

1 2012, and issuing Remittitur on March 5, 2012. Nasby v. State, No. 58579 (Order of
2 Affirmance, Feb. 8, 2012).

3 On December 9, 2014, Defendant filed his third Post-Conviction Petition for Writ of
4 Habeas Corpus. The State responded on February 4, 2015. This Court denied Defendant's
5 Petition as procedurally barred on February 25, 2015. Defendant filed a Notice of Appeal on
6 March 13, 2015. This Findings of Fact, Conclusions of Law was filed on March 30, 2015. On
7 September 11, 2015, the Nevada Supreme Court affirmed the Court's denial of Defendant's
8 third petition as untimely, successive, and an abuse of the writ without a showing of good
9 cause and prejudice.

10 On April 3, 2015, Defendant filed a Motion to Disqualify Judge, and Notice and Motion
11 to Attach Supplemental Exhibits on April 21, 2015. The State filed on Opposition on April
12 28, 2015. On April 28, 2015, the Court filed a written order denying Defendant's motions.
13 Defendant appealed this decision and the Nevada Supreme Court dismissed Defendant's
14 appeal on July 8, 2015.

15 On January 5, 2016, Defendant filed his fourth Post-Conviction Petition for Writ of
16 Habeas Corpus, a Memorandum of Points and Authorities in Support, a Supplemental
17 Memorandum of Points and Authorities in Support, and a Motion for Appointment of Counsel.
18 The State filed a Response on February 23, 2016. Defendant filed a reply on March 10, 2016.
19 On April 4, 2016, Defendant's Petition was denied. The Findings of Fact, Conclusions of Law
20 were filed on May 9, 2016.

21 On May 18, 2016, Defendant filed a Motion to Alter or Amend Judgment N. R. Civ. P.
22 59(e). The State responded on June 2, 2016. The Court denied Defendant's Motion on June
23 8, 2016. Defendant filed a Notice of Appeal on June 14, 2016; the appeal is still pending with
24 the Nevada Court of Appeals.

25 On January 26, 2016, Defendant filed a Petition for Writ of Habeas Corpus (NRS
26 34.360 - Constitutional Questions/Questions of Law) in the Eleventh Judicial District Court,
27 seeking a declaratory judgment on seven allegations of trial error. The Eleventh Judicial
28 District Court transferred Defendant's Petition back to this Court, as this Court has proper

1 jurisdiction over Defendant. On April 4, 2017, Defendant filed a Motion for Reconsideration.
2 The State responded on April 19, 2017. The State Responded to Defendant's Petition on April
3 25, 2017. The next day, Defendant's Motion for Reconsideration was denied.

4 On May 10, 2017, Defendant filed a Reply to the States response to Defendant's
5 Petition, and on May 15, 2017, the court denied Defendant's Petition. The Findings of Fact,
6 Conclusions of Law, and Order was filed on June 20, 2017. On June 27, 2017, Defendant filed
7 a Notice of Appeal.

8 On May 22, 2018, the Nevada Court of Appeals affirmed the denial of Defendant's
9 fourth Petition for Writ of Habeas Corpus.

10 On January 11, 2019, Defendant filed the instant Petition for Writ of Habeas Corpus.
11 This Court ordered the State to respond on January 30, 2019. The State responded on March
12 13, 2019.

13 ANALYSIS

14 **I. DEFENDANT'S FIFTH PETITION IS PROCEDURALLY BARRED**

15 **A. The Procedural Bars are Mandatory**

16 The Nevada Supreme Court has held that "[a]pplication of the statutory procedural
17 default rules to post-conviction habeas petitions is *mandatory*," noting:

18 Habeas corpus petitions that are filed many years after conviction
19 are an unreasonable burden on the criminal justice system. The
20 necessity for a workable system dictates that there must exist a
time when a criminal conviction is final.

21 State v. Dist. Court (Riker), 121 Nev. 225, 112 P.3d 1070 (2005) (emphasis added).
22 Additionally, the Court noted that procedural bars "cannot be ignored [by the district court]
23 when properly raised by the State." Id. at 233, 112 P.3d at 1075. The Nevada Supreme Court
24 has granted no discretion to the district courts regarding whether to apply the statutory
25 procedural bars; the rules must be applied. For the reasons discussed below, this Court finds
26 Defendant's Petition must be denied.

27 ///

28 ///

1 **B. Defendant's Petition is Barred by Laches**

2 NRS 34.800 creates a rebuttable presumption of prejudice to the State if "[a] period
3 exceeding five years between the filing of a judgment of conviction, an order imposing a
4 sentence of imprisonment or a decision on direct appeal of a judgment of conviction and the
5 filing of a petition challenging the validity of a judgment of conviction...." The statute also
6 requires that the State plead laches in its motion to dismiss the petition. NRS 34.800. The
7 State pleaded laches in the instant case.

8 The Judgment of Conviction was filed on December 2, 1999. Defendant filed the
9 instant Petition on January 11, 2019. Since more than 19 years have elapsed since the date the
10 Judgment of Conviction was filed and the filing of the instant petition, NRS 34.800 directly
11 applies in this case. The delay is more than triple the five years required for a presumption of
12 prejudice to arise. After such a passage of time, this Court finds the State is prejudiced in its
13 ability to retry this case should relief be granted.

14 **C. Defendant's Motion is Time Barred**

15 The mandatory provision of NRS 34.726(1) states:

16 Unless there is good cause shown for delay, a petition that
17 challenges the validity of a judgment or sentence must be filed
18 *within 1 year after entry of the judgment of conviction* or, if an
19 appeal has been taken from the judgment, *within 1 year after the*
20 *Supreme Court issues its remittitur*. For the purposes of this
 subsection, good cause for delay exists if the petitioner
 demonstrates to the satisfaction of the court:

21 (emphasis added). "[T]he statutory rules regarding procedural default are mandatory and
22 cannot be ignored when properly raised by the State." State v. Dist. Court (Riker), 121 Nev.
23 225, 233, 112 P.3d 1070, 1075 (2005).

24 Accordingly, the one-year time bar prescribed by NRS 34.726 begins to run from the
25 date the judgment of conviction is filed or a remittitur from a timely direct appeal is filed.
26 Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998); see Pellegrini v.
27 State, 117 Nev. 860, 873, 34 P.3d 519, 528 (2001) (holding that NRS 34.726 should be
28 construed by its plain meaning).

1 In Gonzales v. State, 118 Nev. 590, 593, 590 P.3d 901, 902 (2002), the Nevada Supreme
2 Court affirmed the rejection of a habeas petition that was filed two days late, pursuant to the
3 "clear and unambiguous" mandatory provisions of NRS 34.726(1). Gonzales reiterated the
4 importance of filing the petition with the District Court within the one-year mandate, absent a
5 showing of "good cause" for the delay in filing. Gonzales, 590 P.3d at 902. The one-year
6 time bar is therefore strictly construed. In contrast with the short amount of time to file a
7 notice of appeal, a prisoner has an ample full year to file a post-conviction habeas petition, so
8 there is no injustice in a strict application of NRS 34.726(1), despite any alleged difficulties
9 with the postal system. Gonzales, 118 Nev. at 595, 53 P.3d at 903.

10 Here, Defendant claims that he is not challenging his Judgement of Conviction but
11 appears to argue that his judgment of conviction is void because the jury was instructed on
12 premeditation and deliberation pursuant to the Kazalyn v. State, 108 Nev. 67, 825 P.2d 578
13 (1992) interpretation of NRS 200.030(1)(a) instead of Byford v. State, 116 Nev. 215, 994 P.2d
14 700 (2000). Petition at 5-6. This is clearly a challenge to the validity of Defendant's sentence,
15 and therefore this Petition would only be timely if brought within a year of the filing of
16 Defendant's judgement of Conviction or remittitur if Defendant appealed.

17 Defendant's Judgment of Conviction was filed on December 2, 1999. He filed a Notice
18 of Appeal on December 14, 1999, and the Nevada Supreme Court issued its remittitur on
19 March 6, 2001. Accordingly, Defendant had until approximately March 6, 2002, to file a post-
20 conviction petition. The instant motion was not filed until January 19, 2019, more than 17
21 years later. Therefore, absent a showing of good cause, Defendant's motion must be denied
22 as time-barred pursuant to NRS 34.726(1). NRS 34.726 can only be overcome upon a showing
23 of good cause and prejudice or actual innocence, which Defendant fails to demonstrate.
24 Accordingly, this Court finds Defendant's Petition must be denied.

25 **D. Defendant's Petition is Successive and an Abuse of the Writ**

26 Defendant's instant petition must be dismissed pursuant to NRS 34.810 as it is
27 successive and an abuse of the writ. NRS 34.810 provides in pertinent part that:
28

1 2. A second or successive petition must be dismissed if the
2 judge or justice determines that it fails to allege new or different
3 grounds for relief and that the prior determination was on the
4 merits or, if new and different grounds are alleged, the judge or
5 justice finds that the failure of the Defendant to assert those
6 grounds in a prior petition constituted an abuse of the writ.

3. Pursuant to subsections 1 and 2, the petitioner has the
burden of pleading and proving specific facts that demonstrate:

(a) Good cause for the petitioner's failure to present the
claim or for presenting the claim again; and

(b) Actual prejudice to the petitioner.

7 Defendant filed five previous Petitions for Writ of Habeas Corpus (Post-Conviction)
8 on January 30, 2002, February 18, 2011, December 9, 2014, January 5, 2016, and January 26,
9 2016. Each petition was duly considered and denied by the Court. Consequently, the instant
10 petition filed on January 19, 2019, is a successive petition. Moreover, Defendant raises the
11 exact same claim he raised on direct appeal and in his December 26, 2013, petition. As such,
12 the instant petition is also an abuse of the writ. See also Pellegrini v. State, 117 Nev. 860,
13 888, 34 P.3d 519, 538 (2001); Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975).

14 To avoid the procedural default under NRS 34.810, Defendant has the burden of
15 pleading and proving specific facts that demonstrate both good cause for his failure to present
16 his claim in a timely manner and actual prejudice, which Defendant fails to demonstrate. NRS
17 34.810(3); Hogan v. Warden, 109 Nev. 952, 959-60, 860 P.2d 710, 715-16 (1993); Phelps v.
18 Director, 104 Nev. 656, 659, 764 P.2d 1303, 1305 (1988). Thus, this Court finds the instant
19 Petition must be denied.

21 II. DEFENDANT CANNOT ESTABLISH GOOD CAUSE TO OVERCOME 22 THE PROCEDURAL BARS

23 To avoid procedural default under NRS 34.726 or NRS 34.800, a defendant has the
24 burden of pleading and proving specific facts that demonstrate good cause for his failure to
25 present his claim in earlier proceedings or comply with the statutory requirements. See Hogan,
26 109 Nev. at 959-60, 860 P.2d at 715-16; Phelps, 104 Nev. at 659, 764 P.2d at 1305.

27 "To establish good cause, appellants *must* show that an impediment external to the
28 defense prevented their compliance with the applicable procedural rule." Clem v. State, 119

1 Nev. 615, 621, 81 P.3d 521, 525 (2003) (emphasis added); see Hathaway v. State, 119 Nev.
2 248, 251, 71 P.3d 503, 506 (2003); Pellegrini, 117 Nev. at 887, 34 P.3d at 537. Such an external
3 impediment could be “that the factual or legal basis for a claim was not reasonably available
4 to counsel, or that ‘some interference by officials’ made compliance impracticable.”
5 Hathaway, 119 Nev. at 251, 71 P.3d at 506 (quoting Murray v. Carrier, 477 U.S. 478, 488, 106
6 S. Ct. 2639, 2645 (1986)); see also Gonzalez, 118 Nev. at 595, 53 P.3d at 904 (citing Harris v.
7 Warden, 114 Nev. 956, 959-60 n.4, 964 P.2d 785 n.4 (1998)). Any delay in filing of the petition
8 must not be the fault of the petitioner. NRS 34.726(1)(a).

9 The Nevada Supreme Court has clarified that a defendant cannot attempt to
10 manufacture good cause. Clem, 119 Nev. at 621, 81 P.3d at 526. To find good cause there
11 must be a “substantial reason; one that affords a legal excuse.” Hathaway, 119 Nev. at 251,
12 71 P.3d at 506. Excuses such as the lack of assistance of counsel when preparing a petition,
13 as well as the failure of trial counsel to forward a copy of the file to a petitioner have been
14 found not to constitute good cause. See Phelps, 104 Nev. at 660, 764 P.2d at 1306, superseded
15 by statute on other grounds as recognized in Nika v. State, 120 Nev. 600, 607, 97 P.3d 1140,
16 1145 (2004); Hood v. State, 111 Nev. 335, 890 P.2d 797 (1995). Moreover, a return to state
17 court to exhaust remedies for federal habeas is not good cause to overcome state procedural
18 bars. Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989).

19 Finally, claims asserted in a petition for post-conviction relief must be supported with
20 specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v.
21 State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). “Bare” and “naked” allegations are not
22 sufficient, nor are those belied and repelled by the record. Id.

23 Defendant fails to assert any good cause for his procedural default. Instead, he argues,
24 as discussed, supra, that the procedural bars do not apply to him. For the reasons discussed,
25 they do. Defendant also relies on Montgomery v. Louisiana, 136 S.Ct. 718, 193 L.Ed.2d 599
26 (2016) and Welch v. U.S., 136 S.Ct. 1257, 194 L.Ed.2d 387 (2016) to argue that he could not
27 bring a timely claim because he had cases pending on appeal when these cases were decided.
28 Petition at 7. This claim lacks merit. Both Montgomery and Welch analyze when Byford

1 should be applied retroactively to cases that were final when Byford was decided. At the time
2 Byford was decided, Defendant's case was pending on appeal and therefore not a final
3 decision. The case most favorable to Defendant is Nika v. State, 124 Nev. 1272, 198 P.3d 839
4 (2008) which allowed for Byford to apply to cases pending on appeal at the time Byford
5 pronounced a change in law, and Defendant failed to file a petition within one year after Nika
6 was decided. Moreover, Defendant could and should have previously raised these issues in an
7 earlier petition. As such, Defendant fails to establish an impediment external to the defense
8 and therefore does not constitute good cause to overcome the procedural bars. Phelps v.
9 Director, Nevada Department of Prisons, 104 Nev. 656, 764 P.2d 1303 (1988). Accordingly,
10 Defendant cannot demonstrate good cause and this Court finds Defendant's Petition for Writ
11 of Habeas Corpus must be denied.


12 **ORDER**

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

15 DATED this 9th day of April, 2019.

16 
17 DISTRICT JUDGE

18 STEVEN B. WOLFSON
19 Clark County District Attorney
Nevada Bar #001565

20 BY 
21 CHARLES W. THOMAN
22 Chief Deputy District Attorney
Nevada Bar #12649

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 5th day of April,
2019, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

BRENDAN JAMES NASBY #63618
LOVELOCK CORRECTIONAL CENTER
1200 Prison Road
Lovelock, NV 89419

BY /s/D. Daniels
Secretary for the District Attorney's Office

98F11168/QH-Appeals/dd/MVU

Case Information

A-19-788126-W | Brendan Nasby, Plaintiff(s) vs. Renee Baker Warden, Defendant(s)

Case Number
A-19-788126-W

Court
Department 19

Judicial Officer
Kephart, William D.

File Date
01/11/2019

Case Type
Writ of Habeas Corpus

Case Status
Open

Party

Plaintiff
Nasby, Brendan

Active Attorneys

Pro Se

Defendant
Renee Baker Warden

Active Attorneys

Lead Attorney
Wolfson, Steven B

Retained

Attorney
Thoman, Charles W.

Retained

Defendant
State of Nevada

Active Attorneys
Attorney
Zadrowski, Bernard B.

Retained

Lead Attorney
Wolfson, Steven B

Retained

Attorney
Thoman, Charles W.

Retained

Events and Hearings

- 01/11/2019 Inmate Filed - Petition for Writ of Habeas Corpus

Comment
Post Conviction

- 01/11/2019 Application to Proceed in Forma Pauperis
- 01/25/2019 Order to Proceed In Forma Pauperis

- 01/30/2019 Order for Petition for Writ of Habeas Corpus
 - Comment
 - Order for Petition for Writ of Habeas Corpus
- 02/05/2019 Motion for Appointment of Attorney
 - Comment
 - Motion for Appointment of Counsel
- 02/26/2019 Notice of Motion
 - Comment
 - Notice of Motion
- 03/12/2019 Notice
 - Comment
 - Notice to the Court
- 03/13/2019 Response
 - Comment
 - State's Response to Defendant's Petition for Writ of Habeas Corpus (Post Conviction)
- 03/25/2019 Petition for Writ of Habeas Corpus
 - Judicial Officer
 - Kephart, William D.
 - Hearing Time
 - 8:30 AM
 - Result
 - Denied
- 04/01/2019 Reply
 - Comment
 - Reply to State's Response to Petition for Writ of Habeas Corpus , NRCP 12(f) Motion to Strike ,and if Necessary NRCP 59(e) Motion to Alter or Amend Judgment
- 04/01/2019 Notice
 - Comment
 - Notice of Pleading

- 04/03/2019 Notice of Change of Hearing
 - Comment
 - Notice of Change of Hearing
- 04/08/2019 Response
 - Comment
 - State's Response to Defendant's Motion to Appoint Counsel
- 04/10/2019 Motion for Appointment of Attorney
 - Judicial Officer
 - Kephart, William D.
 - Hearing Time
 - 8:30 AM
 - Result
 - Denied
 - Comment
 - Notice of Motion
 - Parties Present
 - Defendant
 - Attorney: Zadrowski, Bernard B.
- 04/12/2019 Findings of Fact, Conclusions of Law and Order
- 04/15/2019 Notice of Entry
 - Comment
 - Notice of Entry of Findings of Fact, Conclusions of Law and Order

Financial

No financial information exists for this case.

Brendan Nasby #63618
Lovelock Corr. Ctr.
1200 Patton Rd.
Lovelock, NV 89419

Lovelock Correctional Center



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8th Jud. Dist. Ct.
Clerk of The Court
200 Lewis Ave.
3rd Floor
Las Vegas, NV 89155-1160

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6 **IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE**
7 **STATE OF NEVADA IN AND FOR**
8 **THE COUNTY OF CLARK**

9 BRENDAN JAMES NASBY,

10 Plaintiff(s),

11 vs.

12 RENEE BAKER (WARDEN),

13 Defendant(s),
14

Case No: A-19-788126-W

Dept No: XIX

15
16 **CASE APPEAL STATEMENT**
17

18 1. Appellant(s): Brendan James Nasby

19 2. Judge: William D. Kephart

20 3. Appellant(s): Brendan James Nasby

21 Counsel:

22 Brendan James Nasby #63618
23 1200 Prison Rd.
24 Lovelock, NV 89419

25 4. Respondent (s): Renee Baker (Warden)

26 Counsel:

27 Steven B. Wolfson, District Attorney
28 200 Lewis Ave.
Las Vegas, NV 89155-2212

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5. Appellant(s)'s Attorney Licensed in Nevada: N/A
Permission Granted: N/A
- Respondent(s)'s Attorney Licensed in Nevada: Yes
Permission Granted: N/A
6. Has Appellant Ever Been Represented by Appointed Counsel In District Court: No
7. Appellant Represented by Appointed Counsel On Appeal: N/A
8. Appellant Granted Leave to Proceed in Forma Pauperis**: Yes, January 25, 2019
***Expires 1 year from date filed*
Appellant Filed Application to Proceed in Forma Pauperis: N/A
Date Application(s) filed: N/A
9. Date Commenced in District Court: January 11, 2019
10. Brief Description of the Nature of the Action: Unknown
Type of Judgment or Order Being Appealed: Civil Writ of Habeas Corpus
11. Previous Appeal: No
Supreme Court Docket Number(s): N/A
12. Child Custody or Visitation: N/A
13. Possibility of Settlement: Unknown

Dated This 7 day of May 2019.

Steven D. Grierson, Clerk of the Court

/s/ Heather Ungermann
Heather Ungermann, Deputy Clerk
200 Lewis Ave
PO Box 551601
Las Vegas, Nevada 89155-1601
(702) 671-0512

cc: Brendan James Nasby

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Writ of Habeas Corpus

COURT MINUTES

March 25, 2019

A-19-788126-W Brendan Nasby, Plaintiff(s)
vs.
Renee Baker Warden, Defendant(s)

**March 25, 2019 8:30 AM Petition for Writ of Habeas
Corpus**

HEARD BY: Kephart, William D. **COURTROOM:** RJC Courtroom 16B

COURT CLERK: Shannon Emmons

RECORDER: Christine Erickson

REPORTER:

**PARTIES
PRESENT:**

JOURNAL ENTRIES

- Court FINDS, this petition is procedurally barred, successive, and an abuse of the Writ process.
COURT ORDERED, Petition DENIED.

NDC

CLERK'S NOTE: A copy of this minute order was mailed to:

Brendan Nasby #1517690
1200 Prison Road
Lovelock, NV 89419

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Writ of Habeas Corpus

COURT MINUTES

April 10, 2019

A-19-788126-W Brendan Nasby, Plaintiff(s)
vs.
Renee Baker Warden, Defendant(s)

**April 10, 2019 8:30 AM Motion for Appointment of
Attorney**

HEARD BY: Kephart, William D.

COURTROOM: RJC Courtroom 16B

COURT CLERK: Tia Everett

RECORDER: Christine Erickson

REPORTER:

PARTIES

PRESENT: Zadrowski, Bernard B. Attorney

JOURNAL ENTRIES

- Court noted Defendant not present and in custody with the Nevada Department of Corrections. Further, Court noted Defendant is seeking the appointment of counsel, this motion follows the denial of Defendant's sixth Petition for Writ of Habeas Corpus. COURT ORDERED, Motion DENIED as MOOT as the Petition was previously denied on 3/25/2019 and Defendant has provided no legal reason as to why counsel should be appointed and Defendant is not entitled to counsel at this point.

