Clark County D.A.

5 P.O. Box 552211

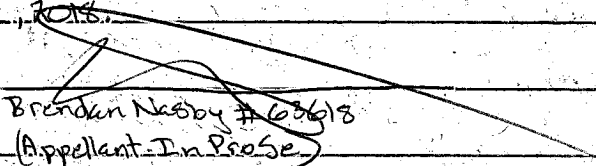
6 Las Vegas, NV 89155-2211

7 By: 
8 Brendan Nasby #63618
(Appellant In Prose)

9 AFFIRMATION PURSUANT TO NRS 239B.030

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

12 Date this 16th day of January, 2018.

13 By: 
14 Brendan Nasby #63618
15 (Appellant In Prose)