NDC

CLERK'S NOTE: The above minute order has been distributed to:

BRENDAN NASBY # 63618
LOVELOCK CORRECTIONAL CENTER
1200 PRISON ROAD
LOVELOCK, NV 89419

Certification of Copy and Transmittal of Record

State of Nevada }
County of Clark } SS:

Pursuant to the Supreme Court order dated June 3, 2019, I, Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, do hereby certify that the foregoing is a true, full and correct copy of the complete trial court record for the case referenced below. The record comprises one volume with pages numbered 1 through 127.

BRENDAN JAMES NASBY,

Plaintiff(s),

vs.

RENEE BAKER (WARDEN),

Defendant(s),

Case No: A-19-788126-W

Dept. No: XIX

now on file and of record in this office.

IN WITNESS THEREOF, I have hereunto
Set my hand and Affixed the seal of the
Court at my office, Las Vegas, Nevada
This 5 day of June 2019.

Steven D. Grierson, Clerk of the Court



Amanda Hampton, Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRENDAN JAMES NASBY,
Appellant(s),

vs.

THE STATE OF NEVADA,
Respondent(s),

Electronically Filed
Jun 05 2019 01:46 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

Case No: A-19-788126-W

Docket No: 78744

RECORD ON APPEAL

ATTORNEY FOR APPELLANT

BRENDAN NASBY #63618,
PROPER PERSON
1200 PRISON RD.
LOVELOCK, NV 89419

ATTORNEY FOR RESPONDENT

STEVEN B. WOLFSON,
DISTRICT ATTORNEY
200 LEWIS AVE.
LAS VEGAS, NV 89155-2212

I N D E X

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A-19-788126-W

Brendan Nasby, Plaintiff(s)

vs.

Renee Baker Warden, Defendant(s)

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER:</u>
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IN THE EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

FILED
JAN 11 2019

* * * * *

John L. Johnson
CLERK OF COURT

Brendan James Nasby,
Petitioner,

Case No.

A-19-788126-W

Dept. No.

Dept. XIX

vs.

Renee Baker (Warden), et al.,
Respondent

Date of Hearing

Time of Hearing

PETITION FOR WRIT OF HABEAS CORPUS
(NRS 34.360/34.480/34.500(3) - Attack On A Void Judgment)

BRENDAN JAMES NASBY

I.D. No. 63618

LOVELOCK CORRECTIONAL CENTER

1200 PRISON ROAD

LOVELOCK, NEVADA 89419

(PETITIONER IN PRO SE)

RECEIVED

JAN 11 2019

CLERK OF THE COURT

A-19-788126-W
IPWHC
Inmate Filed - Petition for Writ of Habeas
4810970



1 JURISDICTION.

2 The Petitioner, Brendan James Nasby, is presently imprisoned at:
3 Lovelock Correctional Center, Pershing County, Nevada.
4 Petitioner's petition challenges present custody and attacks a void judg-
5 ment.

6
7 GROUND PRESENTED

8
9 Ground One: As His Judgment Of Conviction Is Void, There Is No Legal Cause
10 For Nasby's Imprisonment.
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1 I. STATEMENT OF THE CASE

2 On August 11, 1998, Petitioner, Brendan James Nasby (hereinafter "Nasby")
3 was charged by criminal complaint with Conspiracy To Commit Murder and Murder
4 With The Use Of A Deadly Weapon. Case No. C154293. Represented by counsel,
5 "Joseph S. Sciscento" and "Frederick A. Santacrose", Nasby proceeded to trial in the
6 8th Judicial District Court of Nevada on October 13, 1999. The jury ultimately
7 concluded Nasby was guilty of conspiracy to ~~commit~~ ~~murder~~ murder, and first
8 degree murder with the use of a deadly weapon. Subsequently, a penalty hearing
9 was held. The court imposed a maximum term of 120 months with a minimum
10 of 48 months for Count I - Conspiracy To Commit Murder and one life sentence
11 with the possibility of parole for Count II - Murder With Use Of A Deadly Weapon,
12 plus an equal and consecutive term of life with the possibility of parole for the Use
13 Of A Deadly Weapon. The Judgment Of Conviction was filed on December 2, 1999.
14 Nasby appealed to the Nevada Supreme Court, which upheld his conviction and sent-
15 ence. That order of affirmance was filed on February 7, 2001. Nev. Sup. Ct. No.
16 35319.

17 On January 30, 2002, Nasby filed a post-conviction petition for writ of habeas
18 corpus in this Court.¹ This Court denied the petition on March 27, 2006. An Order
19 to that effect was filed on, or about, April 26, 2006. Nasby appealed the denial of
20 the petition to the Nevada Supreme Court, which upheld the denial on June 18,
21 2007. Nev. Sup. Ct. No. 47130.

22 On February 18, 2011, after being granted a stay of proceedings in his federal habeas
23 action (Fed. Dist. Ct. No. 3:07-cv-00304-LRH),² Nasby filed a second post-conviction
24 habeas petition in this Court, which denied the petition as time and procedurally
25 barred, and subject to laches. Case No. C154293-2. On February 8, 2012, the Nevada
26 Supreme Court affirmed the denial of Nasby's second petition. Nev. Sup. Ct. No. 58579.

27
28 Fn. 1 - Nasby's federal petition is still currently pending in the Federal district court.
2 - Anthony L. Sgro, Esq. was appointed to represent Nasby on this post-conviction action.

1 On December 9, 2014, Nasby filed his third post-conviction petition in this Court.
2 Case No. 98C154293-2. This Court denied Nasby's third petition, and Nasby appeal-
3 ed. On September 11, 2015, the Nevada Supreme Court affirmed the denial. Nev. Sup. Ct.
4 No. 67580.

5 On January 5, 2016, Nasby filed his fourth post-conviction petition in this
6 Court. On April 4, 2016, this Court denied Nasby's petition. The Court's "Finding of
7 Facts, Conclusions of Law and Order" was filed on May 9, 2016, in which, the Court
8 ruled that Nasby did not demonstrate good cause to overcome the time and procedural bars
9 of NRS 34.726, NRS 34.800, and NRS 34.810. Nasby appealed. The Appellate Court
10 issued its Order of Affirmance on July 12, 2017. Nev. Sup. Ct. No. 70626. On August
11 2, 2017, Nasby's Petition For Rehearing was filed. It was denied on September 15, 2017.
12 On September 28, 2017, Nasby's Petition For Review By The Supreme Court was filed. On
13 November 29, 2017, that petition was denied. On February 27, 2018, Nasby filed his
14 Petition For Writ Of Certiorari in the U.S. Supreme Court. That petition was deni-
15 ed on March 14, 2018, and the Nevada Supreme Court issued its Remittitur on May
16 18, 2018.

17 On January 26, 2016, Nasby filed an NRS 34.360 petition in the 11th Jud. Dist.
18 Ct. Case No. PT16-1002. The 11th Jud. Dist. Ct. transferred that petition to this Court
19 on August 11, 2016. After construing the petition as one requesting post-conviction
20 relief, this Court denied Nasby's petition on May 15, 2017. On June 27, 2017,
21 Nasby filed his Notice of Appeal. The Court of Appeals Affirmed on August 14, 2018,
22 Nev. Sup. Ct. No. 73412. On September 6, 2018, Nasby filed his Petition For Rehear-
23 ing, which was denied on October 22, 2018. Remittitur issued on November 16, 2018.
24 What followed is the instant petition.

25

26 II. STATEMENT OF FACTS

27 At the time of Nasby's trial, the law announced in Kazalyn v. State, 108 Nev. 67, 75;
28 928 P.2d 578, 583 (1992), applied to First Degree Murder cases. Kazalyn's interpretation of

1 NRS 200.030(1)(a) made the element of deliberation synonymous with the element
2 of premeditation, which thus required only premeditation be defined for a jury.
3 In turn, the state need only prove premeditation, while the elements of willfulness
4 and ~~deliberation~~ deliberation automatically inferred. Under Kazalyn, a jury was not required
5 to find the distinct element of deliberation, but only premeditation. In instruct-
6 ing the jury on premeditation at Nasby's trial, the Court used instructions con-
7 sistent with the law of Kazalyn, known as the "Kazalyn Instructions." Specifically,
8 the Kazalyn instruction instructs the jury that a killing resulting from premedit-
9 ation is willful, deliberate, and premeditated murder, and then defines only preme-
10 ditation. See - (Jury Instruction No. 12). At trial, defense counsel objected to
11 this instruction, instead offering, Defense "A" (T.T. Vol. VI, pg. 3). The Court reject-
12 ed Defense "A" (T.T. Vol. VI, pg. 5). The jury was also given an instruction for Second
13 Degree Murder, which stated that, "all murder that is not first degree, is second de-
14 gree." See - (Jury Instruction No. 13). The jury ultimately concluded Nasby was guilty
15 of conspiracy to commit murder, and First Degree Murder with the use of a deadly
16 weapon. He was later sentenced to 4 to 10 yrs. for the conspiracy, and two conse-
17 cutive terms of 20 yrs. to Life for the murder with the use of a deadly weapon.
18 The Judgment of Conviction was filed on December 2, 1999.
19 Nasby appealed, but before his Opening Brief was filed, the Nevada Supreme Court decid-
20 ed Byford v. State, 994 P.2d 700, 116 Nev. 215 (2000). In Byford, the court said that "deliberat-
21 ion remains a critical element of the mens rea necessary for first-degree murder." Id. at
22 235-36. "In order to establish first-degree murder, the premeditated killing must also
23 have been done deliberately." Id. Byford then goes on to say that "[b]ecause deliberation
24 is a distinct element of mens rea for first-degree murder, we direct the district courts
25 to cease instructing juries that a killing resulting from premeditation is 'willful,
26 deliberate, and premeditated murder.' Further, if a jury is instructed separately on
27 the meaning of premeditation, it should also be instructed on the meaning of deliber-
28 ation." Id. Byford then set forth new instructions to be provided to the jury

1 in first degree murder cases. Byford, 994 P.2d 700 at 714-15

2 On Direct Appeal, Nasby raised the claim that, "The Court Failed To Instruct

3 The Jury On Willfulness, Deliberation, and Premeditation (Inst 12)." In this

4 claim, Nasby argued that the decision in Byford applied to his case. The Nevada

5 Supreme Court, citing to Bridge v State, 11 Nev. , 6 P.3d 1000 (2000) and Garner

6 v. State, 116 Nev. , 6 P.3d 1013 (2000), erroneously rejected Nasby's Kazalyn/

7 Byford claim for the sole reason that, "Nasby was tried prior to the decision

8 in Byford."³

9 I 2008, the Nevada Supreme Court decided Nika v State, 124 Nev. 1272, 959 P.3d 939

10 (2008). In Nika at P.3d 950, the Court said that: 1) Byford announced a change of law;

11 2) that it erred in Garner, supra; 3) that it overruled Garner to the extent that

12 Garner declined to apply Byford to cases pending on direct appeal; 4) that, as a matter

13 of due process, the change in law announced in Byford does apply to cases that were

14 not final when Byford was decided; and 5) due process requires the conviction be set

15 aside.

16 As Nasby's case is one that was pending on direct appeal, and not final, at the time

17 Byford was decided — the decision in Byford, per Nika, applied to Nasby's case.

18 While on appeal from the denial of his fourth post-conviction petition, Nasby raised

19 five issues in his appeal brief. The first issue was raised ~~never~~ for the first time

20 on appeal, and was: "The 8th Judicial District Court Lacked Jurisdiction And Author-

21 ity." This brief was filed on December 23, 2016, and argued that the Nevada Supreme

22 Court's Nika decision retroactively divested this Court of its jurisdiction to try

23 and convict Nasby of 1st degree murder under the law of Kazalyn. The Court of

24 Appeals failed to address this issue in its order of affirmance. Nev. Sup. Ct. No.

25 70626. After being informed of the U.S. Sup. Ct.'s ruling in Montgomery v. Louisiana,

26 136 S.Ct. 718, 193 L.Ed.2d 549 (2016), Nasby asserted the ruling in his NRAP40 Petition

27
28 FN. 3 - Nasby raised this claim again in his 1st, 2nd, and 4th post-conviction petitions, but those actions
were first barred by the law of the case and then time and procedurally barred.

1 For rehearing, on July 28, 2017. See (NRA P Rule 40 Petition, Nev. Sup. Ct. No. 70626)
2 Nashby repeated this in his NRA P 40B Petition For Review By The Supreme Court.
3 See - NRA P Rule ~~40B~~ 40B Petition, pg 7, ln. 8-12, Nev. Sup. Ct. No. 70626) Both
4 of Nashby's Rule 40 and Rule 40B petitions were denied without explanation.
5

6 III. ARGUMENT.

7 A. This Petition Can Not Be Barred.

8 As a preliminary matter - The strictures of NRS 34.726, 34.800, and 34.810, do
9 not apply to this petition for the following reasons:

10 1) Nashby Is Challenging The Existence Of A Valid Judgment Of Conv-
11 iction, Under NRS 34.360, 34.480, and 34.500(3) - Not The Valid-
12 ity Of That Judgment Of Conviction.

13 The provisions of NRS 34.722 to 34.930, inclusive, apply only to petitions for
14 writs of habeas corpus in which the petitioner: Request relief from a judgment of
15 conviction or sentence in a criminal case; or challenges the computation of time
16 that he has served. (NRS 34.720. Scope of Provisions).

17 When interpreting NRS 34.720, the Supreme Court held that it was evident from
18 Nevada's statutory scheme that when a habeas corpus petition seeks relief from a
19 conviction or sentence, then a post-conviction petition for writ of habeas corpus
20 is the exclusive remedy. McConnell v. State, 125 Nev. 246, 248; 212 P3d 309, 310 (2009).

21 The Supreme Court also held that, "[A]ny remedy that [. . .] allows a person to raise a
22 claim that is outside the scope of a post-conviction petition for writ of habeas corpus
23 is not subject to the exclusive remedy language in NRS 34.724(2)(b) regardless of wheth-
24 er the remedy is or is not incident to the proceedings in the trial court." Harris v.
25 State, 329 P3d 619 (Nev. 2014), at Fn. 1.

26 NRS 34.360 allows Nashby to prosecute a writ of habeas corpus to inquire into the
27 cause of his unlawful imprisonment. (NRS 34.360). Nashby's petition claims that he is
28 in custody by virtue of process, from this Court, which is defective in some matter

1 of substance ~~and~~ required by law, rendering it void. (NRS 34.500(3)). That process
2 being void, Nasby has no valid Judgment of Conviction or sentence to request relief
3 from. (NRS 34.720). As a result, there is no legal cause for Nasby's imprisonment
4 and he is entitled to release on habeas corpus. (NRS 34.480). See Also - Re Smith, 35
5 Nev. 30, 123; 126 P. 655 (1912) ("A conviction under it is not merely erroneous, but is illegal
6 and void, and cannot be a legal cause of imprisonment.")

7 On the face of the record, it is clear that Nasby was tried under an in-
8 applicable law (Kazdyn's interpretation of NRS 200.030(1)(a)), when, per Nika,
9 the required application was Byford's interpretation of NRS 200.030(1)(a).
10 The only real question is — was the change in law announced in Byford a new
11 substantive rule? Based on Nevada and US Supreme Court precedence,
12 Nasby answers, "Yes."

13 2) There Is No Time Limit On An Attack On A Judgment As Void.

14 In the alternative — Even if this Court construed Nasby's petition as a
15 petition for post-conviction relief, under NRS 34.724, the petition can still not be
16 barred by NRS 34.726, 34.800, and 34.810 — as an attack on a void judgment can be
17 made at anytime.

18 "Either a judgment is void or it is valid. Determining which it is may well present a diff-
19 icult question, but when that question is resolved, the court must act accordingly." Garcia
20 v. Ideal Supply Co., Inc., 110 Nev. 493, 495-96; 974 P. 2d 752, 753 (1994). "By the same token,
21 there is no time limit on an attack on a judgment as void... Even the requirement
22 that the [petition] be made within [one year], which seems literally to apply... cannot
23 be enforced with regard to this class of [petition]. 11 Charles A. Wright & Arthur R.
24 Miller, Federal Practice and Procedure § 2862 (1973). "Id."

25 "A judgment is not void merely because it is erroneous. It is void only if the court that
26 rendered judgment lacked jurisdiction of the subject matter, or of the parties, or if the
27 court acted in a manner inconsistent with due process of law. See 11 C. Wright & A. Mill-
28 er, Federal Practice and Procedure § 2862 at 198-200 (1973) and cases cited therein."

1 In Re Center Wholesale, Inc., 758 F.2d 1440, 1448 (4th Cir. 1985) "[I]f a judgment is void,
2 a [petition] to set it aside may be brought at anytime" Id. at 1448. "Moreover, a
3 void judgment cannot acquire validity because of laches" Id. No passage of time
4 can make valid, a void judgment. Therefore, any delay in Nasby bringing his petition
5 "is irrelevant and the [petition] was timely." Id.

6 3) The U.S. Sup Ct Precedent Relied Upon, Did Not Become Available
7 Until The Year 2016, And When Nasby Discovered The Precedent,
8 The Court Of Appeals Maintained Jurisdiction Of His Case.

9 Montgomery v. Louisiana, 136 S.Ct 718, 143 LEd2d 599 (2016), was decided in mid-
10 2016, published soon after, and made available to Nevada prisons some time
11 after publication. When Nasby was informed of the case, in approximately July 28,
12 2017, his case was pending on appeal. This Court would not have jurisdiction to
13 entertain Nasby's petition until the remittitur was issued by the appellate court.
14 However, Nasby attempted, and did assert, the application of Montgomery and
15 Welch v. U.S., 578 U.S. , 14 LEd2d 387 (2016) in a petition for rehearing
16 filed in the Court of Appeals. (Nev. Sup. Ct. No. 20626.) Thus, Nasby asserted the Mont-
17 gomery and Welch cases within one year of their availability, or more acc-
18 urately accessibility, to him. Since remittitur was issued on Nasby's fourth
19 petition, on May 18, 2018, only 8 months had past. Then, Nasby's fifth petition,
20 which was originally filed as a NRS 34.360 petition in the 11th Jud. Dist. Ct. then
21 transferred to this Court and construed as a NRS 34.724 petition under his original
22 case number, was also pending on appeal since June 27, 2017 up until remittitur
23 was issued on November 16, 2018. (Nev. Sup. Ct. No. 73412). Not even two months
24 had past since this Court could retain jurisdiction of Nasby's case and the in-
25 stant petition. See - Rippon v. State, 132 Nev. Adv. Op. 11, 2016 Nev. LEXIS 42, at *24 (2016);
26 and Hathaway v. State, 119 Nev. 252 (2003).

27 4) Nasby's Claim Carries With It, The Presumption Of Prejudice.

28 This portion is to be reviewed in conjunction with Ground One of this petition.

1 a. Under Chapman, Nasby's Claim Maintains A Presumption Of Prejudice

2 Because Nasby objected to the Kazalyn instructions at his trial, and
3 raised the Kazalyn/Bryford issue on direct appeal*, if there was to be a
4 harmless error analysis applied - Chapman's harmless error analysis would
5 be the appropriate analysis. Under Chapman v. California, 386 U.S. 18, 23-24; 17
6 L.Ed.2d 705, 710 (1967), Nasby's claim comes with a presumption of prejudice
7 and it is the State, not Nasby, who must ~~to~~ bear the burden of demonstrating
8 that they did not benefit from the error.

9 b. The Court Lacks Authority To Determine Facts When That Fact Is An Element
10 Of The Crime.

11 As Nasby went to trial, the 5th, 6th, and 14th Amendments, prevent the Court
12 from determining elements of an offense, and require that a jury alone, with
13 proper instructions from the court, determine guilt or innocence of every element
14 of a crime. See - U.S. v. Gaudin, 515 U.S. 506, 509-523; 132 L.Ed.2d 444, 449-458; 115
15 S.Ct. 2310 (1995). Also at Gaudin, 515 U.S. at 523-24, ~~132 L.Ed.2d~~ 132 L.Ed.2d at 458-59, in
16 a separate opinion, Chief Justice Rehnquist, with whom Justice O'Connor and
17 Justice Breyer join, concurring said:

18 "I write separately to point out that there are issues in this area of the law
19 which, though similar to those decided in the Court's opinion, are not dis-
20 posed of by the Court today. There is a certain syllogistic neatness about
21 what we do decide: Every element of an offense charged must be proved to
22 the satisfaction of the jury beyond a reasonable doubt; "[deliberation]"
23 is an element of the offense charged under [NRS 200.030(1)(a)]; therefore,
24 the jury, not the Court, must decide the issue of [deliberation]."

25 Thus, a Court can not, especially ~~after~~ after the fact, determine that the
26 State proved ~~deliberation~~ deliberation, as it is an essential element of first-degree murder.

27 c. No Harmless Error Analysis Can Be Applied To Nasby's Claim.

28 Because the jury in Nasby's case, was never instructed that deliberation
29 was a distinct element of first degree murder, applying a harmless error analysis
30 would require the Court to perform a hypothetical inquiry. In a separate concur-
31 ing opinion, the late Justice Scalia warned against such hypothetical ~~inquiries~~ inquiries.

1 in Yates v. Evans, 500 U.S. 391, 414; 114 F.2d 432, 455; 111 S.Ct. 1184 (1991), saying:

2 "Given the nature of the instruction here, then, to determine from the 'entire
3 record' that the error is 'harmless' would be to answer a purely hypotheti-
4 cal question, viz., whether, if the jury had been instructed correctly, it
5 would have found that the state proved the existence of [deliberation] beyond
6 a reasonable doubt. Such a hypothetical inquiry is inconsistent with the harm-
7 less-error standard announced in Chapman v. California, 386 U.S. 18, 24, 17
8 L.Ed.2d 705, 57 S.Ct. 624, 24 ALR3d 1065 (1967), and reiterated by the Court to-
9 day. [T]he issue under Chapman is whether the jury actually tested its ver-
10 dict on evidence establishing the presumed fact beyond a reasonable doubt,
independently of the presumption. Ante, at 404, 114 L.Ed.2d, at 449 (emphasis added).
See also Bollenbach v. United States, 326 U.S. 607, 614, 90 L.Ed. 350, 66 S.Ct. 402
(1946) ('[T]he question is not whether guilt may be spelt out of a record, but wheth-
er guilt has been found by a jury according to the procedure and standards appro-
priate for criminal trials'). While such a hypothetical inquiry ensures that the
State has, in fact, proved [deliberation] beyond a reasonable doubt, it does not
ensure that it has proved that element beyond a reasonable doubt to the satis-
faction of a jury."

11 Also, in its application of Sullivan v. Louisiana, 124 L.Ed.2d 182, 113 S.Ct. 2078 (1993),
12 the 9th Circuit said the following in U.S. v. Stein, 37 F.3d 1407, 1410 (9th Cir. 1994):

13 "If jury instructions omit an element of the offense, constitutional error results
14 because the jury has been precluded from finding each fact necessary to convict
15 a defendant.' Martinez v. Borg, 937 F.2d 422, 424 (9th Cir. 1991). Such an error cannot
16 be harmless. Under recent Supreme Court authority, we may no longer consider the
17 strength of evidence and determine whether it was so clear that the jury would
18 have found the element of a crime to exist, had it been properly instructed, but
19 instead, we must determine whether the jury was actually able to consider
20 that evidence under the instructions given by the court. When proof of an ele-
21 ment has been completely removed from the jury's determination, there can be
no inquiry into what evidence the jury considered to establish that element be-
cause the jury was precluded from considering whether the element existed at
all. United States v. Gaudin, 28 F.3d 943, 951 (9th Cir. 1994) (emphasis added).
The harmless error analysis is incapable of being applied here. "There is no object
... upon which harmless error scrutiny can operate," because the jury was eff-
ectively instructed to disregard the [deliberation] element of the offense. Sulli-
van v. Louisiana, 124 L.Ed.2d 182, 113 S.Ct. 2078, 2082 (1993)."

22 d. The Error Is Plain.

23 "Had the members of the jury been correctly instructed in this case, they could
24 have [returned a guilty verdict for 2nd degree murder.]" Hicks v. Oklahoma, 447 U.S.
25 343, 346; 65 L.Ed.2d 125, 130; 100 S.Ct. 2327 (1980). "The possibility that the jury
26 would have returned a [verdict of 2nd degree murder instead of the 1st degree
27 murder it did return] is thus substantial. It is, therefore, wholly incorrect to say
28 that the petitioner could not have been prejudiced by the instruction requir-

ing the jury to find that the killing was willful, deliberate, and premeditated murder, if it found that the killing resulted from premeditation." Id. "In this case [Nevada] denied the petitioner the jury [determination] to which he was entitled under state law." Id. "Such [a] disregard of the petitioner's right to liberty is a denial of due process of law." Id.

B. Ground For Relief.

Ground One: As His Judgment Of Conviction Is Void, There Is No Legal Cause For Nasby's Imprisonment.

The United States Supreme Court, in Montgomery v. Louisiana, 136 S.Ct. 718, 731, 193 L.Ed.2d 599, 616 (2016), said: "A conviction or sentence imposed in violation of a substantive rule is not just erroneous but contrary to law and, as a result, void. See Siebold, 100 U.S. at 376, 25 L.Ed. 717. It follows, as a general principle, that a court has no authority to leave in place a conviction or sentence that violates a substantive rule."

The Nevada Supreme Court, in Byford v. State, 994 P.2d 200, 116 Nev. 215 (2000), set forth new interpretations, and instructions, regarding the distinct elements of first-degree murder — specifically the necessary element of "deliberation." Furthermore, the Nevada Supreme Court determined that the change in law announced in Byford was one that "changed to narrow the scope of a criminal statute." Nika v. State, 199 P.3d 939, 124 Nev. 1272 (2008). The Court also aligned itself with the United States Supreme Court when it stated: "[B]y requiring that the jury be correctly informed of the elements of the offense, [Byford] 'establishes a procedure without which the likelihood of an accurate conviction is seriously diminished.' Colwell, 118 Nev. at 920, 59 P.3d at 472. As the Supreme Court noted in Schiro v. Summerlin, 542 U.S. 348, 352, 124 S.Ct. 2519, 159 L.Ed.2d 442 & n.4, 542 U.S. 348, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004), rules like that of [Byford], which address the elements of an offense, are perhaps more accurately characterized as new

1 substantive rules." Mitchell v. State, 122 Nev. 1269, 149 P.3d 33 (2006), at Fm 25

2 So, as acknowledged by Nevada, and the United States Supreme Courts,

3 changes in law, such as Byford, are described normally as "new substantive

4 rules." Nika making Byford retroactively applicable to Nasby's case, means

5 that, because Nasby was convicted under the law of Kearllyn, which is clearly

6 contrary to the law of Byford, Nasby's conviction and sentence were imp-

7 oised in violation of a substantive rule.

8 Thus, Nasby's Judgment Of Conviction and sentence, are void, and this

9 Court must relieve him of his unlawful confinement — as it has no author-

10 ity to leave it in place. Montgomery, *supra*.

12 IV. CONCLUSION.

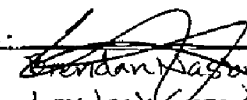
13 Therefore, Nasby respectfully request this Court: ① Grant his petition for Writ

14 of Habeas Corpus; ② Order relief from his unlawful imprisonment per NRS 34

15 360 to 34.680, inclusive; and ③ Whatever else this Court deems full and fair.

16 **EXECUTED** at Lovelock Correctional Center, on this 7th day of

17 January, 2019:

18 By:  #63618
19 Lovelock Corr. Ctr.
20 1200 Prison Rd.
21 Lovelock, NV 89419
(Petitioner In Pro Se)

23 V. VERIFICATION.

23 Under penalty of perjury, the undersigned declares that he is the petitioner,

24 "Nasby" named in the foregoing "Petition For Writ Of Habeas Corpus" and knows

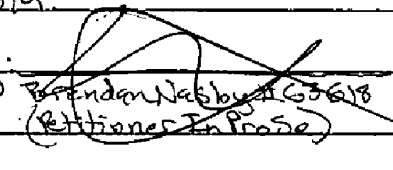
25 the contents thereof; that the pleading is true of his own knowledge, except as

26 to those matters stated on information and belief, and as to such matters

27 he believes them to be true; and that the foregoing is rendered without

28 notary per NRS 208.165.

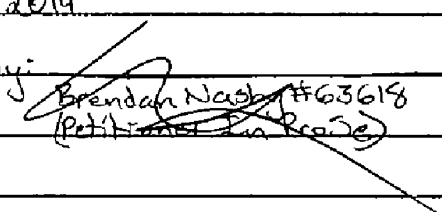
1 Dated this 7th day of January, 2019.

2 By: 
3 Brendan Nash #63618
4 (Petitioner In Pro Se)

5 VI. AFFIRMATION PURSUANT TO NRS 239B.030.

6 The undersigned does hereby affirm that the preceding "Petition For Writ
7 Of Habeas Corpus" does not contain the social security number of any
8 person.

9 Dated this 7th day of January, 2019.

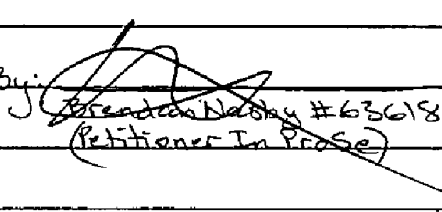
10 By: 
11 Brendan Nash #63618
12 (Petitioner In Pro Se)

13 VII. CERTIFICATE OF SERVICE

14 I, Brendan Nash, hereby certify that on this 7th day of January,
15 2019, I mailed to the clerk, and caused to be served by the Clerk's Electron-
16 ic Filing/Service, the foregoing "Petition For Writ Of Habeas Corpus (NRS 34
17 360/34.480/34.500(3)-Attack On A Void Judgment) to:

18 1) Attorney General
19 100 N. Carson St.
20 Carson City, NV 89710-4717

21 2) Brendan Nash #63618
22 Care of LCC Law Librarian
23 Lovelock Correctional Center
24 1200 Prison Road
25 Lovelock, Nevada 89419
26 lcclawlibrary@doc.nv.gov

27 By: 
28 Brendan Nash #63618
(Petitioner In Pro Se)

FILED 11

JAN 11 2019

Ch. 168
CLERK OF COURT

1 PIFP
2 Brendan Nasby # 63618
3 Lovelock Correctional Center
4 1200 Prison Road
5 Lovelock, Nevada 89419

6 Petitioner In Pro Se

7 DISTRICT COURT
8 CLARK COUNTY, NEVADA

9 * * * * *

10 Brendan James Nasby,)
11 Petitioner,)
12 -vs-)
13 Renee Baker (Warden) et al.,)
14 Respondent.)

Case No. A-19-788126-W
Dept. XIX
Dept. No.

15 APPLICATION TO PROCEED IN FORMA PAUPERIS

16 COMES NOW Petitioner Brendan James Nasby, in
17 pro se, and moves the Court for an order granting him leave to
18 proceed in the above-entitled action without paying the costs
19 and/or security of proceeding herein.

20 This motion is made and based upon NRS 12.015 and the
21 attached affidavit and certificate of inmate's institutional
22 account.

23 Dated this 7th day of January, 2019.
24 *BN* *BN*

25 A-19-788126-W
26 PIFP
27 *Application to Proceed in Forma Pauperis*

Brendan Nasby # 63618
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

Petitioner In Pro Se

RECEIVED
CLERK OF THE COURT
JAN 11 2019
JAN 16 2019

Affidavit In Support of Application
To Proceed In Forma Pauperis

STATE OF NEVADA)
) ss:
COUNTY OF PERSHING)

COMES NOW, Brendan J. Nasby, who first being duly sworn and on my own oath, do hereby depose and state the following in support of my foregoing motion:

(1) Because of my poverty I am unable to pay the costs of the proceedings in the foregoing action or to give security therefore; I am entitled to relief. This application is made in good faith.

(2) I swear that the responses below are true and correct and to the best of my knowledge, information and belief:

(a) I am ✓ am not presently employed. I currently earn salary or wages per month in the following amount at Lovelock Correctional Center OR, if I am not presently employed, the date of my last employment and the amount of salary or wages I earned per month were as follows: July 1998
K-Mart Clerk. About \$1200⁰⁰ a month.

(b) I have NOT received any money from any of the following sources within the past 12 months: business, profession, self-employment, rent payments, pensions, interests or dividends, annuities, insurance payments, gifts or inheritances. Money, if any, placed on my prison account from sources such as family or friends, is in the amount as indicated on the attached Certificate of Inmate's Institutional Account, which reflects the total amount of money on my prison account.

(c) I do NOT own any real estate, stocks, bonds, notes, automobiles or other valuable property, and I do not have any money in a checking account.

(d) I do ✓ do not have persons dependent upon me for support. The persons I support, if any, are as follows, with my relationship to them and the amount of my contribution towards their support being as follows: N/A

(3) I swear under penalty of perjury that the above is true and correct and to the best of my personal knowledge, and that the foregoing is rendered without notary per NRS 208.165.

Dated this 7th day of January, 2019
BN BN

Brendan J. Nasby # 63618
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

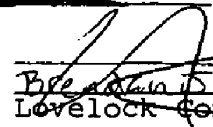
Petitioner In Pro Se

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AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding APPLICATION FOR LEAVE TO PROCEED IN FORMA PAUPERIS does not contain the social security number of any person.

Dated this 7th day of January, 2019.


Breanna S. Neaby # 63618
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419
Petitioner In Pro Se

///
///
///
///

NAME & BACK # B. Nasby #63618

RCUD INBANK 18DEC12

2A/24

Case No. _____

Dept. No. _____

IN THE 8th JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF Clark

* * * * *

Brendan James Nasby,
Petitioner,

-vs-

Renee Baker (Warden) et al.,
Respondent.

CERTIFICATE OF INMATE'S
INSTITUTIONAL ACCOUNT

I, the undersigned, do certify that Brendan Nasby,
NDOC # 63618, above-named, has a balance of \$ 154.82 on
account to his credit in the prisoners' personal property fund
for his use at Lovelock Correctional Center, in the County of
Pershing, where he is presently confined.

I further certify that said prisoner owes departmental
charges in the amount of \$ 13,521.78 and that the solitary
security to his credit is a savings account established pursuant
to NRS 209.247(5) with a balance of \$ 200.00 which is
inaccessible to him.

Dated this 14 day of December, 2018.

[Signature]

Inmate Services Division
Nevada Department of Corrections

Submitted by: Brendan Nasby # 63618, on 12/5/18

This is a Civil Habeas Matter.

LCC 24.012

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JAN 11 2019

CLERK OF THE COURT

OIFP

Brendan James Nasby # 63618
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

FILED

JAN 25 2019

Petitioner In Pro Se

John H. Williams
CLERK OF COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

Brendan James Nasby ,)

Petitioner ,)

Case No. **A-19-788126-W**

-vs-

Dept. No.

Dept. XIX

Renee Baker (Warden), et al. ,)

Respondent .)

ORDER TO PROCEED IN FORMA PAUPERIS

Upon consideration of Petitioner 's Application to Proceed In Forma Pauperis and it appearing that there is not sufficient income, property or resources with which to commence and maintain the action, and with good cause appearing:

IT IS HEREBY ORDERED that Petitioner , Brendan J. Nasby , shall be permitted to proceed In Forma Pauperis in this action, with no fees, costs or securities being necessary towards the filing or issuance of any writ, process, pleading or papers.

IT IS FURTHER ORDERED that the Sheriff shall make personal service of any necessary pleadings in this action without fees.

IT IS SO ORDERED.

Dated this 20 day of Jan , 2019 .

District Court Judge BN

A-19-788126-W
OIFP

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JAN 11 2019

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CLERK OF THE COURT
JAN 24 2019
CLERK OF THE COURT

Brendan Nabby #63618
Lovelock Corr. Ctr.
1200 Prison Rd.
Lovelock, NV 89419

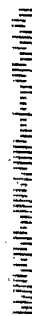
Lovelock Correctional Center



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8th Jud. Dist. Ct.,
Clark County Clerk
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Las Vegas, NV 89155-2311

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FILED
JAN 30 2019
CLERK OF COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

Brendan Nasby,

Petitioner,

vs.

Renee Baker Warden,

Respondent,

Case No: A-19-788126-W
Department 19

ORDER FOR PETITION FOR
WRIT OF HABEAS CORPUS

Petitioner filed a Petition for Writ of Habeas Corpus (Post-Conviction Relief) on January 11, 2019. The Court has reviewed the Petition and has determined that a response would assist the Court in determining whether Petitioner is illegally imprisoned and restrained of his/her liberty, and good cause appearing therefore,

IT IS HEREBY ORDERED that Respondent shall, within 45 days after the date of this Order, answer or otherwise respond to the Petition and file a return in accordance with the provisions of NRS 34.360 to 34.830, inclusive.

IT IS HEREBY FURTHER ORDERED that this matter shall be placed on this Court's

Calendar on the 25th day of March, 20 19, at the hour of

8:30 A.M.
o'clock for further proceedings.

RECEIVED
JAN 30 2019
CLERK OF THE COURT

Walter Kest
District Court Judge

A - 19 - 788126 - W
OPWH
Order for Petition for Writ of Habeas Corpus
4812226



Brendan Nisby
Locke Corr. Ctr.
1200 Prison Rd.
Las Vegas, NV 89119
(702) 462-1234

FILED
FEB 05 2019

IN THE EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

* * * * *

7	Brendan James Nisby,	Case No. A-11-799126-W
8	Petitioner,	Dept. No. 19
10	vs.	
11	Renée Baker (Warden), et al.,	Date of Hearing
12	Respondent.	Time of Hearing

MOTION FOR APPOINTMENT OF COUNSEL

16 COMES NOW, the Petitioner, Brendan James Nisby, proceeding in Person before
17 His Honorable Court, in the above-captioned action, respectfully submitting this
18 Motion for Appointment of Counsel.

19 This motion is made and based on NRS Ch. 34, the attached Facts and Authorities
20 set forth, as well as, all other papers, pleadings, and documents on file in this
21 case.

POINTS AND AUTHORITIES

I. STATEMENT OF FACTS

- 2) Defendant (Respondent Nisby), is unable to afford counsel. See Application
to Proceed In Forma Pauperis on file herein.
- 2) The merits of the claim presented in Nisby's Petition, etc. of Constitution
al dimension, and the substantive issues and procedural requirements of this...

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FEB 05 2019

1 case are difficult and incomprehensible to him.

2 3) Nashy, due to his incarceration, cannot investigate, take depositions, or
3 otherwise proceed with discovery herein.

4 4) Nashy is a lay inmate, and does not have the adequate legal knowledge and
5 ability, as an attorney would have, to properly present and litigate the case in
6 this Court.

7 5) Due to decisions made by the New Dept. of Corr., Nashy is limited in his
8 access to legal materials.

9 6) Nashy only has access to the material in the prison's law library, via
10 institutional mail, ~~and~~ using a paging system, which delays the reception of needed
11 legal materials, e.g., On day 1, an inmate may realize what he may need to order
12 from the law library. He must wait until day 2 to order that material in the morning.
13 If the request was specific enough, he'll receive the requested materials, in the ~~morning~~
14 ~~may~~ afternoon, on day 3. He then must wait until day 4 to request shepards of the
15 received material. On day 5, he'll receive the list of shepards cases. He'll have to
16 wait until day 6 to request some of the cases listed in the received shepards. On
17 day 7, he'll receive those requested cases. This is an example of how the process
18 works when everything runs smoothly, but more often than not, an inmate will receive
19 the wrong materials instead of the ones requested, or the requested materials are
20 later discovered to be useless after reviewing them. This process is also extended
21 due to the law library being closed on the weekends. To add, the fact that an inmate
22 may only possess ten (10) items at one time, which includes right or wrong case
23 cites, also prevents timely filings.

24 7) The paging system, used at all of Nevada's prisons, require inmates to know, ~~before~~
25 beforehand, what materials are available in order to specifically request them and re-
26 ceive them. An inmate is not allowed in the law library, and thus, can not browse
27 through materials and discover the materials he may need.

28 8) At Lovelock Correctional Center (LCC), an inmate's litigation is not based on

1 the inmate-petitioner's research, but based on the research of an untrained
2 inmate-researcher, whose only qualifications for his position are a 9th grade
3 reading level and to be 12 months disciplinary free.

4 9) The prison has very limited research materials and sources, and to add,
5 much needed research materials are already checked out to other inmates, are
6 not in stock, the computers are down, or the law library is doing inventory, which
7 means that, for that whole week, no materials will be checked out and the law
8 library is closed.

9 10) Prison legal assistants are not permitted to assist or give legal advice to in-
10 mates at LCC. Thus, not only is Nasby not allowed access to the prison law
11 library and denied the assistance of someone trained in the law, but ~~no~~ in-
12 mates in a position to possibly assist him are not permitted to assist him.

13 11) Nasby is indigent, cannot afford to pay for legal copies, and the prison has
14 refused to make legal copies for him, because he has reach the prison's \$100.⁰⁰
15 copywork credit limit.

16 12) The Nev. Dept. of Corr. has been admonished by Federal courts, here in
17 Nevada, several times regarding the paying system used at all Nevada prisons
18 and the constitutionally suspect method of providing inmates meaningful
19 access to the Court.

20 13) Should Respondents file a motion to dismiss or a response to Nasby's
21 petition, Nasby, without a law library or counsel, cannot adequately respond
22 to Respondents' motions or reply to Respondents' response.

23 14) Nasby was sentenced to 4 to 10 yrs, plus two consecutive 20 to life sentences.

24 II. ARGUMENT.

25 Discretion lies with the Court to appoint counsel under NRS 34.752, Crump
26 v. Warden, 113 Nev. 293, 934 P.2d 247, 259 (1997). The Court is to consider: (1) the com-
27 plexity of the issues; (2) whether Nasby comprehends the issues; (3) whether coun-
28 sel is necessary to conduct discovery; and (4) the severity of Nasby's sentence.

1 NRS 34.750(1)-(1)(c).

2 under similar discretionary standards, federal courts are encouraged to
3 appoint counsel when the interest of justice so requires - a showing which in-
4 creases proportionately with the increased complexities of a case and the
5 penalties involved in the conviction. Chaney v. Lewis, 801 F.2d 1191, 1196 (9th
6 Cir. 1986). Attorneys should be appointed for indigent petitioners who cannot
7 "adequately present their own cases." Jeffers v. Lewis, 68 F.3d 295, 297-98
8 (9th Cir. 1995).

9 The Nevada Supreme Court's decision in Rogers v. State, 267 P.3d 922, 127 Nev.
10 Adv. Rep. 34 (2011) further supports the need for the appointment of counsel, when
11 it ruled that, "District court abused its discretion in denying appellant's petition for
12 a writ of habeas corpus without appointing counsel under Nev. Rev. Stat. § 34.750(1)
13 because appellant moved for appointment of counsel, claimed he was indigent, and
14 failure to appoint counsel prevented the meaningful litigation of appellant's petition"
15 (emphasis added).

16 Nader has a fundamental constitutional right to meaningful access to the courts,
17 which requires the state to assist him in the preparation and filing of meaningful
18 legal papers by providing him with adequate law libraries or adequate assistance
19 from persons trained in the law. Bounds v. Smith, 430 U.S. 817, 52 L.Ed.2d 76 (1977).

20 The U.S. Supreme Court also stated that the appointment of counsel may be sought
21 to remedy the denial of meaningful access to the courts, when it said: "Thus, in the
22 prison-litigation cases, the relief sought may be [...] simply a lawyer." (citations
23 omitted). Christopher v. Harperbury, 536 U.S. 403, 412 (2002).

24 The federal district court in Nevada recognized that inmates are not allowed physical
25 access to the law library and the CD-ROM "system can only access specific cases re-
26 quested, but [the inmate] cannot retrieve cases by their West law or Lexis case num-
27 bers. Inmates have no direct access to the CD-ROM system in the library but instead may
28 request cases and materials only through the 'paging' or 'runner' system. The inmate

1 must know the specific case number or specific citation of any other materials to
2 be reviewed." Koerschner v. Warden, 509 F. Supp.2d 849, 856 (D.C.). "Over and
3 above the difficulty of knowing specifically what to request in advance, it would
4 be exceedingly difficult for anyone, much less, a lay inmate, to prepare and file
5 meaningful legal papers to present constitutional claims under such restrictions on
6 access to, retention, and use of supporting authority. Moreover, even for an in-
7 mate who knows what he needs to see in advance, he must attempt to convey
8 his requests through and to persons who potentially have attained the reading level
9 only of a freshman in high school. Worse yet, if the inmate does not know what spe-
10 cific citations or materials to ask for in advance, his only recourse is to ask for assist-
11 ance from a person who may only have a ninth grade reading level and a clean recent
12 disciplinary record as his qualifications, who then will ask another similarly
13 'qualified' inmate in the not improbable event that he does not know the answer."
14 Id. at 860. "The Court therefore is not sanguine that the Lovelock procedures
15 satisfy the minimum constitutional standard under bounds and limits of provid-
16 ing adequate access to the courts by assisting inmates 'in the preparation and
17 filing of meaningful legal papers by providing prisoners with adequate law libraries
18 or adequate assistance from persons trained in the law.' The Lovelock procedures
19 quite arguably provide the appearance of both but the substance of neither."
20 Id. at 861. Despite the admonishing of the federal court, the same con-
21 ditions ~~as then~~ continued to exist in 2013 (see - Rose v. Lefrand, 2013 U.S.
22 Dist. LEXIS 94750 at Fn. 2), and as Nasby has shown, these conditions exist
23 today. However, in both Koerschner and Rose, the court ruled that
24 these conditions warranted the appointment of counsel.

25 In regards to litigation following the initial filing of legal papers, such as a reply
26 or a response to a motion to dismiss, the U.S. Supreme Court in Bounds at 526 said:

27 "Moreover, if the State files a response to a cross pleading, it will undoubtedly con-
28 tain seemingly authoritative citations. Without a library, an inmate will be unable
29 to rebut the State's argument. It is not enough to say that the Court will

1 evaluate the facts pleaded in light of relevant law. Even the most dedicated
2 trial judges are bound to overlook meritorious cases without the benefit of
adversary presentation."

3 Further, in Gibbs v. Ar. Dept. of Corr., 451 F.2d 1304, 1502-08 (9th Cir. 1971) the court
4 said: "[I]f the state denies a prisoner reasonable access to a law library, the state
5 must provide that prisoner legal assistance." (emphasis added).

6 So, although Nasby has no right to counsel in habeas corpus proceedings, the
7 State, in light of its denial of adequate access to the prison law library and some-
8 one trained in the law, must provide Nasby with legal assistance. This Court has
9 discretion to grant the appointment of counsel, and the U.S. Supreme Court ex-
10 plained that Nasby can seek "a lawyer" to remedy imminent injury (Harburg,
11 supra). But even more to the point - This Court is charged with the duty of
12 ensuring an indigent defendant meaningful access to the courts. Lewis v.
13 Cabey, 519 U.S. 343, 349 (1996); Bounds, at 824. And See Missouri v. Jenkins,
14 515 U.S. 70, 88, 89, 137 L.Ed.2d 63, 115 S.Ct. 2033 (1995) ("[T]he nature of the
15 remedy is to be determined by the nature and scope of the constitutional vio-
16 lation"). In this instance, the appropriate remedy would be to appoint counsel to
17 represent Nasby. Not appointing counsel will only result in the continued denial
18 of Nasby's fundamental constitutional right to meaningful access to the courts.

19 Although Nasby need only meet but one(1) of the enumerated criteria of WPS
20 3d 750 in order to merit appointment of counsel, he meets all of them. He also pre-
21 sents a classic example of one meriting counsel under the interest of justice
22 test bespoken by the 9th Circuit. Indeed, Nasby's sentence, coupled with the
23 other factors set forth above, demonstrate that appointment of counsel to him
24 would not only satisfy justice, but fundamental fairness, as well.

1 III. CONCLUSION.

2 Wherefore, the Court should appoint counsel to represent Nasby in and
3 for all further proceedings in this habeas corpus action.

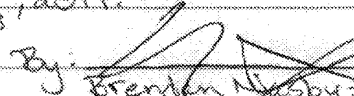
4 Date this 31st day of January, 2019.

5 By: 
6 Brendan Nasby #63618
7 (Petitioner In Pro Se)

8 IV. AFFIRMATION PURSUANT TO NRS 29A.030.

9 The undersigned does hereby affirm that the preceding "Motion For
10 Appointment Of Counsel" does not contain the social security number
11 of any person.

12 Dated this 31st day of January, 2019.


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

16 V. CERTIFICATE OF SERVICE.

17 I, Brendan Nasby, hereby certify that on this 31st day of January,
18 2019, I mailed to the clerk, and caused to be served by the Clerk's Electron-
19 ic Filing/Service, the foregoing "Motion For Appointment Of Counsel" to:

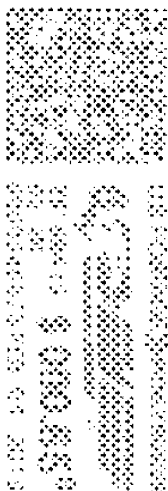
20 1) Attorney General
21 100 N. Carson St.
22 Carson City, NV 89710-4717

23 2) Brendan Nasby #63618
24 Care of LCC Law Librarian
25 Levelock Correctional Center
26 1700 Prison Road
27 Levelock, Nevada 89419
28 lcclawlibrary@dca.nv.gov

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

Brandon Hickey #1618
Las Vegas Correctional Center
1200 Oregon Road
Las Vegas, NV 89103

Las Vegas Correctional Center



5th Judicial Ct.
Steven D. Johnson, Clerk of the Court
200 Lewis Ave.
Las Vegas NV 89155

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JAN 31 2019

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CONFIRMED BY MAIL IN JAN 4 2019

Dept. XIX

MEMO

District Court

To: Attorney
From: David Sorensen, Law Clerk, Department 19
Subject: Returned order
Date: February 7, 2019

RETURN UNSIGNED

Your order could not be signed by the judge for the following reason(s):

XXXXXX Before this order can be signed because a noticed hearing must occur. Please file your motion and a Notice of motion prior to submitting your order for review and signature.

When resubmitting the amended order to the court for signature please include this memo.

Thank you for your cooperation.

1 Case No. A-19-789126-W

2 Dept. No. 19

3

4 IN THE EIGHTH JUDICIAL DISTRICT COURT
5 CLARK COUNTY, NEVADA

6 * * * * *

7

8 Brendan James Nisby,

9 Petitioner,

10 vs.

11 Renee Baker (Warden), et al.,

12 Respondent.

13

14

15 The Court, having considered Petitioner's Motion for Appointment of
16 Counsel, and with Good Cause appearing,

17 It Is HEREBY ORDERED that the motion is **GRANTED**.

18

19 Attorney _____ is hereby appointed to
20 represent Petitioner for and in relation to all further proceedings in the
21 above-entitled habeas corpus petition action.

22

23 IT IS SO ORDERED.

24

25 Dated this _____ day of _____, 2019.

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FEB 13 2019

CLERK OF THE COURT

District Court Judge

1 Brendan Nasby
2 D. No. 63618
3 Lovelock Corr. Ctr.
4 1200 Prison Rd.
5 Lovelock, NV 89419
6 (Petitioner In Prose)

FILED

FEB 05 2019

CLERK OF COURT

3 IN THE EIGHTH JUDICIAL DISTRICT COURT
4 CLARK COUNTY, NEVADA

5 * * * * *

7 Brendan James Nasby,
8 Petitioner,

Case No. A-19-788126-W

Dept. No. 19

9 v.
10 Renee Baker (Warden), et al,
11 Respondent.

Date Of Hearing _____

Time Of Hearing _____

13
14 MOTION FOR APPOINTMENT OF COUNSEL

15
16 COMES NOW, the Petitioner, Brendan James Nasby, proceeding in Prose, before
17 this Honorable Court, in the above-captioned action, respectfully submitting this
18 Motion For Appointment of Counsel.

19 This motion is made and based on NRS Ch. 34, the attached Points And Author-
20 ities, as well as, all other papers, pleadings, and documents on file within this
21 case.

22 POINTS AND AUTHORITIES

23
24 I. STATEMENT OF FACTS

25 1) Petitioner (hereinafter "Nasby") is unable to afford counsel. See - Application
26 to Proceed In Forma Pauperis on file herein.

27 2) The merits of the claim presented in Nasby's Petition, are of Constitution-
28 al dimension, and the substantive issues and procedural requirements of this

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CLERK OF COURT

1 case are difficult and incomprehensible to him.

2 3) Nasby, due to his incarceration, cannot investigate, take depositions, or
3 otherwise proceed with discovery herein.

4 4) Nasby is a lay inmate, and does not have the adequate legal knowledge and
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27 through materials and discover the materials he may need.

28 8) At Lovelock Correctional Center (LCC), an inmate's litigation is not based on

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3 reading level and to be 12 months disciplinary free.

4 9) The prison has very limited research materials and sources, and to add,
5 much needed research materials are already checked out to other inmates, are
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13 11) Nasby is indigent, cannot afford to pay for legal copies, and the prison has
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16 12) The Nev. Dept. of Corr. has been admonished by Federal courts, here in
17 Nevada, several times regarding the paging system used at all Nevada prisons
18 and the constitutionally suspect method of providing inmates meaningful
19 access to the Court.

20 13) Should Respondents file a motion to dismiss or a response to Nasby's
21 petition, Nasby, without a law library or counsel, cannot adequately respond
22 to Respondents' motions or reply to Respondents' response.

23 14) Nasby was sentenced to 4 to 10 yrs, plus two consecutive 20 to life sentences.

24 II. ARGUMENT

25 Discretion lies with the Court to appoint counsel under NRS 34.752 Camp
26 v. Warden, 113 Nev. 233, 934 P.2d 247, 254 (1997). The Court is to consider: (1) the com-
27 plexity of the issues; (2) whether Nasby comprehends the issues; (3) whether coun-
28 sel is necessary to conduct discovery; and (4) the severity of Nasby's sentence.

1 NRS 34.750(1)-(1)(C).

2 Under similar discretionary standards, federal courts are encouraged to
3 appoint counsel when the interest of justice so requires - a showing which in-
4 creases proportionately with the increased complexities of a case and the
5 penalties involved in the conviction. Chaney v. Lewis, 301 F.2d 1191, 1196 (9th
6 Cir. 1966). Attorneys should be appointed for indigent petitioners who cannot
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9 The Nevada Supreme Court's decision in Rogers v. State, 267 N.3d 302, 122 Nev.
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11 it ruled that, "District court abused its discretion in denying appellant's petition for
12 a writ of habeas corpus without appointing counsel under NRS 34.750(1),
13 because appellant moved for appointment of counsel, claimed he was indigent, and
14 failure to appoint counsel prevented the meaningful litigation of appellant's petition."
15 (emphasis added).

16 Nasy has a fundamental constitutional right to meaningful access to the courts,
17 which requires the state to assist him in the preparation and filing of meaningful
18 legal papers by providing him with adequate law libraries or adequate assistance
19 from persons trained in the law. Bowels v. Smith, 432 U.S. 512, 52 L.Ed.2d 76 (1977).

20 The U.S. Supreme Court also stated that the appointment of counsel may be sought
21 to remedy the denial of meaningful access to the courts, when it said: "Thus, in the
22 prison litigation cases, the relief sought may be [...] simply a lawyer." (citations
23 omitted). Christopher v. Harbury, 536 U.S. 403, 413 (2002).

24 The federal district court in Nevada recognized that inmates are not allowed physical
25 access to the law library and the CD-ROM "system can only access specific cases re-
26 quested, but [the inmates] cannot retrieve cases by their Westlaw or Lexis case number
27 ers. Inmates have no direct access to the CD-ROM system in the library but instead may
28 request cases and materials only through the 'paging' or 'inmate' system. The inmate

1 must know the specific case number or specific citation of any other materials to
2 be reviewed." Koerschner v. Warden, 509 F.Supp.2d 844, 856 (2007). "Over and
3 above the difficulty of knowing specifically what to request in advance, it would
4 be exceedingly difficult for anyone, much less, a lay inmate, to prepare and file
5 meaningful legal papers to present constitutional claims under such restrictions on
6 access to, retention, and use of supporting authority. Moreover, even for an in-
7 mate who knows what he needs to see in advance, he must attempt to convey
8 his requests through and to persons who potentially have attained the reading level
9 only of a freshman in high school. Worse yet, if the inmate does not know what spec-
10 ific citations or materials to ask for in advance, his only recourse is to ask for assist-
11 ance from a person who may only have a ninth grade reading level and a clean recent
12 disciplinary record as his qualifications, whether will ask another similarly
13 'qualified' inmate in the not improbable event that he does not know the answer."
14 Id. at 866. "The Court therefore is not sanguine that the Loxlock procedures
15 satisfy the minimum constitutional standard under Bounds and Lewis of provid-
16 ing adequate access to the courts by assisting inmates "in the preparation and
17 filing of meaningful legal papers by providing prisoners with adequate law libraries
18 or adequate assistance from persons trained in the law." The Loxlock procedures
19 quite arguably provide the appearance of both but the substance of neither.
20 Id. at 866. Despite the admonishing of the Federal court, the same con-
21 ditions ~~continued~~ continued to exist in 2013 (See - Rose v. Lofgren, 2013 U.S.
22 Dist. LEXIS 84750 at Pn 2), and as Nasby has shown, these conditions exist
23 today. However, in both Koerschner and Rose, the court ruled that
24 these conditions warranted the appointment of counsel.
25 In regards to litigation following the initial filing of legal papers, such as a reply
26 or a response to a motion to dismiss, the U.S. Supreme Court, in Bounds at 826 said:
27 "Moreover, if the State files a response to a pro se pleading, it will undoubtedly con-
28 tain seemingly authoritative citations. Without a library plan inmate will be unable
to rebut the State's argument. It is not enough to answer that the Court will

1 evaluate the facts pleaded in light of relevant law. Even the most dedicated
2 trial judges are bound to overlook meritorious cases without the benefit of
adversary presentation."

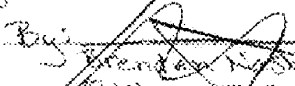
3 Further, in Gutierrez v. Am. Dep't of Corr., 491 F.2d 1504, 1507-09 (11th Cir. 1974) the court
4 said: "[I]f the state denies a prisoner reasonable access to a law library, the state
5 must provide that prisoner legal assistance." (emphasis added)

6 So, although Nasby has no right to counsel in habeas corpus proceedings, the
7 State, in light of its denial of adequate access to the prison law library and some-
8 one trained in the law, must provide Nasby with legal assistance. This Court has
9 discretion to grant the appointment of counsel, and the U.S. Supreme Court ex-
10 plained that Nasby can seek "a lawyer" to remedy imminent injury (Hartung,
11 supra). But even more to the point - This Court is charged with the duty of
12 ensuring an indigent defendant meaningful access to the courts. Lewis v.
13 Cabany, 519 U.S. 343, 349 (1996); Bounds, at 825. And see Missouri v. Jenkins,
14 515 U.S. 70, 88, 89, 137 L.Ed.2d 63, 115 S.Ct. 2033 (1995) ("[T]he nature of the
15 remedy is to be determined by the nature and scope of the constitutional viol-
16 ation"). In this instance, the appropriate remedy would be to appoint counsel to
17 represent Nasby. Not appointing counsel will only result in the continued denial
18 of Nasby's fundamental constitutional right to meaningful access to the courts.
19 Although Nasby need only meet but one (1) of the enumerated criteria of NRS
20 24-250 in order to merit appointment of counsel, he meets all of them. He also pre-
21 sents a classic example of one meriting counsel under the interest of justice
22 test bespoken by the 9th Circuit. Indeed, Nasby's sentence, coupled with the
23 other factors set forth above, demonstrate that appointment of counsel to him
24 would not only satisfy justice, but fundamental fairness, as well.

1 III CONCLUSION

2 wherefore, the Court should appoint counsel to represent Nasby in and
3 for all further proceedings in this habeas corpus action.

4 Date this 31st day of January, 2019.

5 By: 
6 Brendan Nasby #63618
7 (Petitioner In Pro Se)

8 IV AFFIRMATION PURSUANT TO NRS 239B.030.

9 The undersigned does hereby affirm that the preceding "Motion For
10 Appointment Of Counsel" does not contain the social security number
11 of any person.

12 Dated this 31st day of January, 2019.

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

16 V CERTIFICATE OF SERVICE

17 I, Brendan Nasby, hereby certify that on this 31st day of January,
18 2019, I mailed to the clerk, and caused to be served by the Clerk's Electron-
19 ic Filing/Service, the foregoing "Motion For Appointment Of Counsel" to:

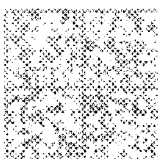
20 1) Attorney General
21 100 N. Carson St.
22 Carson City, NV 89701-4717

23 2) Brendan Nasby #63618
24 Care of LCC Law Librarian
25 Lovelock Correctional Center
26 1700 Prison Road
27 Lovelock, Nevada 89419
28 lcclawlibrary@doc.nv.gov

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

Brendan Masby #63016
Lovelock Correctional Center
1300 Prison Road
Lovelock, NV 89419

Lovelock Correctional Center



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Lovelock, NV 89419
(Petitioner-In-Prose)

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FEB 26 2019

CLERK OF COURT

IN THE EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

Brendan James Nasby,

Petitioner,

vs.

Renee Baker (Warden), et al.,

Respondent.

Case No. A-19-788126-W

Dept. No. 19

NOTICE OF MOTION

Please take notice that the hearing on Petitioner's "Motion For Appointment
of Counsel" will be heard on April 4, 2019, 2019 in Department
XIX Floor TBA Courtroom TBA at the hour of In chambers AM/PM.

Dated this _____ day of _____, 2019.

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CLERK OF THE COURT

A-19-788126-W
NOTM
Notice of Motion
4818652



Dept. XIX

MEMO

District Court

To: Attorney
From: David Sorensen, Law Clerk, Department 19
Subject: Returned order
Date: February 7, 2019

RETURN UNSIGNED

Your order could not be signed by the judge for the following reason(s):

XXXXX Before this order can be signed because a noticed hearing must occur. Please file your motion and a Notice of motion prior to submitting your order for review and signature.

When resubmitting the amended order to the court for signature please include this memo.

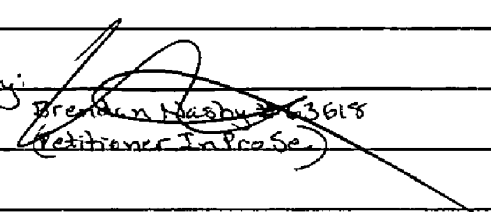
Thank you for your cooperation.

CERTIFICATE OF SERVICE

I, Brendan Nashby, hereby certify that on this 21st day of February, 2019, I mailed to the clerk, and caused to be served by the Clerk's Electronic Filing/Service, the foregoing "Notice Of Motion", "Amended Order Appointing Counsel", "Memo" from Law Clerk David Sorensen, and a letter to the clerk Re: Motion For Appointment Of Counsel to:

1) Attorney General
100 N. Carson St.
Carson City, NV 89710-4717

2) Brendan Nashby #63618
Care of LCC Law Library
Levelock Correctional Center
1200 Prison Road
Levelock, Nevada 89419
lcclawlibrary@doc.nv.gov

By: 
Brendan Nashby #63618
(Petitioner In Pro Se)

Brendan Nashby #63618
Lovelock Corr. Ctr.
1200 Prison Rd.
Lovelock, NV 89419

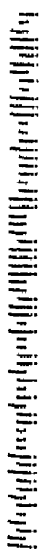
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(Petitioner In Pro Se)

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CLERK OF COURT

IN THE EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

Brendan James Nasby,

Case No. A-19-788126-W

Petitioner,

Dept. No. 19

vs.

Renee Baker (Warden), et al.,

Date of Hearing: March 25, 2019

Respondent.

Time of Hearing: 8:30 A.M.

A-19-788126-W
NOTC
Notice
4822236

NOTICE TO THE COURT

Re: Considering Dictum From Branham v. Baca, 134 Nev. Adv. Rep. 99 (Dec. 13, 2018)

In The Instant Action

COMES NOW, Petitioner, Brendan James Nasby (hereinafter "Nasby"), proceeding in Pro Se, before this Honorable Court, in the above-captioned action, respectfully submitting this "Notice To The Court", and hereby requesting this Court TAKE NOTICE of the following:

On March 3, 2019, Nasby received, and reviewed, the Court of Appeals of Nevada's recent decision in Branham v. Baca, 134 Nev. Adv. Rep. 99 (Dec. 13, 2018). Montgomery v. Louisiana, 136 S.Ct. 718 (2016) and Welch v. U.S., 194 LEd2d 287 (2016), were asserted in the instant habeas corpus petition, the dictum from the Court of Appeals' opinion in Branham is dispositive in this case.

Nasby's petition asserts: "The United States Supreme Court, in Montgomery v. Louisiana, 136 S.Ct. 718, 231, 193 LEd2d 599, 616 (2016), said: 'A conviction or sentence imposed in violation of a substantive rule is not just erroneous but

1 contrary to law and, as a result, void. See Siebold, 100 U.S., at 376, 25 LEd
2 717. It follows, as a general principle, that a court has no authority to leave
3 in place a conviction or sentence that violates a substantive rule."²

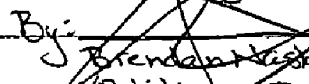
4 Nasby's petition also says: "On the face of the record, it is clear that
5 Nasby was tried under an inapplicable law (Kazaly's interpretation of NRS
6 200.030(1)(a)), when, per Nike, the required application was Byford's
7 interpretation of NRS 200.030(1)(a). The only real question is — was the
8 change in law announced in Byford a new substantive rule?"²

9 Although the Court of Appeals ruled that Welch and Montgomery did
10 not provide good cause to overcome the procedural bars on the ground that
11 Byford did not announce a new constitutional rule, it said: "We note
12 the district court erred by finding that Welch and Montgomery did not pro-
13 vide good cause to overcome the procedural bars on the ground that Byford
14 did not announce a new substantive rule."³ Thus, based on this statement,
15 Welch and Montgomery do establish good cause on the ground that Byford
16 announced a new substantive rule.

17 As no new facts or arguments have been presented herein, Nasby simply
18 request this Court TAKE NOTICE, and consider, the dictum from Branham,
19 when reviewing his petition.

20 Dated this 7th day of March, 2019.

21 Respectfully Submitted,

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

27 Fn. 1. Petition, pg. 10, lns. 10-15.

28 2. Petition, pg. 6, lns. 7-11.

3. Branham, at Fn. 4.

1 CERTIFICATE OF SERVICE

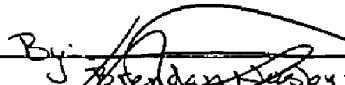
2 I, Brendan Nasby, hereby certify that on this 7th day of March,
3 2019, I mailed to the clerk, and caused to be served by the Clerk's Ele-
4 ctronic Filing/Service, the foregoing "Notice To The Court" to:

5 1) Attorney General

6 100 N. Carson St.
7 Carson City, NV 89710-4717

8 2) Brendan Nasby #63618

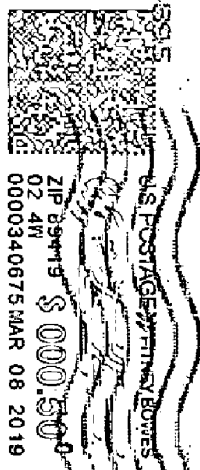
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Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419
lcclawlibrary@doc.nv.gov

9 By: 
10 Brendan Nasby #63618
(Petitioner In Prison)

Brendan Haby #63618
Lovelock Corr. Ctr.
1200 Prison Rd.
Lovelock, NV 89419

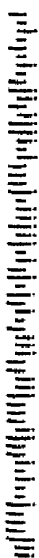
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Las Vegas, NV 89155-1160

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1 **RSPN**
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 CHARLES W. THOMAN
6 Chief Deputy District Attorney
7 Nevada Bar #012649
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

8 DISTRICT COURT
9 CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,
10 Plaintiff,

11 -vs-

12 BRENDAN JAMES NASBY,
13 #1517690
14 Defendant.

CASE NO: A-19-788126-W
(98C154293-2)

DEPT NO: XIX

15 STATE'S RESPONSE TO DEFENDANT'S PETITION FOR WRIT OF HABEAS
16 CORPUS (POST-CONVICTION)

17 DATE OF HEARING: March 25, 2019
18 TIME OF HEARING: 08:30 AM

19 COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County
20 District Attorney, through CHARLES THOMAN, Chief Deputy District Attorney, and hereby
21 submits the attached Points and Authorities in Response to Defendant's Petition For Writ Of
22 Habeas Corpus (Post-Conviction).

23 This response is made and based upon all the papers and pleadings on file herein, the
24 attached points and authorities in support hereof, and oral argument at the time of hearing, if
25 deemed necessary by this Honorable Court.

26 //

27 //

28 //

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1
2 POINTS AND AUTHORITIES

3 STATEMENT OF THE CASE

4 On November 9, 1998, the State filed an Information charging BRENDAN JAMES
5 NASBY ("Defendant") with: COUNT 1 – Conspiracy to Commit Murder (Felony - NRS
6 199.480, 200.010, 200.030) and COUNT 2 – Murder with use of a Deadly Weapon (Open
7 Murder) (Felony - NRS 200.010, 200.030, 193.165).

8 Defendant's jury trial began on October 11, 1999. On October 19, 1999, the jury
9 returned found Defendant guilty on both counts; as to COUNT 2, the jury returned a guilty
10 verdict for First Degree Murder with use of a Deadly Weapon. On November 29, 1999,
11 Defendant was sentenced to the Nevada Department of Corrections ("NDC") as follows: as
12 to COUNT 1 – 48 to 120 months and as to COUNT 2 – Life with the possibility of parole, plus
13 an equal and consecutive term for the use of a deadly weapon, to run consecutive to COUNT
14 1. Defendant's Judgment of Conviction was filed on December 2, 1999.

15 Defendant filed a Notice of Appeal on December 14, 1999. The Nevada Supreme Court
16 affirmed Defendant's conviction on February 7, 2001. Nasby v. State, No. 35319 (Order of
17 Affirmance, Feb. 7, 2001). Remittitur issued on March 6, 2001.

18 On January 30, 2002, Defendant filed a Post-Conviction Petition for Writ of Habeas
19 Corpus. The State filed a Response on April 5, 2002. On March 27, 2006, the Court denied
20 Defendant's Petition. Defendant filed a Notice of Appeal on April 12, 2006. The Court filed
21 its Findings of Fact, Conclusions of Law and Order on April 26, 2006, and its Notice of Entry
22 on April 27, 2006. On June 18, 2007, the Nevada Supreme Court affirmed the Court's denial
23 of Defendant's first Petition. Nasby v. State, No. 47130 (Order of Affirmance, June 28, 2007).
24 Remittitur issued on July 13, 2007.

25 Defendant filed his second Post-Conviction Petition for Writ of Habeas Corpus on
26 February 18, 2011. The State responded on April 8, 2011. The Court denied Defendant's
27 second Petition as procedurally barred on May 11, 2011. The Court filed its Findings of Fact,
28

1
2 Conclusions of Law on June 17, 2011. Defendant filed a Notice of Appeal on June 13, 2011,
3 with the Nevada Supreme Court affirming the decision of the district court on February 8,
4 2012, and issuing Remittitur on March 5, 2012. Nasby v. State, No. 58579 (Order of
5 Affirmance, Feb. 8, 2012).

6 On December 9, 2014, Defendant filed his third Post-Conviction Petition for Writ of
7 Habeas Corpus. The State responded on February 4, 2015. This Court denied Defendant's
8 Petition as procedurally barred on February 25, 2015. Defendant filed a Notice of Appeal on
9 March 13, 2015. This Findings of Fact, Conclusions of Law was filed on March 30, 2015. On
10 September 11, 2015, the Nevada Supreme Court affirmed the Court's denial of Defendant's
11 third petition as untimely, successive, and an abuse of the writ without a showing of good
12 cause and prejudice.

13 On April 3, 2015, Defendant filed a Motion to Disqualify Judge, and Notice and Motion
14 to Attach Supplemental Exhibits on April 21, 2015. The State filed on Opposition on April
15 28, 2015. On April 28, 2015, the Court filed a written order denying Defendant's motions.
16 Defendant appealed this decision and the Nevada Supreme Court dismissed Defendant's
17 appeal on July 8, 2015.

18 On January 5, 2016, Defendant filed his fourth Post-Conviction Petition for Writ of
19 Habeas Corpus, a Memorandum of Points and Authorities in Support, a Supplemental
20 Memorandum of Points and Authorities in Support, and a Motion for Appointment of Counsel.
21 The State filed a Response on February 23, 2016. Defendant filed a reply on March 10, 2016.
22 On April 4, 2016, Defendant's Petition was denied. The Findings of Fact, Conclusions of Law
23 were filed on May 9, 2016.

24 On May 18, 2016, Defendant filed a Motion to Alter or Amend Judgment N. R. Civ. P.
25 59(e). The State responded on June 2, 2016. The Court denied Defendant's Motion on June
26 8, 2016. Defendant filed a Notice of Appeal on June 14, 2016; the appeal is still pending with
27 the Nevada Court of Appeals.
28

1
2 On January 26, 2016, Defendant filed a Petition for Writ of Habeas Corpus (NRS
3 34.360 - Constitutional Questions/Questions of Law) in the Eleventh Judicial District Court,
4 seeking a declaratory judgment on seven allegations of trial error. The Eleventh Judicial
5 District Court transferred Defendant's Petition back to this Court, as this Court has proper
6 jurisdiction over Defendant. On April 4, 2017, Defendant filed a Motion for Reconsideration.
7 The State responded on April 19, 2017. The State Responded to Defendant's Petition on April
8 25, 2017. The next day, Defendant's Motion for Reconsideration was denied.

9 On May 10, 2017, Defendant filed a Reply to the States response to Defendant's
10 Petition, and on May 15, 2017, the court denied Defendant's Petition. The Findings of Fact,
11 Conclusions of Law, and Order was filed on June 20, 2017. On June 27, 2017, Defendant filed
12 a Notice of Appeal.

13 On May 22, 2018, the Nevada Court of Appeals affirmed the denial of Defendant's
14 fourth Petition for Writ of Habeas Corpus.

15 On January 11, 2019, Defendant filed the instant Petition for Writ of Habeas Corpus.
16 This Court ordered us to respond on January 30, 2019. The State responds herein.

17 **ARGUMENT**

18 **I. DEFENDANT'S FIFTH PETITION IS PROCEDURALLY BARRED**

19 **A. The Procedural Bars are Mandatory**

20 The Nevada Supreme Court has held that "[a]pplication of the statutory procedural
21 default rules to post-conviction habeas petitions is *mandatory*," noting:

22 Habeas corpus petitions that are filed many years after conviction
23 are an unreasonable burden on the criminal justice system. The
24 necessity for a workable system dictates that there must exist a
time when a criminal conviction is final.

25 State v. Dist. Court (Riker), 121 Nev. 225, 112 P.3d 1070 (2005) (emphasis added).
26 Additionally, the Court noted that procedural bars "cannot be ignored [by the district court]
27 when properly raised by the State." Id. at 233, 112 P.3d at 1075. The Nevada Supreme Court
28

1
2 has granted no discretion to the district courts regarding whether to apply the statutory
3 procedural bars; the rules must be applied. For the reasons discussed below, Defendant's
4 Petition must be denied.

5 **B. Defendant's Petition is Barred by Laches**

6 NRS 34.800 creates a rebuttable presumption of prejudice to the State if "[a] period
7 exceeding five years between the filing of a judgment of conviction, an order imposing a
8 sentence of imprisonment or a decision on direct appeal of a judgment of conviction and the
9 filing of a petition challenging the validity of a judgment of conviction..." The statute also
10 requires that the State plead laches in its motion to dismiss the petition. NRS 34.800. The
11 State pleads laches in the instant case.

12 The Judgment of Conviction was filed on December 2, 1999. Defendant filed the
13 instant Petition on January 11, 2019. Since more than 19 years have elapsed since the date the
14 Judgment of Conviction was filed and the filing of the instant petition, NRS 34.800 directly
15 applies in this case. The delay is more than triple the five years required for a presumption of
16 prejudice to arise. After such a passage of time, the State is prejudiced in its ability to retry
17 this case should relief be granted.

18 **C. Defendant's Motion is Time Barred**

19 The mandatory provision of NRS 34.726(1) states:

20 Unless there is good cause shown for delay, a petition that
21 challenges the validity of a judgment or sentence must be filed
22 *within 1 year after entry of the judgment of conviction* or, if an
23 appeal has been taken from the judgment, *within 1 year after the*
24 *Supreme Court issues its remittitur*. For the purposes of this
subsection, good cause for delay exists if the petitioner
demonstrates to the satisfaction of the court:

25 (emphasis added). "[T]he statutory rules regarding procedural default are mandatory and
26 cannot be ignored when properly raised by the State." State v. Dist. Court (Riker), 121 Nev.
27 225, 233, 112 P.3d 1070, 1075 (2005).
28

1
2 Accordingly, the one-year time bar prescribed by NRS 34.726 begins to run from the
3 date the judgment of conviction is filed or a remittitur from a timely direct appeal is filed.
4 Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998); see Pellegrini v.
5 State, 117 Nev. 860, 873, 34 P.3d 519, 528 (2001) (holding that NRS 34.726 should be
6 construed by its plain meaning).

7 In Gonzales v. State, 118 Nev. 590, 593, 590 P.3d 901, 902 (2002), the Nevada Supreme
8 Court affirmed the rejection of a habeas petition that was filed two days late, pursuant to the
9 “clear and unambiguous” mandatory provisions of NRS 34.726(1). Gonzales reiterated the
10 importance of filing the petition with the District Court within the one-year mandate, absent a
11 showing of “good cause” for the delay in filing. Gonzales, 590 P.3d at 902. The one-year
12 time bar is therefore strictly construed. In contrast with the short amount of time to file a
13 notice of appeal, a prisoner has an ample full year to file a post-conviction habeas petition, so
14 there is no injustice in a strict application of NRS 34.726(1), despite any alleged difficulties
15 with the postal system. Gonzales, 118 Nev. at 595, 53 P.3d at 903.

16 Here, Defendant claims that he is not challenging his Judgement of Conviction but
17 appears to argue that his judgment of conviction is void because the jury was instructed on
18 premeditation and deliberation pursuant to the Kazalyn v. State, 108 Nev. 67, 825 P.2d 578
19 (1992) interpretation of NRS 200.030(1)(a) instead of Byford v. State, 116 Nev. 215, 994 P.2d
20 700 (2000). Petition at 5-6. This is clearly a challenge to the validity of Defendant’s sentence,
21 and therefore this Petition would only be timely if brought within a year of the filing of
22 Defendant’s judgement of Conviction or remittitur if Defendant appealed.

23 Defendant’s Judgment of Conviction was filed on December 2, 1999. He filed a Notice
24 of Appeal on December 14, 1999, and the Nevada Supreme Court issued its remittitur on
25 March 6, 2001. Accordingly, Defendant had until approximately March 6, 2002, to file a post-
26 conviction petition. The instant motion was not filed until January 19, 2019, more than 17
27 years later. Therefore, absent a showing of good cause, Defendant’s motion must be denied
28

1
2 as time-barred pursuant to NRS 34.726(1). NRS 34.726 can only be overcome upon a showing
3 of good cause and prejudice or actual innocence, which Defendant fails to demonstrate.
4 Accordingly, this Court must deny Defendant's Petition as time-barred.

5 **D. Defendant's Petition is Successive and an Abuse of the Writ**

6 Defendant's instant petition should be dismissed pursuant to NRS 34.810 as it is
7 successive and an abuse of the writ. NRS 34.810 provides in pertinent part that:

8 2. A second or successive petition must be dismissed if the
9 judge or justice determines that it fails to allege new or different
10 grounds for relief and that the prior determination was on the
11 merits or, if new and different grounds are alleged, the judge or
12 justice finds that the failure of the Defendant to assert those
13 grounds in a prior petition constituted an abuse of the writ.

14 3. Pursuant to subsections 1 and 2, the petitioner has the
15 burden of pleading and proving specific facts that demonstrate:

16 (a) Good cause for the petitioner's failure to present the
17 claim or for presenting the claim again; and

18 (b) Actual prejudice to the petitioner.

19 Defendant filed five previous Petitions for Writ of Habeas Corpus (Post-Conviction)
20 on January 30, 2002, February 18, 2011, December 9, 2014, January 5, 2016, and January 26,
21 2016. Each petition was duly considered and denied by the Court. Consequently, the instant
22 petition filed on January 19, 2019, is a successive petition. Moreover, Defendant raises the
23 exact same claim he raised on direct appeal and in his December 26, 2013, petition. As such,
24 the instant petition is also an abuse of the writ. See also Pellegrini v. State, 117 Nev. 860,
25 888, 34 P.3d 519, 538 (2001); Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975).

26 To avoid the procedural default under NRS 34.810, Defendant has the burden of
27 pleading and proving specific facts that demonstrate both good cause for his failure to present
28 his claim in a timely manner and actual prejudice, which Defendant fails to demonstrate. NRS
34.810(3); Hogan v. Warden, 109 Nev. 952, 959-60, 860 P.2d 710, 715-16 (1993); Phelps v.
Director, 104 Nev. 656, 659, 764 P.2d 1303, 1305 (1988). Thus, the instant Petition must be
denied.

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1
2 **II. DEFENDANT CANNOT ESTABLISH GOOD CAUSE TO OVERCOME**
3 **THE PROCEDURAL BARS**

4 To avoid procedural default under NRS 34.726 or NRS 34.800, a defendant has the
5 burden of pleading and proving specific facts that demonstrate good cause for his failure to
6 present his claim in earlier proceedings or comply with the statutory requirements. See Hogan,
7 109 Nev. at 959-60, 860 P.2d at 715-16; Phelps, 104 Nev. at 659, 764 P.2d at 1305.

8 “To establish good cause, appellants *must* show that an impediment external to the
9 defense prevented their compliance with the applicable procedural rule.” Clem v. State, 119
10 Nev. 615, 621, 81 P.3d 521, 525 (2003) (emphasis added); see Hathaway v. State, 119 Nev.
11 248, 251, 71 P.3d 503, 506 (2003); Pellegrini, 117 Nev. at 887, 34 P.3d at 537. Such an external
12 impediment could be “that the factual or legal basis for a claim was not reasonably available
13 to counsel, or that ‘some interference by officials’ made compliance impracticable.”
14 Hathaway, 119 Nev. at 251, 71 P.3d at 506 (quoting Murray v. Carrier, 477 U.S. 478, 488, 106
15 S. Ct. 2639, 2645 (1986)); see also Gonzalez, 118 Nev. at 595, 53 P.3d at 904 (citing Harris v.
16 Warden, 114 Nev. 956, 959-60 n.4, 964 P.2d 785 n.4 (1998)). Any delay in filing of the petition
17 must not be the fault of the petitioner. NRS 34.726(1)(a).

18 The Nevada Supreme Court has clarified that a defendant cannot attempt to
19 manufacture good cause. Clem, 119 Nev. at 621, 81 P.3d at 526. To find good cause there
20 must be a “substantial reason; one that affords a legal excuse.” Hathaway, 119 Nev. at 251,
21 71 P.3d at 506. Excuses such as the lack of assistance of counsel when preparing a petition,
22 as well as the failure of trial counsel to forward a copy of the file to a petitioner have been
23 found not to constitute good cause. See Phelps, 104 Nev. at 660, 764 P.2d at 1306, superseded
24 by statute on other grounds as recognized in Nika v. State, 120 Nev. 600, 607, 97 P.3d 1140,
25 1145 (2004); Hood v. State, 111 Nev. 335, 890 P.2d 797 (1995). Moreover, a return to state
26 court to exhaust remedies for federal habeas is not good cause to overcome state procedural
27 bars. Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989).

1
2 Finally, claims asserted in a petition for post-conviction relief must be supported with
3 specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v.
4 State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). “Bare” and “naked” allegations are not
5 sufficient, nor are those belied and repelled by the record. Id.

6 Defendant fails to assert any good cause for his procedural default. Instead, he argues,
7 as discussed, supra, that the procedural bars do not apply to him. For the reasons discussed,
8 they do. Defendant also relies on Montgomery v. Louisiana, 136 S.Ct. 718, 193 L.Ed.2d 599
9 (2016) and Welch v. U.S., 136 S.Ct. 1257, 194 L.Ed.2d 387 (2016) to argue that he could not
10 bring a timely claim because he had cases pending on appeal when these cases were decided.
11 Petition at 7. This claim lacks merit. Both Montgomery and Welch analyze when Byford
12 should be applied retroactively to cases that were final when Byford was decided. At the time
13 Byford was decided, Defendant’s case was pending on appeal and therefore not a final
14 decision. The case most favorable to Defendant is Nika v. State, 124 Nev. 1272, 198 P.3d 839
15 (2008) which allowed for Byford to apply to cases pending on appeal at the time Byford
16 pronounced a change in law, and Defendant failed to file a petition within one year after Nika
17 was decided. Moreover, Defendant could and should have previously raised these issues in an
18 earlier petition. As such, Defendant fails to establish an impediment external to the defense
19 and therefore does not constitute good cause to overcome the procedural bars. Phelps v.
20 Director, Nevada Department of Prisons, 104 Nev. 656, 764 P.2d 1303 (1988). Accordingly,
21 Defendant cannot demonstrate good cause and this Court should deny the Petition for Writ of
22 Habeas Corpus.

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CONCLUSION

Based on the foregoing reasons, Defendant's Petition for Writ of Habeas Corpus should be DENIED.

DATED this 13th day of March, 2019.

Respectfully submitted,

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

BY /s/CHARLES W. THOMAN
CHARLES W. THOMAN
Chief Deputy District Attorney
Nevada Bar #012649

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 13th day of March, 2019, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

BRENDAN JAMES NASBY #63618
LOVELOCK CORRECTIONAL CENTER
1200 Prison Road
Lovelock, NV 89419

BY /s/D. Daniels
Secretary for the District Attorney's Office

98F11168/QH-Appeals/dd/MVU

Brendan Nasby
I.D. No. 63618
Lovelock Corr. Ctr.
1200 Prison Rd.
Lovelock, NV 89419
(Petitioner Pro Se)

A-19-789126-W
RPLY
Reply
4827638



FILED

APR 01 2019

CLERK OF COURT

27

IN THE EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

* * * * *

Brendan Nasby,

Petitioner,

vs.

Renee Baker (Warden) et al.,

Respondent

Case No. A-19-789126-W

Dept. No. 19

Date of Hearing:

Time of Hearing:

REPLY TO STATE'S RESPONSE TO PETITION FOR WRIT OF
HABEAS CORPUS; NRCP 12(f) MOTION TO STRIKE; AND IF
NECESSARY, NRCP 59(e) MOTION TO ALTER OR AMEND JUDGMENT.

COMES NOW, the Petitioner, Brendan Nasby, proceeding in Pro Se, before
this Honorable Court, in the above-captioned action, respectfully submitting
this Reply To State's Response To Petition For Writ Of Habeas Corpus; NRCP 12(f)
Motion To Strike; and if necessary, NRCP 59(e) Motion To Alter Or Amend Judg-
ment.

This pleading is made and based on NRS Ch. 34, NRCP 12(f), NRCP 59(e),
the attached Points and Authorities, as well as all other papers, pleadings, and
documents on file within this case.

POINTS AND AUTHORITIES

Nasby filed the instant petition for writ of Habeas Corpus on January 11, 2019.

RECEIVED
APR 01 2019
CLERK OF THE COURT

1 On January 30, 2019, this Court issued its "Order For Petition For Writ Of
2 Habeas Corpus", in which, this Court, after reviewing the petition, "determined
3 that a response would assist [it] in determining whether [Nashby] is illegally impri-
4 soned and restrained of his [] liberty, and good cause appearing therefore,"
5 ~~not~~ ordered Respondent, within 15 days after the date of its Order, "to answer or other-
6 wise respond to the Petition and file a return in accordance with the provisions
7 of NRS 34.360 to 34.830, inclusive." The Court's order further ordered the matt-
8 er be placed on the Court's calendar on March 25, 2019. See (Order For Petition
9 For Writ Of Habeas Corpus).

10 On March 13, 2019, twelve (12) days before the Court's hearing on the petition
11 and five (5) days before their 15 days were expired, the State filed its Response
12 to the petition. Nashby was served the Response, by mail. It arrived at the pri-
13 son on March 18, 2019, and was delivered to Nashby the following day, on March
14 19, 2019, six (6) days before the Court's hearing, including non-judicial days.

15 What followed is the instant pleading.
16

17 I. ARGUMENT

18 A. Applicable Law

19 "In a motion to dismiss the petition based on that prejudice, the respondent or
20 the State of Nevada must specifically plead laches. The petitioner must be given an
21 opportunity to respond to the allegations in the pleading before a ruling on the motion
22 is made." NRS 34.800(2).

23 "The petitioner shall respond within 15 days after service to a motion by the state
24 to dismiss the action." NRS 34.750(4).

25 "Upon motion made by a party before responding to a pleading or, if no responsive
26 pleading is permitted by these rules, upon motion made by a party within 20 days
27 after the service of the pleading upon the party or upon the court's own initia-
28 tive at any time, the court may order stricken from any pleading any insufficient

1 A defense or any redundant, immaterial, impertinent, or scandalous matter."

2 N.R.C.P. 12(f).

3 "A motion to alter or amend the judgment shall be filed no later than 10 days
4 after service of written notice of entry of the judgment." N.R.C.P. 59(e). There
5 are four grounds for granting a Rule 59(e) motion: (1) the motion is necessary to
6 correct manifest errors of law or fact upon which the judgment is based; (2) the
7 moving party presents newly discovered or previously unavailable evidence;
8 (3) the motion is necessary to prevent manifest injustice; or (4) there is an
9 intervening change in controlling law.

11 B. The State's Affirmative Defenses Are Waived.

12 "[T]he statutory rules regarding procedural default are mandatory and can-
13 not be ignored when properly raised by the State." State v. Dist. Ct. (Baker), 121
14 Nev. 225, 233, 112 P.3d 1070, 1075 (2005). The State, however, did not properly
15 raise the statutory rules.

16 Although the State's response is, for the most part, a disguised boiler plate
17 motion to dismiss, it is, nonetheless, the "State's Response To Defendant's Pet-
18 ition For Writ Of Habeas Corpus (Post-Conviction)", (Response, pg. 1), and not a
19 Motion To Dismiss Petition. However, the exclusive remedy for the State to
20 assert its affirmative defenses, is a pre-response motion to dismiss, and
21 not a Response, in habeas corpus proceedings under NRS Ch. 34. See - (NRS
22 34.300(2)). A pre-response motion to dismiss would allow Nasky due notice
23 and the statutorily allotted 15 days to rebut, or respond to, the State's
24 assertions. See - (NRS 34.750(4)). Asserting affirmative defenses and argu-
25 ments for dismissal in a Response to the Petition, only 12 days before the
26 hearing, fails to provide Nasky the due notice and 15 days to respond, which
27 he is entitled to. E.D.C.R. 2.20(h), won't even permit Nasky to respond, rebut, or
28 reply, as nothing is to be filed within 5 days of the hearing. 15 days after

1 the State filed its Response, would be March 28, 2019, and NRC P 6(e)'s addi-
2 tional 3 days for service by mail would have Nasby's response, rebuttal,
3 reply due on April 1, 2019. Both dates are past the March 25, 2019
4 hearing of the petition. And, despite when the State filed its Response,
5 Nasby did not receive it until March 19, 2019 - six days before the
6 hearing, and only 4 judicial days before the hearing. This, clearly, does
7 not provide Nasby with due notice and further prejudices Nasby in liti-
8 gating his petition. "Nevada is a notice-pleading jurisdiction." Pittman v.
9 Lower Court Counseling, 110 Nev. 359, 365, 871 P.2d 953, 957 (1994); and "[f]ailure
10 to timely assert an affirmative defense may operate as a waiver if the
11 opposing party is not given reasonable notice and an opportunity to respond"
12 Williams v. Cottonwood Cove, 96 Nev. 857, 860; 619 P.2d 1219, 1221 (1980) (em-
13 phasis added).

14 Because the State did not properly raise its affirmative defenses in a
15 timely Motion To Dismiss, and denied Nasby due notice and the 15 days to re-
16 spond, rebut, or reply, to which he was entitled, Nasby respectfully request
17 this Court strike the State's assertion of the time and procedural bars,
18 as well as laches, from its Response to Nasby's petition.¹

20 C. Reply To State's Response.

21 The State claims that Nasby's Petition argues that his judgment of convict-
22 ion is void because the jury at his trial was instructed on premeditation pursu-
23 ant to Karslyn v. State, 108 Nev. 67, 825 P.2d 578 (1992) interpretation of NRS
24 200.030(1)(a) instead of Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000), and
25 thus he is clearly challenging his judgment of conviction. See (Response, pg. 6).

26
27 ^{Fn. 1-} Nasby also request this Court strike, or otherwise, disregard the "Statement of
28 The Case" in the State's Response, as it is incorrect at many points, and refer to
the "Statement Of The Case" as listed in Nasby's Petition.

1 Although Nasby argues how he was prejudiced by the application of the
2 Kazalyn instructions (petition, pg. 7-10), this was done to meet the good cause
3 and prejudice requirement should this Court construe the petition as a NRS
4 34.724 petition for post-conviction relief. However, Nasby's petition does
5 not claim that the jury was incorrectly instructed, that the manner in which
6 his trial was conducted violated his rights, or that the manner in which the
7 statute was applied violated his rights — as that would imply a challenge
8 to the validity of his conviction. What Nasby's petition does allege, is
9 that he was tried and convicted under the unauthorized, or otherwise incorrect,
10 interpretation of NRS 200.030(1)(a).

11 A statute, is its interpretation. Following Byford . . . Kazalyn's definition
12 of first-degree murder — ~~is no longer first-degree murder~~ is no longer first-degree mur-
13 der. Kazalyn's definition is now outside the scope of NRS 200.030(1)(a).
14 In this instance, there is no difference between a conviction under an unconstitu-
15 tional statute, and a conviction under an inapplicable interpretation of a statute,
16 as neither is lawfully applicable from the very moment they are applied. See:
17 (Same comparison in Montgomery v. Louisiana, 136 S.Ct. 718, 731-32; 193 LEd
18 2d 599, 616-17 (2016)). And so it goes — "A conviction under it is not merely erron-
19 eous, but is illegal and void, and cannot be a legal cause of imprisonment". Re Smith,
20 35 Nev. 80, 123 (1912) (quoting Ex parte Siebold, 100 U.S. 371, 25 LEd 717). Nasby has no
21 judgment of conviction under Byford's interpretation of NRS 200.030(1)(a)
22 which, per Nika v. State, 124 Nev. 1272, 198 P.3d 839, 850 (2008), applies to
23 his case. This is why Nasby believes, he is not challenging the validity of
24 his judgment of conviction or sentence — but instead, the very exist-
25 ence of a judgment of conviction. The lack of a judgment of conviction
26 brings his petition squarely within the scope of a NRS 34.360 petition
27 challenging a void judgment.

28 To simplify — The December 2, 1999 date on the Judgment of Conviction

1 which list Nasby's conviction and sentence for first-degree murder under
2 NRS 200.030(1)(a), is enough to determine that it is FACIALLY VOID,
3 as Byford did not exist until the following year, in 2000. But, as Nika
4 explains, the law of Byford applies retroactively to Nasby's case, and the
5 law of Kazelyn, which was applied, does not.

6 The State also asserts that Nasby's reliance on Montgomery, *supra* and
7 Welch v. U.S., 136 S.Ct. 1257, 194 L.Ed 2d 387 (2016) to argue that he
8 could not bring a timely claim because he had cases pending on appeal
9 when these cases were decided, lacks merit. (Response, pg. 9). The State then
10 isolates Montgomery and Welch's analysis to a determination of wheth-
11 er or not Byford should be applied retroactively to case that were final
12 when Byford was decided. (Response, pg. 9). However, Welch and Montgomery
13 mandate that state courts are to look to the "function" of a new rule
14 in ~~determining~~ determining whether or not it is a substantive new rule
15 (Welch, 194 L.Ed 2d at 400-01), and explains, *inter alia*, when a new rule is a
16 substantive new rule. Welch, at 399-400. Montgomery further mandates
17 that if a conviction or sentence is imposed in violation of a substantive
18 rule, it is not just erroneous, but contrary to law and, as a result void.
19 Montgomery, 136 S.Ct. at 731; and State Courts have no authority to leave a con-
20 viction or sentence in place that violates a substantive rule. Id. at 731-32.

21 Furthermore, dictum from the Court of Appeals of Nevada's decision in
22 Brankham v. Baca, 134 Nev. Adv. Rep. 99 (Dec. 13, 2019) is dispositive in this
23 case.² Although the Court of Appeals ruled that Welch and Montgomery did
24 not provide good cause to overcome the procedural bars on the ground that
25 Byford did not announce a new constitutional rule, it said: "We note, the

26
27 ^{Footnote} - In a March 12, 2019 "Notice To The Court," filed in this Court and served on Resp-
28 andent, Nasby requested the Court take Notice of the dictum in this case
and consider it in the instant action.

1 district court erred by finding that Welch and Montgomery did not pro-
2 vide good cause to overcome the procedural bars on the ground that
3 Byford did not announce a new substantive rule." Branham, at Encl.
4 Thus, based on this statement, Welch and Montgomery do establish
5 good cause on the ground that Byford announced a new substantive
6 rule.

7 As acknowledged by the State, Nasby's case was pending on direct
8 appeal when Byford was decided, and per Nika, Byford applies retro-
9 actively to his case. (Response, pg. 9). On Its Face, Nasby's judgment
10 of conviction is void, as it was obtained in violation of a substantive
11 rule. It follows that, as mandated by the U.S. Supreme Court, this
12 Court must not leave his conviction and sentence in place. Further,
13 in addition to Welch and Montgomery being good cause to overcome the
14 time and procedural bars, and this Court previously determining that
15 after reviewing Nasby's petition ~~there was~~ "good cause appearing"
16 (See - Order For Petition For Writ Of Habeas Corpus), "If a state collateral proceed-
17 ing is open to a claim controlled by federal law, the state court has a duty
18 to grant the relief that federal law requires" (Montgomery, at 731) and "no
19 resources marshaled by a State could preserve a conviction or sentence that
20 the Constitution deprives the State power to impose." Id at 732. This
21 petition cannot be barred, but instead, this Court must grant relief.

22 23 D. If Necessary, NRC P 59(e) Relief Is Warranted.

24 As the Court will not receive this pleading until after the March 25,
25 2019 hearing on Nasby's Petition, Nasby will not know the outcome of the
26 hearing and if a motion under NRC P 59(e) is even necessary. However,
27 Nasby has demonstrated the denial of due process, should this Court con-
28 sider the State's Response, in its entirety, and deny Nasby's Petition.

1 Nasby, herein this pleading, demonstrated that 59(e) relief is warrant-
2 ed, should this Court deny his Petition based on the State's assertions.

3 "[D]ue process, unlike some legal rules, is not a technical conception
4 with a fixed content unrelated to time, place, and circumstances. Due
5 process is flexible and calls for such procedural protections as the
6 particular ~~suit~~ situation demands." (internal citations omitted) Mathews
7 v. Eldridge, 424 U.S. 319, 334; 47 LEd2d 18, 33; 96 S.Ct. 893 (1976).

9 II. CONCLUSION.

10 Wherefore, Nasby respectfully request this Court: ① Grant Nasby 59(e)
11 relief if necessary; ② Strike the state's affirmative defenses from their
12 Response; ③ Grant the relief requested in the Petition; and/or ④ any-
13 thing else this Court deems full and fair.

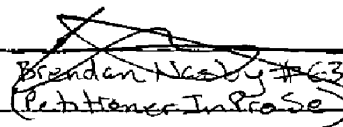
14 Dated this 26th day of March, 2019.

15
16 By:  Brendan Nasby #63618
17 (Petitioner In Pro Se)
18

19 III. VERIFICATION.

20 Under penalty of perjury, the undersigned declares that he is the petitioner
21 "Nasby" named in the foregoing "Reply To State's Response To Petition For Writ Of
22 Habeas Corpus; NRCP 12(f) Motion To Strike; And If Necessary, NRCP 59(e)
23 Motion To Alter Or Amend Judgment" and knows the contents thereof; that the
24 pleading is true of his own knowledge, except as to those matters stated on inform-
25 ation and belief, and as to such matters he believes them to be true; and that
26 the foregoing is rendered without notary per NRS 208.165.

27 Dated this 26th day of March, 2019.

28 By:  Brendan Nasby #63618
(Petitioner In Pro Se)

1 IV. AFFIRMATION PURSUANT TO NRS 239B.030.

2 The undersigned does hereby affirm that the preceding "Reply To State's
3 Response To Petition For Writ Of Habeas Corpus; NRCP 12(f) Motion To
4 Strike; And If Necessary, NRCP 59(e) Motion To Alter Or Amend
5 Judgment" does not contain the social security number of any person.

6 Dated this 26th day of March, 2019.

7
8 By:  Brendan Nasby #63618
9 (Petitioner In Pro Se)
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CERTIFICATE OF SERVICE

I, Brendan Nasby, hereby certify that on this 26th day of March, 2019, I mailed to the clerk, and caused to be served by the Clerk's Electronic Filing/Service, the foregoing "Notice Of Pleading" and "Reply To State's Response To Petition For Writ Of Habeas Corpus; NRC P 12(f) Motion To Strike; And If Necessary, NRC P 54(e) Motion To Alter Or Amend Judgment" to:

1) Attorney General
100 N. Carson St.
Carson City, NV 89710-4717

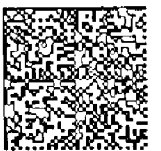
2) STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
CHARLES W. THOMAS
Chief Deputy District Attorney
Nevada Bar #012649
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney For Respondent.

3) Brendan Nasby #63618
Care of LCC Law Librarian
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419
lcclawlibrary@doc.nv.gov

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

Brendan Masby #63619
Lovelock Corr. Ctr.
1200 Prison Rd.
Lovelock, NV 89419

Lovelock Correctional Center



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200 Lewis Ave.
3rd Floor
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Brendan Nasby
I.D. No. 63618
Lovelock Corr. Ctr.
1200 Prison Rd.
Lovelock, NV 89419
(Petitioner In Pro Se)

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FILED

APR 01 2019

[Signature]
CLERK OF COURT

IN THE EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

* * * * *

Brendan James Nasby,
Petitioner,
vs
Pence Baker (Warden), et al,
Respondent.

Case No. A-19-788126-W
Dept. No. 19

NOTICE OF PLEADING

Please take notice that the hearing on Petitioner's "Reply To State's
Response To Petition For Writ Of Habeas Corpus; NRC P 12(f) Motion
To Strike; And If Necessary, NRC P 59(e) Motion To Alter Or Amend
Judgment" will be heard on _____, 2019 in Department
Floor Courtroom at the hour of _____ AM/PM

Dated this 26th day of March, 2019.

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CLERK OF COURT

[Signature]
Brendan Nasby #63618
(Petitioner In Pro Se)

A-19-788126-W
NOTC
Notice
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1 NOCH

2
3 **DISTRICT COURT**
4 **CLARK COUNTY, NEVADA**

5 *****

6 Brendan Nasby, Plaintiff(s)

Case No.: A-19-788126-W

7 vs.

Department 19

8 Renee Baker Warden, Defendant(s)

9
10 **NOTICE OF CHANGE OF HEARING**

11 The hearing on the Motion for Appointment of Attorney, presently set for April 04, 2019, at
12 8:30 AM, has been moved to the 10th day of April, 2019, at 8:30 AM and will be heard by
13 Judge William D. Kephart.

14 STEVEN D. GRIERSON, CEO/Clerk of the Court

15 By: /s/Michelle McCarthy

16 Michelle McCarthy, Deputy Clerk of the Court

17 **CERTIFICATE OF SERVICE**

18 I hereby certify that this 3rd day of April, 2019

19 ☒ I mailed, via first-class, postage fully prepaid, the foregoing Clerk of the Court, Notice
20 of Change of Hearing to:


21 Brendan Nasby
22 LCC
23 1200 Prison Road
24 Lovelock NV 89419

25 ☒ I placed a copy of the foregoing Notice of Change of Hearing in the appropriate
26 attorney folder located in the Clerk of the Court's Office:

27 Steven B Wolfson

28 /s/ Michelle McCarthy

Michelle McCarthy, Deputy Clerk of the Court



RSPN
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
CHARLES W. THOMAN
Chief Deputy District Attorney
Nevada Bar #012649
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,

-vs-

BRENDAN JAMES NASBY,
#1517690
Defendant.

CASE NO: A-19-788126-W

DEPT NO: XIX

STATE'S RESPONSE TO DEFENDANT'S MOTION TO APPOINT COUNSEL

DATE OF HEARING: APRIL 10, 2019
TIME OF HEARING: 8:30 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through CHARLES THOMAN, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition/Response to Defendant's Document Name.

This opposition/response is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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1 **POINTS AND AUTHORITIES**

2 **STATEMENT OF THE CASE**

3 On November 9, 1998, the State filed an Information charging BRENDAN JAMES
4 NASBY ("Defendant") with: COUNT 1 – Conspiracy to Commit Murder (Felony - NRS
5 199.480, 200.010, 200.030) and COUNT 2 – Murder with use of a Deadly Weapon (Open
6 Murder) (Felony - NRS 200.010, 200.030, 193.165).

7 Defendant's jury trial began on October 11, 1999. On October 19, 1999, the jury
8 returned found Defendant guilty on both counts; as to COUNT 2, the jury returned a guilty
9 verdict for First Degree Murder with use of a Deadly Weapon. On November 29, 1999,
10 Defendant was sentenced to the Nevada Department of Corrections ("NDC") as follows: as
11 to COUNT 1 – 48 to 120 months and as to COUNT 2 – Life with the possibility of parole, plus
12 an equal and consecutive term for the use of a deadly weapon, to run consecutive to COUNT
13 1. Defendant's Judgment of Conviction was filed on December 2, 1999.

14 Defendant filed a Notice of Appeal on December 14, 1999. The Nevada Supreme Court
15 affirmed Defendant's conviction on February 7, 2001. Nasby v. State, No. 35319 (Order of
16 Affirmance, Feb. 7, 2001). Remittitur issued on March 6, 2001.

17 On January 30, 2002, Defendant filed a Post-Conviction Petition for Writ of Habeas
18 Corpus. The State filed a Response on April 5, 2002. On March 27, 2006, the Court denied
19 Defendant's Petition. Defendant filed a Notice of Appeal on April 12, 2006. The Court filed
20 its Findings of Fact, Conclusions of Law and Order on April 26, 2006, and its Notice of Entry
21 on April 27, 2006. On June 18, 2007, the Nevada Supreme Court affirmed the Court's denial
22 of Defendant's first Petition. Nasby v. State, No. 47130 (Order of Affirmance, June 28, 2007).
23 Remittitur issued on July 13, 2007.

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25 February 18, 2011. The State responded on April 8, 2011. The Court denied Defendant's
26 second Petition as procedurally barred on May 11, 2011. The Court filed its Findings of Fact,
27 Conclusions of Law on June 17, 2011. Defendant filed a Notice of Appeal on June 13, 2011,
28 with the Nevada Supreme Court affirming the decision of the district court on February 8,

1 2012, and issuing Remittitur on March 5, 2012. Nasby v. State, No. 58579 (Order of
2 Affirmance, Feb. 8, 2012).

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4 Habeas Corpus. The State responded on February 4, 2015. This Court denied Defendant's
5 Petition as procedurally barred on February 25, 2015. Defendant filed a Notice of Appeal on
6 March 13, 2015. This Findings of Fact, Conclusions of Law was filed on March 30, 2015. On
7 September 11, 2015, the Nevada Supreme Court affirmed the Court's denial of Defendant's
8 third petition as untimely, successive, and an abuse of the writ without a showing of good
9 cause and prejudice.

10 On April 3, 2015, Defendant filed a Motion to Disqualify Judge, and Notice and Motion
11 to Attach Supplemental Exhibits on April 21, 2015. The State filed on Opposition on April
12 28, 2015. On April 28, 2015, the Court filed a written order denying Defendant's motions.
13 Defendant appealed this decision and the Nevada Supreme Court dismissed Defendant's
14 appeal on July 8, 2015.

15 On January 5, 2016, Defendant filed his fourth Post-Conviction Petition for Writ of
16 Habeas Corpus, a Memorandum of Points and Authorities in Support, a Supplemental
17 Memorandum of Points and Authorities in Support, and a Motion for Appointment of Counsel.
18 The State filed a Response on February 23, 2016. Defendant filed a reply on March 10, 2016.
19 On April 4, 2016, Defendant's Petition was denied. The Findings of Fact, Conclusions of Law
20 were filed on May 9, 2016.

21 On May 18, 2016, Defendant filed a Motion to Alter or Amend Judgment N. R. Civ. P.
22 59(e). The State responded on June 2, 2016. The Court denied Defendant's Motion on June
23 8, 2016. Defendant filed a Notice of Appeal on June 14, 2016; the appeal is still pending with
24 the Nevada Court of Appeals.

25 On January 26, 2016, Defendant filed a Petition for Writ of Habeas Corpus (NRS
26 34.360 - Constitutional Questions/Questions of Law) in the Eleventh Judicial District Court,
27 seeking a declaratory judgment on seven allegations of trial error. The Eleventh Judicial
28 District Court transferred Defendant's Petition back to this Court, as this Court has proper

1 jurisdiction over Defendant. On April 4, 2017, Defendant filed a Motion for Reconsideration.
2 The State responded on April 19, 2017. The State Responded to Defendant's Petition on April
3 25, 2017. The next day, Defendant's Motion for Reconsideration was denied.

4 On May 10, 2017, Defendant filed a Reply to the States response to Defendant's
5 Petition, and on May 15, 2017, the court denied Defendant's Petition. The Findings of Fact,
6 Conclusions of Law, and Order was filed on June 20, 2017. On June 27, 2017, Defendant filed
7 a Notice of Appeal.

8 On May 22, 2018, the Nevada Court of Appeals affirmed the denial of Defendant's
9 fourth Petition for Writ of Habeas Corpus.

10 On January 11, 2019, Defendant filed his sixth Petition for Writ of Habeas Corpus. This
11 Court ordered the State to respond on January 30, 2019, and the State responded on March 13,
12 2019. The court denied Defendant's petition on March 25, 2019.

13 On February 5, 2019, Defendant filed a Motion to Appoint Counsel. The State responds
14 herein.

15 **ARGUMENT**

16 **I. DEFENDANT IS NOT ENTITLED TO POST-CONVICTION COUNSEL**

17 Under the U.S. Constitution, the Sixth Amendment provides no right to counsel in post-
18 conviction proceedings. Coleman v. Thompson, 501 U.S. 722, 111 S. Ct. 2546 (1991). In
19 McKague v. Warden, 112 Nev. 159, 912 P.2d 255 (1996), the Nevada Supreme Court similarly
20 observed that "[t]he Nevada Constitution...does not guarantee a right to counsel in post-
21 conviction proceedings, as we interpret the Nevada Constitution's right to counsel provision
22 as being coextensive with the Sixth Amendment to the United States Constitution." McKague
23 specifically held that with the exception of NRS 34.820(1)(a) (entitling appointed counsel
24 when petitioner is under a sentence of death), one does not have "[a]ny constitutional or
25 statutory right to counsel at all" in post-conviction proceedings. Id. at 164, 912 P.2d at 258.

26 However, the Nevada Legislature has given courts the discretion to appoint post-conviction
27 counsel so long as "the court is satisfied that the allegation of indigency is true and the petition
28 is not dismissed summarily." NRS 34.750. NRS 34.750(1) reads:

1 [a] petition may allege that the Defendant is unable to pay the costs
2 of the proceedings or employ counsel. If the court is satisfied that the
3 allegation of indigency is true and the petition is not dismissed
4 summarily, the court may appoint counsel at the time the court orders
the filing of an answer and a return. In making its determination, the
court may consider whether:

- 5 (a) The issues are difficult;
6 (b) The Defendant is unable to comprehend the proceedings;
or
(c) Counsel is necessary to proceed with discovery.

7 NRS 34.750.

8 In the instant case, the Defendant is requesting counsel for his sixth petition that was
9 filed January 11, 2019. The State responded to that petition on March 13, 2019, and the court
10 denied the petition on March 25, 2019. As such, it is unnecessary for this Court to appoint
11 counsel for Defendant because his claims have already been denied. Therefore, Defendant's
12 request is moot.

13 Accordingly, this Court should find that Defendant is not entitled to counsel and deny
14 his Motion to Appoint Counsel.

15 **CONCLUSION**

16 Based on the foregoing reasons, Defendant's Motion to Appoint Counsel should be
17 DENIED.

18 DATED this 8th day of April, 2019.

19 Respectfully submitted,

20 STEVEN B. WOLFSON
21 Clark County District Attorney
22 Nevada Bar #

23 BY /s/CHARLES W. THOMAN
24 CHARLES W. THOMAN
25 Chief Deputy District Attorney
26 Nevada Bar #012649
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CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 8th day of April, 2019, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

BRENDAN JAMES NASBY #63618
LOVELOCK CORRECTIONAL CENTER
1200 Prison Road
Lovelock, NV 89419

BY /s/D. Daniels
Secretary for the District Attorney's Office

98F11168/QH-Appeals/dd/MVU



1 FCL
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 CHARLES W. THOMAN
6 Chief Deputy District Attorney
7 Nevada Bar #12649
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

7 DISTRICT COURT
8 CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,
10 Plaintiff,

11 -vs-

CASE NO: A-19-788126-W

12 BRENDAN JAMES NASBY,
13 #1517690
14 Defendant.

DEPT NO: XIX

14 **FINDINGS OF FACT, CONCLUSIONS OF**
15 **LAW AND ORDER**

16 DATE OF HEARING: March 25, 2019
17 TIME OF HEARING: 08:30 AM

18 THIS CAUSE having come on for hearing before the Honorable WILLIAM D.
19 KEPHART, District Judge, on the 25th day of March, 2019, the Petitioner not being present,
20 the Respondent being represented by STEVEN B. WOLFSON, Clark County District
21 Attorney, by and through BERNARD ZADROWSKI, Chief Deputy District Attorney, and the
22 Court having considered the matter, including briefs, transcripts, arguments of counsel, and
23 documents on file herein, now therefore, the Court makes the following findings of fact and
24 conclusions of law:

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1 2012, and issuing Remittitur on March 5, 2012. Nasby v. State, No. 58579 (Order of
2 Affirmance, Feb. 8, 2012).

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5 Petition as procedurally barred on February 25, 2015. Defendant filed a Notice of Appeal on
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8 third petition as untimely, successive, and an abuse of the writ without a showing of good
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8 On May 22, 2018, the Nevada Court of Appeals affirmed the denial of Defendant's
9 fourth Petition for Writ of Habeas Corpus.

10 On January 11, 2019, Defendant filed the instant Petition for Writ of Habeas Corpus.
11 This Court ordered the State to respond on January 30, 2019. The State responded on March
12 13, 2019.

13 ANALYSIS

14 **I. DEFENDANT'S FIFTH PETITION IS PROCEDURALLY BARRED**

15 **A. The Procedural Bars are Mandatory**

16 The Nevada Supreme Court has held that "[a]pplication of the statutory procedural
17 default rules to post-conviction habeas petitions is *mandatory*," noting:

18 Habeas corpus petitions that are filed many years after conviction
19 are an unreasonable burden on the criminal justice system. The
20 necessity for a workable system dictates that there must exist a
time when a criminal conviction is final.

21 State v. Dist. Court (Riker), 121 Nev. 225, 112 P.3d 1070 (2005) (emphasis added).
22 Additionally, the Court noted that procedural bars "cannot be ignored [by the district court]
23 when properly raised by the State." Id. at 233, 112 P.3d at 1075. The Nevada Supreme Court
24 has granted no discretion to the district courts regarding whether to apply the statutory
25 procedural bars; the rules must be applied. For the reasons discussed below, this Court finds
26 Defendant's Petition must be denied.

27 ///

28 ///

1 **B. Defendant's Petition is Barred by Laches**

2 NRS 34.800 creates a rebuttable presumption of prejudice to the State if "[a] period
3 exceeding five years between the filing of a judgment of conviction, an order imposing a
4 sentence of imprisonment or a decision on direct appeal of a judgment of conviction and the
5 filing of a petition challenging the validity of a judgment of conviction...." The statute also
6 requires that the State plead laches in its motion to dismiss the petition. NRS 34.800. The
7 State pleaded laches in the instant case.

8 The Judgment of Conviction was filed on December 2, 1999. Defendant filed the
9 instant Petition on January 11, 2019. Since more than 19 years have elapsed since the date the
10 Judgment of Conviction was filed and the filing of the instant petition, NRS 34.800 directly
11 applies in this case. The delay is more than triple the five years required for a presumption of
12 prejudice to arise. After such a passage of time, this Court finds the State is prejudiced in its
13 ability to retry this case should relief be granted.

14 **C. Defendant's Motion is Time Barred**

15 The mandatory provision of NRS 34.726(1) states:

16 Unless there is good cause shown for delay, a petition that
17 challenges the validity of a judgment or sentence must be filed
18 *within 1 year after entry of the judgment of conviction* or, if an
19 appeal has been taken from the judgment, *within 1 year after the*
20 *Supreme Court issues its remittitur.* For the purposes of this
 subsection, good cause for delay exists if the petitioner
 demonstrates to the satisfaction of the court:

21 (emphasis added). "[T]he statutory rules regarding procedural default are mandatory and
22 cannot be ignored when properly raised by the State." State v. Dist. Court (Riker), 121 Nev.
23 225, 233, 112 P.3d 1070, 1075 (2005).

24 Accordingly, the one-year time bar prescribed by NRS 34.726 begins to run from the
25 date the judgment of conviction is filed or a remittitur from a timely direct appeal is filed.
26 Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998); see Pellegrini v.
27 State, 117 Nev. 860, 873, 34 P.3d 519, 528 (2001) (holding that NRS 34.726 should be
28 construed by its plain meaning).

1 In Gonzales v. State, 118 Nev. 590, 593, 590 P.3d 901, 902 (2002), the Nevada Supreme
2 Court affirmed the rejection of a habeas petition that was filed two days late, pursuant to the
3 “clear and unambiguous” mandatory provisions of NRS 34.726(1). Gonzales reiterated the
4 importance of filing the petition with the District Court within the one-year mandate, absent a
5 showing of “good cause” for the delay in filing. Gonzales, 590 P.3d at 902. The one-year
6 time bar is therefore strictly construed. In contrast with the short amount of time to file a
7 notice of appeal, a prisoner has an ample full year to file a post-conviction habeas petition, so
8 there is no injustice in a strict application of NRS 34.726(1), despite any alleged difficulties
9 with the postal system. Gonzales, 118 Nev. at 595, 53 P.3d at 903.

10 Here, Defendant claims that he is not challenging his Judgement of Conviction but
11 appears to argue that his judgment of conviction is void because the jury was instructed on
12 premeditation and deliberation pursuant to the Kazalyn v. State, 108 Nev. 67, 825 P.2d 578
13 (1992) interpretation of NRS 200.030(1)(a) instead of Byford v. State, 116 Nev. 215, 994 P.2d
14 700 (2000). Petition at 5-6. This is clearly a challenge to the validity of Defendant’s sentence,
15 and therefore this Petition would only be timely if brought within a year of the filing of
16 Defendant’s judgement of Conviction or remittitur if Defendant appealed.

17 Defendant’s Judgment of Conviction was filed on December 2, 1999. He filed a Notice
18 of Appeal on December 14, 1999, and the Nevada Supreme Court issued its remittitur on
19 March 6, 2001. Accordingly, Defendant had until approximately March 6, 2002, to file a post-
20 conviction petition. The instant motion was not filed until January 19, 2019, more than 17
21 years later. Therefore, absent a showing of good cause, Defendant’s motion must be denied
22 as time-barred pursuant to NRS 34.726(1). NRS 34.726 can only be overcome upon a showing
23 of good cause and prejudice or actual innocence, which Defendant fails to demonstrate.
24 Accordingly, this Court finds Defendant’s Petition must be denied.

25 **D. Defendant’s Petition is Successive and an Abuse of the Writ**

26 Defendant’s instant petition must be dismissed pursuant to NRS 34.810 as it is
27 successive and an abuse of the writ. NRS 34.810 provides in pertinent part that:
28

2. A second or successive petition must be dismissed if the judge or justice determines that it fails to allege new or different grounds for relief and that the prior determination was on the merits or, if new and different grounds are alleged, the judge or justice finds that the failure of the Defendant to assert those grounds in a prior petition constituted an abuse of the writ.

3. Pursuant to subsections 1 and 2, the petitioner has the burden of pleading and proving specific facts that demonstrate:

(a) Good cause for the petitioner's failure to present the claim or for presenting the claim again; and

(b) Actual prejudice to the petitioner.

Defendant filed five previous Petitions for Writ of Habeas Corpus (Post-Conviction) on January 30, 2002, February 18, 2011, December 9, 2014, January 5, 2016, and January 26, 2016. Each petition was duly considered and denied by the Court. Consequently, the instant petition filed on January 19, 2019, is a successive petition. Moreover, Defendant raises the exact same claim he raised on direct appeal and in his December 26, 2013, petition. As such, the instant petition is also an abuse of the writ. See also Pellegrini v. State, 117 Nev. 860, 888, 34 P.3d 519, 538 (2001); Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975).

To avoid the procedural default under NRS 34.810, Defendant has the burden of pleading and proving specific facts that demonstrate both good cause for his failure to present his claim in a timely manner and actual prejudice, which Defendant fails to demonstrate. NRS 34.810(3); Hogan v. Warden, 109 Nev. 952, 959-60, 860 P.2d 710, 715-16 (1993); Phelps v. Director, 104 Nev. 656, 659, 764 P.2d 1303, 1305 (1988). Thus, this Court finds the instant Petition must be denied.

II. DEFENDANT CANNOT ESTABLISH GOOD CAUSE TO OVERCOME THE PROCEDURAL BARS

To avoid procedural default under NRS 34.726 or NRS 34.800, a defendant has the burden of pleading and proving specific facts that demonstrate good cause for his failure to present his claim in earlier proceedings or comply with the statutory requirements. See Hogan, 109 Nev. at 959-60, 860 P.2d at 715-16; Phelps, 104 Nev. at 659, 764 P.2d at 1305.

"To establish good cause, appellants *must* show that an impediment external to the defense prevented their compliance with the applicable procedural rule." Clem v. State, 119

1 Nev. 615, 621, 81 P.3d 521, 525 (2003) (emphasis added); see Hathaway v. State, 119 Nev.
2 248, 251, 71 P.3d 503, 506 (2003); Pellegrini, 117 Nev. at 887, 34 P.3d at 537. Such an external
3 impediment could be “that the factual or legal basis for a claim was not reasonably available
4 to counsel, or that ‘some interference by officials’ made compliance impracticable.”
5 Hathaway, 119 Nev. at 251, 71 P.3d at 506 (quoting Murray v. Carrier, 477 U.S. 478, 488, 106
6 S. Ct. 2639, 2645 (1986)); see also Gonzalez, 118 Nev. at 595, 53 P.3d at 904 (citing Harris v.
7 Warden, 114 Nev. 956, 959-60 n.4, 964 P.2d 785 n.4 (1998)). Any delay in filing of the petition
8 must not be the fault of the petitioner. NRS 34.726(1)(a).

9 The Nevada Supreme Court has clarified that a defendant cannot attempt to
10 manufacture good cause. Clem, 119 Nev. at 621, 81 P.3d at 526. To find good cause there
11 must be a “substantial reason; one that affords a legal excuse.” Hathaway, 119 Nev. at 251,
12 71 P.3d at 506. Excuses such as the lack of assistance of counsel when preparing a petition,
13 as well as the failure of trial counsel to forward a copy of the file to a petitioner have been
14 found not to constitute good cause. See Phelps, 104 Nev. at 660, 764 P.2d at 1306, superseded
15 by statute on other grounds as recognized in Nika v. State, 120 Nev. 600, 607, 97 P.3d 1140,
16 1145 (2004); Hood v. State, 111 Nev. 335, 890 P.2d 797 (1995). Moreover, a return to state
17 court to exhaust remedies for federal habeas is not good cause to overcome state procedural
18 bars. Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989).

19 Finally, claims asserted in a petition for post-conviction relief must be supported with
20 specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v.
21 State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). “Bare” and “naked” allegations are not
22 sufficient, nor are those belied and repelled by the record. Id.

23 Defendant fails to assert any good cause for his procedural default. Instead, he argues,
24 as discussed, *supra*, that the procedural bars do not apply to him. For the reasons discussed,
25 they do. Defendant also relies on Montgomery v. Louisiana, 136 S.Ct. 718, 193 L.Ed.2d 599
26 (2016) and Welch v. U.S., 136 S.Ct. 1257, 194 L.Ed.2d 387 (2016) to argue that he could not
27 bring a timely claim because he had cases pending on appeal when these cases were decided.
28 Petition at 7. This claim lacks merit. Both Montgomery and Welch analyze when Byford

1 should be applied retroactively to cases that were final when Byford was decided. At the time
2 Byford was decided, Defendant's case was pending on appeal and therefore not a final
3 decision. The case most favorable to Defendant is Nika v. State, 124 Nev. 1272, 198 P.3d 839
4 (2008) which allowed for Byford to apply to cases pending on appeal at the time Byford
5 pronounced a change in law, and Defendant failed to file a petition within one year after Nika
6 was decided. Moreover, Defendant could and should have previously raised these issues in an
7 earlier petition. As such, Defendant fails to establish an impediment external to the defense
8 and therefore does not constitute good cause to overcome the procedural bars. Phelps v.
9 Director, Nevada Department of Prisons, 104 Nev. 656, 764 P.2d 1303 (1988). Accordingly,
10 Defendant cannot demonstrate good cause and this Court finds Defendant's Petition for Writ
11 of Habeas Corpus must be denied.

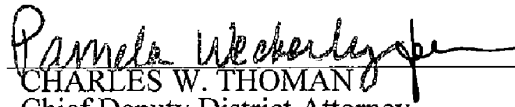
12 **ORDER**

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

15 DATED this 9th day of April, 2019.

16 
17 DISTRICT JUDGE

18 STEVEN B. WOLFSON
19 Clark County District Attorney
Nevada Bar #001565

20 BY 
21 CHARLES W. THOMAN
22 Chief Deputy District Attorney
Nevada Bar #12649

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 5th day of April, 2019, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

BRENDAN JAMES NASBY #63618
LOVELOCK CORRECTIONAL CENTER
1200 Prison Road
Lovelock, NV 89419

BY /s/D. Daniels
Secretary for the District Attorney's Office

98F11168/QH-Appeals/dd/MVU



1 NEO

2 **DISTRICT COURT**
3 **CLARK COUNTY, NEVADA**

4
5 BRENDAN NASBY,

6 Petitioner,

Case No: A-18-788126-W

Dept No: XIX

7 vs.

8 RENEE BAKER WARDEN; ET AL,

9 Respondent,

**NOTICE OF ENTRY OF FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER**

10
11 **PLEASE TAKE NOTICE** that on April 12, 2019, the court entered a decision or order in this matter, a
12 true and correct copy of which is attached to this notice.

13 You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you
14 must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is
15 mailed to you. This notice was mailed on April 15, 2019.

16 STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Debra Donaldson

Debra Donaldson, Deputy Clerk

17
18
19 CERTIFICATE OF E-SERVICE / MAILING

20 I hereby certify that on this 15 day of April 2019, I served a copy of this Notice of Entry on the following:

21 ☒ By e-mail:

22 Clark County District Attorney's Office
23 Attorney General's Office – Appellate Division-

24 ☒ The United States mail addressed as follows:

25 Brendan Nasby # 63618
26 1200 Prison Rd.
27 Lovelock, NV 89419

28 /s/ Debra Donaldson

Debra Donaldson, Deputy Clerk



1 FCL
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 CHARLES W. THOMAN
6 Chief Deputy District Attorney
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8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

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10 Plaintiff,

11 -vs-

CASE NO: A-19-788126-W

12 BRENDAN JAMES NASBY,
13 #1517690
14 Defendant.

DEPT NO: XIX

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER

DATE OF HEARING: March 25, 2019
TIME OF HEARING: 08:30 AM

18 THIS CAUSE having come on for hearing before the Honorable WILLIAM D.
19 KEPHART, District Judge, on the 25th day of March, 2019, the Petitioner not being present,
20 the Respondent being represented by STEVEN B. WOLFSON, Clark County District
21 Attorney, by and through BERNARD ZADROWSKI, Chief Deputy District Attorney, and the
22 Court having considered the matter, including briefs, transcripts, arguments of counsel, and
23 documents on file herein, now therefore, the Court makes the following findings of fact and
24 conclusions of law:

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1 **FINDINGS OF FACT, CONCLUSIONS OF LAW**

2 **PROCEDURAL BACKGROUND**

3 On November 9, 1998, the State filed an Information charging BRENDAN JAMES
4 NASBY ("Defendant") with: COUNT 1 – Conspiracy to Commit Murder (Felony - NRS
5 199.480, 200.010, 200.030) and COUNT 2 – Murder with use of a Deadly Weapon (Open
6 Murder) (Felony - NRS 200.010, 200.030, 193.165).

7 Defendant's jury trial began on October 11, 1999. On October 19, 1999, the jury
8 returned found Defendant guilty on both counts; as to COUNT 2, the jury returned a guilty
9 verdict for First Degree Murder with use of a Deadly Weapon. On November 29, 1999,
10 Defendant was sentenced to the Nevada Department of Corrections ("NDC") as follows: as
11 to COUNT 1 – 48 to 120 months and as to COUNT 2 – Life with the possibility of parole, plus
12 an equal and consecutive term for the use of a deadly weapon, to run consecutive to COUNT
13 1. Defendant's Judgment of Conviction was filed on December 2, 1999.

14 Defendant filed a Notice of Appeal on December 14, 1999. The Nevada Supreme Court
15 affirmed Defendant's conviction on February 7, 2001. Nasby v. State, No. 35319 (Order of
16 Affirmance, Feb. 7, 2001). Remittitur issued on March 6, 2001.

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1 2012, and issuing Remittitur on March 5, 2012. Nasby v. State, No. 58579 (Order of
2 Affirmance, Feb. 8, 2012).

3 On December 9, 2014, Defendant filed his third Post-Conviction Petition for Writ of
4 Habeas Corpus. The State responded on February 4, 2015. This Court denied Defendant's
5 Petition as procedurally barred on February 25, 2015. Defendant filed a Notice of Appeal on
6 March 13, 2015. This Findings of Fact, Conclusions of Law was filed on March 30, 2015. On
7 September 11, 2015, the Nevada Supreme Court affirmed the Court's denial of Defendant's
8 third petition as untimely, successive, and an abuse of the writ without a showing of good
9 cause and prejudice.

10 On April 3, 2015, Defendant filed a Motion to Disqualify Judge, and Notice and Motion
11 to Attach Supplemental Exhibits on April 21, 2015. The State filed on Opposition on April
12 28, 2015. On April 28, 2015, the Court filed a written order denying Defendant's motions.
13 Defendant appealed this decision and the Nevada Supreme Court dismissed Defendant's
14 appeal on July 8, 2015.

15 On January 5, 2016, Defendant filed his fourth Post-Conviction Petition for Writ of
16 Habeas Corpus, a Memorandum of Points and Authorities in Support, a Supplemental
17 Memorandum of Points and Authorities in Support, and a Motion for Appointment of Counsel.
18 The State filed a Response on February 23, 2016. Defendant filed a reply on March 10, 2016.
19 On April 4, 2016, Defendant's Petition was denied. The Findings of Fact, Conclusions of Law
20 were filed on May 9, 2016.

21 On May 18, 2016, Defendant filed a Motion to Alter or Amend Judgment N. R. Civ. P.
22 59(e). The State responded on June 2, 2016. The Court denied Defendant's Motion on June
23 8, 2016. Defendant filed a Notice of Appeal on June 14, 2016; the appeal is still pending with
24 the Nevada Court of Appeals.

25 On January 26, 2016, Defendant filed a Petition for Writ of Habeas Corpus (NRS
26 34.360 - Constitutional Questions/Questions of Law) in the Eleventh Judicial District Court,
27 seeking a declaratory judgment on seven allegations of trial error. The Eleventh Judicial
28 District Court transferred Defendant's Petition back to this Court, as this Court has proper

1 jurisdiction over Defendant. On April 4, 2017, Defendant filed a Motion for Reconsideration.
2 The State responded on April 19, 2017. The State Responded to Defendant's Petition on April
3 25, 2017. The next day, Defendant's Motion for Reconsideration was denied.

4 On May 10, 2017, Defendant filed a Reply to the States response to Defendant's
5 Petition, and on May 15, 2017, the court denied Defendant's Petition. The Findings of Fact,
6 Conclusions of Law, and Order was filed on June 20, 2017. On June 27, 2017, Defendant filed
7 a Notice of Appeal.

8 On May 22, 2018, the Nevada Court of Appeals affirmed the denial of Defendant's
9 fourth Petition for Writ of Habeas Corpus.

10 On January 11, 2019, Defendant filed the instant Petition for Writ of Habeas Corpus.
11 This Court ordered the State to respond on January 30, 2019. The State responded on March
12 13, 2019.

13 ANALYSIS

14 **I. DEFENDANT'S FIFTH PETITION IS PROCEDURALLY BARRED**

15 **A. The Procedural Bars are Mandatory**

16 The Nevada Supreme Court has held that "[a]pplication of the statutory procedural
17 default rules to post-conviction habeas petitions is *mandatory*," noting:

18 Habeas corpus petitions that are filed many years after conviction
19 are an unreasonable burden on the criminal justice system. The
20 necessity for a workable system dictates that there must exist a
time when a criminal conviction is final.

21 State v. Dist. Court (Riker), 121 Nev. 225, 112 P.3d 1070 (2005) (emphasis added).
22 Additionally, the Court noted that procedural bars "cannot be ignored [by the district court]
23 when properly raised by the State." Id. at 233, 112 P.3d at 1075. The Nevada Supreme Court
24 has granted no discretion to the district courts regarding whether to apply the statutory
25 procedural bars; the rules must be applied. For the reasons discussed below, this Court finds
26 Defendant's Petition must be denied.

27 ///

28 ///

1 **B. Defendant's Petition is Barred by Laches**

2 NRS 34.800 creates a rebuttable presumption of prejudice to the State if "[a] period
3 exceeding five years between the filing of a judgment of conviction, an order imposing a
4 sentence of imprisonment or a decision on direct appeal of a judgment of conviction and the
5 filing of a petition challenging the validity of a judgment of conviction...." The statute also
6 requires that the State plead laches in its motion to dismiss the petition. NRS 34.800. The
7 State pleaded laches in the instant case.

8 The Judgment of Conviction was filed on December 2, 1999. Defendant filed the
9 instant Petition on January 11, 2019. Since more than 19 years have elapsed since the date the
10 Judgment of Conviction was filed and the filing of the instant petition, NRS 34.800 directly
11 applies in this case. The delay is more than triple the five years required for a presumption of
12 prejudice to arise. After such a passage of time, this Court finds the State is prejudiced in its
13 ability to retry this case should relief be granted.

14 **C. Defendant's Motion is Time Barred**

15 The mandatory provision of NRS 34.726(1) states:

16 Unless there is good cause shown for delay, a petition that
17 challenges the validity of a judgment or sentence must be filed
18 *within 1 year after entry of the judgment of conviction* or, if an
19 appeal has been taken from the judgment, *within 1 year after the*
20 *Supreme Court issues its remittitur.* For the purposes of this
 subsection, good cause for delay exists if the petitioner
 demonstrates to the satisfaction of the court:

21 (emphasis added). "[T]he statutory rules regarding procedural default are mandatory and
22 cannot be ignored when properly raised by the State." State v. Dist. Court (Riker), 121 Nev.
23 225, 233, 112 P.3d 1070, 1075 (2005).

24 Accordingly, the one-year time bar prescribed by NRS 34.726 begins to run from the
25 date the judgment of conviction is filed or a remittitur from a timely direct appeal is filed.
26 Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998); see Pellegrini v.
27 State, 117 Nev. 860, 873, 34 P.3d 519, 528 (2001) (holding that NRS 34.726 should be
28 construed by its plain meaning).

1 In Gonzales v. State, 118 Nev. 590, 593, 590 P.3d 901, 902 (2002), the Nevada Supreme
2 Court affirmed the rejection of a habeas petition that was filed two days late, pursuant to the
3 “clear and unambiguous” mandatory provisions of NRS 34.726(1). Gonzales reiterated the
4 importance of filing the petition with the District Court within the one-year mandate, absent a
5 showing of “good cause” for the delay in filing. Gonzales, 590 P.3d at 902. The one-year
6 time bar is therefore strictly construed. In contrast with the short amount of time to file a
7 notice of appeal, a prisoner has an ample full year to file a post-conviction habeas petition, so
8 there is no injustice in a strict application of NRS 34.726(1), despite any alleged difficulties
9 with the postal system. Gonzales, 118 Nev. at 595, 53 P.3d at 903.

10 Here, Defendant claims that he is not challenging his Judgment of Conviction but
11 appears to argue that his judgment of conviction is void because the jury was instructed on
12 premeditation and deliberation pursuant to the Kazalyn v. State, 108 Nev. 67, 825 P.2d 578
13 (1992) interpretation of NRS 200.030(1)(a) instead of Byford v. State, 116 Nev. 215, 994 P.2d
14 700 (2000). Petition at 5-6. This is clearly a challenge to the validity of Defendant’s sentence,
15 and therefore this Petition would only be timely if brought within a year of the filing of
16 Defendant’s judgment of Conviction or remittitur if Defendant appealed.

17 Defendant’s Judgment of Conviction was filed on December 2, 1999. He filed a Notice
18 of Appeal on December 14, 1999, and the Nevada Supreme Court issued its remittitur on
19 March 6, 2001. Accordingly, Defendant had until approximately March 6, 2002, to file a post-
20 conviction petition. The instant motion was not filed until January 19, 2019, more than 17
21 years later. Therefore, absent a showing of good cause, Defendant’s motion must be denied
22 as time-barred pursuant to NRS 34.726(1). NRS 34.726 can only be overcome upon a showing
23 of good cause and prejudice or actual innocence, which Defendant fails to demonstrate.
24 Accordingly, this Court finds Defendant’s Petition must be denied.

25 **D. Defendant’s Petition is Successive and an Abuse of the Writ**

26 Defendant’s instant petition must be dismissed pursuant to NRS 34.810 as it is
27 successive and an abuse of the writ. NRS 34.810 provides in pertinent part that:
28

2. A second or successive petition must be dismissed if the judge or justice determines that it fails to allege new or different grounds for relief and that the prior determination was on the merits or, if new and different grounds are alleged, the judge or justice finds that the failure of the Defendant to assert those grounds in a prior petition constituted an abuse of the writ.

3. Pursuant to subsections 1 and 2, the petitioner has the burden of pleading and proving specific facts that demonstrate:

(a) Good cause for the petitioner's failure to present the claim or for presenting the claim again; and

(b) Actual prejudice to the petitioner.

Defendant filed five previous Petitions for Writ of Habeas Corpus (Post-Conviction) on January 30, 2002, February 18, 2011, December 9, 2014, January 5, 2016, and January 26, 2016. Each petition was duly considered and denied by the Court. Consequently, the instant petition filed on January 19, 2019, is a successive petition. Moreover, Defendant raises the exact same claim he raised on direct appeal and in his December 26, 2013, petition. As such, the instant petition is also an abuse of the writ. See also Pellegrini v. State, 117 Nev. 860, 888, 34 P.3d 519, 538 (2001); Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975).

To avoid the procedural default under NRS 34.810, Defendant has the burden of pleading and proving specific facts that demonstrate both good cause for his failure to present his claim in a timely manner and actual prejudice, which Defendant fails to demonstrate. NRS 34.810(3); Hogan v. Warden, 109 Nev. 952, 959-60, 860 P.2d 710, 715-16 (1993); Phelps v. Director, 104 Nev. 656, 659, 764 P.2d 1303, 1305 (1988). Thus, this Court finds the instant Petition must be denied.

II. DEFENDANT CANNOT ESTABLISH GOOD CAUSE TO OVERCOME THE PROCEDURAL BARS

To avoid procedural default under NRS 34.726 or NRS 34.800, a defendant has the burden of pleading and proving specific facts that demonstrate good cause for his failure to present his claim in earlier proceedings or comply with the statutory requirements. See Hogan, 109 Nev. at 959-60, 860 P.2d at 715-16; Phelps, 104 Nev. at 659, 764 P.2d at 1305.

"To establish good cause, appellants *must* show that an impediment external to the defense prevented their compliance with the applicable procedural rule." Clem v. State, 119

1 Nev. 615, 621, 81 P.3d 521, 525 (2003) (emphasis added); see Hathaway v. State, 119 Nev.
2 248, 251, 71 P.3d 503, 506 (2003); Pellegrini, 117 Nev. at 887, 34 P.3d at 537. Such an external
3 impediment could be “that the factual or legal basis for a claim was not reasonably available
4 to counsel, or that ‘some interference by officials’ made compliance impracticable.”
5 Hathaway, 119 Nev. at 251, 71 P.3d at 506 (quoting Murray v. Carrier, 477 U.S. 478, 488, 106
6 S. Ct. 2639, 2645 (1986)); see also Gonzalez, 118 Nev. at 595, 53 P.3d at 904 (citing Harris v.
7 Warden, 114 Nev. 956, 959-60 n.4, 964 P.2d 785 n.4 (1998)). Any delay in filing of the petition
8 must not be the fault of the petitioner. NRS 34.726(1)(a).

9 The Nevada Supreme Court has clarified that a defendant cannot attempt to
10 manufacture good cause. Clem, 119 Nev. at 621, 81 P.3d at 526. To find good cause there
11 must be a “substantial reason; one that affords a legal excuse.” Hathaway, 119 Nev. at 251,
12 71 P.3d at 506. Excuses such as the lack of assistance of counsel when preparing a petition,
13 as well as the failure of trial counsel to forward a copy of the file to a petitioner have been
14 found not to constitute good cause. See Phelps, 104 Nev. at 660, 764 P.2d at 1306, superseded
15 by statute on other grounds as recognized in Nika v. State, 120 Nev. 600, 607, 97 P.3d 1140,
16 1145 (2004); Hood v. State, 111 Nev. 335, 890 P.2d 797 (1995). Moreover, a return to state
17 court to exhaust remedies for federal habeas is not good cause to overcome state procedural
18 bars. Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989).

19 Finally, claims asserted in a petition for post-conviction relief must be supported with
20 specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v.
21 State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). “Bare” and “naked” allegations are not
22 sufficient, nor are those belied and repelled by the record. Id.

23 Defendant fails to assert any good cause for his procedural default. Instead, he argues,
24 as discussed, *supra*, that the procedural bars do not apply to him. For the reasons discussed,
25 they do. Defendant also relies on Montgomery v. Louisiana, 136 S.Ct. 718, 193 L.Ed.2d 599
26 (2016) and Welch v. U.S., 136 S.Ct. 1257, 194 L.Ed.2d 387 (2016) to argue that he could not
27 bring a timely claim because he had cases pending on appeal when these cases were decided.
28 Petition at 7. This claim lacks merit. Both Montgomery and Welch analyze when Byford

1 should be applied retroactively to cases that were final when Byford was decided. At the time
2 Byford was decided, Defendant's case was pending on appeal and therefore not a final
3 decision. The case most favorable to Defendant is Nika v. State, 124 Nev. 1272, 198 P.3d 839
4 (2008) which allowed for Byford to apply to cases pending on appeal at the time Byford
5 pronounced a change in law, and Defendant failed to file a petition within one year after Nika
6 was decided. Moreover, Defendant could and should have previously raised these issues in an
7 earlier petition. As such, Defendant fails to establish an impediment external to the defense
8 and therefore does not constitute good cause to overcome the procedural bars. Phelps v.
9 Director, Nevada Department of Prisons, 104 Nev. 656, 764 P.2d 1303 (1988). Accordingly,
10 Defendant cannot demonstrate good cause and this Court finds Defendant's Petition for Writ
11 of Habeas Corpus must be denied.

12 **ORDER**

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

15 DATED this 9th day of April, 2019.

16
17 Will L. L. L.
DISTRICT JUDGE

18 STEVEN B. WOLFSON
19 Clark County District Attorney
Nevada Bar #001565

20 BY Pamela Weckerly
21 CHARLES W. THOMAS
22 Chief Deputy District Attorney
Nevada Bar #12649

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 5th day of April, 2019, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

BRENDAN JAMES NASBY #63618
LOVELOCK CORRECTIONAL CENTER
1200 Prison Road
Lovelock, NV 89419

BY /s/D. Daniels
Secretary for the District Attorney's Office

98F11168/QH-Appeals/dd/MVU

Brendan Nasby
I.D. No. 63619
Lovelock Corr. Ctr.
1200 Prison Rd.
Lovelock, NV 89419
(Petitioner In Pro Se)

Electronically Filed
5/2/2019 12:20 PM
Steven D. Grierson
CLERK OF THE COURT

Steven D. Grierson

IN THE EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

* * * * *

Brendan James Nasby,

Petitioner,

vs.

Renee Baker (Warden), et al.,

Respondent.

Case No. A-19-788126-W

Dept. No. 19

NOTICE OF APPEAL

Notice is hereby given that, Brendan James Nasby, Petitioner in pro
se, hereby appeals to the Supreme Court of the State of Nevada, from
the final judgment/order Denying Petition for Post-Conviction Relief and
Reply To State's Response To Petition for Writ of Habeas Corpus, NRCP 12(f)
Motion To Strike, And If Necessary NRCP 59(e) Motion To Alter Or Amend
Judgment entered in this action on the 12th day of April, 2019; as
well as the Denial of Petitioner's Motion For Appointment Of Counsel
entered on the 10th day of April, 2019.

Dated this 26th day of April, 2019.

By: *[Signature]*
Brendan James Nasby #63619
(Petitioner In Pro Se)

CLERK OF THE COURT

MAY 02 2019

RECEIVED

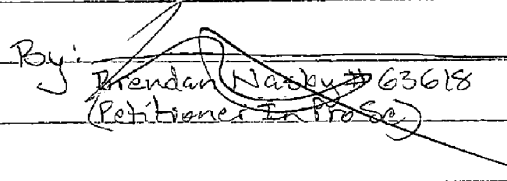
Certificate Of Service

I, Brendan James Nasby, hereby certify that on this 26th day
of April, 2019, I mailed to the clerk, and caused to be served by
the Clerk's Electronic Filing/Service, the foregoing "Notice Of
Appeal" to:

1) Attorney General
100 N. Carson St.
Carson City, NV 89710-9717

2) STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
CHARLES W. THOMAS
Chief Deputy District Attorney
Nevada Bar #012649
200 Lewis Avenue
Las Vegas, Nevada 89155-7212
(702) 671-2500
Attorney For Respondent.

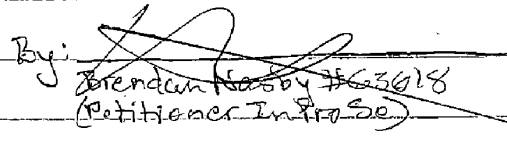
3) Brendan Nasby #63618
Care of LCC Law Librarian
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419
lcclawlibrary@doc.nv.gov

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

Affirmation Pursuant To NRS 239B.030.

The undersigned does hereby affirm that the preceding "Notice of Appeal"
does not contain the social security number of any person.

Dated this 26th day of April, 2019.

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

COPY

Electronically Filed
4/15/2019 3:13 PM
Steven D. Grierson
CLERK OF THE COURT

Steven D. Grierson

1 NEO

2 DISTRICT COURT
3 CLARK COUNTY, NEVADA

4
5 BRENDAN NASBY,

6 Petitioner,

Case No: A-18-788126-W

Dept No: XIX

7 vs.

8 RENEE BAKER WARDEN; ET AL,

9 Respondent,

NOTICE OF ENTRY OF FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

10
11 PLEASE TAKE NOTICE that on April 12, 2019, the court entered a decision or order in this matter, a
12 true and correct copy of which is attached to this notice.

13 You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you
14 must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is
15 mailed to you. This notice was mailed on April 15, 2019.

16 STEVEN D. GRIERSON, CLERK OF THE COURT

17 /s/ Debra Donaldson

18 Debra Donaldson, Deputy Clerk

19 CERTIFICATE OF E-SERVICE / MAILING

20 I hereby certify that on this 15 day of April 2019, I served a copy of this Notice of Entry on the following:

21 ☒ By e-mail:

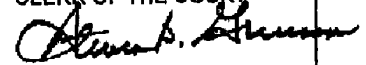
22 Clark County District Attorney's Office
23 Attorney General's Office - Appellate Division-

24 ☒ The United States mail addressed as follows:

25 Brendan Nasby # 63618
26 1200 Prison Rd.
27 Lovelock, NV 89419

28 /s/ Debra Donaldson

Debra Donaldson, Deputy Clerk



1 **FCL**
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 CHARLES W. THOMAN
6 Chief Deputy District Attorney
7 Nevada Bar #12649
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,
10 Plaintiff,

11 -vs-

12 BRENDAN JAMES NASBY,
13 #1517690
14 Defendant.

CASE NO: A-19-788126-W

DEPT NO: XIX

15 **FINDINGS OF FACT, CONCLUSIONS OF**
16 **LAW AND ORDER**

17 DATE OF HEARING: March 25, 2019
18 TIME OF HEARING: 08:30 AM

19 THIS CAUSE having come on for hearing before the Honorable WILLIAM D.
20 KEPHART, District Judge, on the 25th day of March, 2019, the Petitioner not being present,
21 the Respondent being represented by STEVEN B. WOLFSON, Clark County District
22 Attorney, by and through BERNARD ZADROWSKI, Chief Deputy District Attorney, and the
23 Court having considered the matter, including briefs, transcripts, arguments of counsel, and
24 documents on file herein, now therefore, the Court makes the following findings of fact and
25 conclusions of law:

26 ///

27 ///

28 ///

///

1 **FINDINGS OF FACT, CONCLUSIONS OF LAW**

2 **PROCEDURAL BACKGROUND**

3 On November 9, 1998, the State filed an Information charging BRENDAN JAMES
4 NASBY ("Defendant") with: COUNT 1 – Conspiracy to Commit Murder (Felony - NRS
5 199.480, 200.010, 200.030) and COUNT 2 – Murder with use of a Deadly Weapon (Open
6 Murder) (Felony - NRS 200.010, 200.030, 193.165).

7 Defendant's jury trial began on October 11, 1999. On October 19, 1999, the jury
8 returned found Defendant guilty on both counts; as to COUNT 2, the jury returned a guilty
9 verdict for First Degree Murder with use of a Deadly Weapon. On November 29, 1999,
10 Defendant was sentenced to the Nevada Department of Corrections ("NDC") as follows: as
11 to COUNT 1 – 48 to 120 months and as to COUNT 2 – Life with the possibility of parole, plus
12 an equal and consecutive term for the use of a deadly weapon, to run consecutive to COUNT
13 1. Defendant's Judgment of Conviction was filed on December 2, 1999.

14 Defendant filed a Notice of Appeal on December 14, 1999. The Nevada Supreme Court
15 affirmed Defendant's conviction on February 7, 2001. Nasby v. State, No. 35319 (Order of
16 Affirmance, Feb. 7, 2001). Remittitur issued on March 6, 2001.

17 On January 30, 2002, Defendant filed a Post-Conviction Petition for Writ of Habeas
18 Corpus. The State filed a Response on April 5, 2002. On March 27, 2006, the Court denied
19 Defendant's Petition. Defendant filed a Notice of Appeal on April 12, 2006. The Court filed
20 its Findings of Fact, Conclusions of Law and Order on April 26, 2006, and its Notice of Entry
21 on April 27, 2006. On June 18, 2007, the Nevada Supreme Court affirmed the Court's denial
22 of Defendant's first Petition. Nasby v. State, No. 47130 (Order of Affirmance, June 28, 2007).
23 Remittitur issued on July 13, 2007.

24 Defendant filed his second Post-Conviction Petition for Writ of Habeas Corpus on
25 February 18, 2011. The State responded on April 8, 2011. The Court denied Defendant's
26 second Petition as procedurally barred on May 11, 2011. The Court filed its Findings of Fact,
27 Conclusions of Law on June 17, 2011. Defendant filed a Notice of Appeal on June 13, 2011,
28 with the Nevada Supreme Court affirming the decision of the district court on February 8,