IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Aug 11 2020 11:38 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

BRENDAN JAMES NASBY,
Appellant(s),

vs.

THE STATE OF NEVADA,
Respondent(s),

Case No: A-19-788126-W

Docket No: 81484

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

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

I N D E X

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

I N D E X

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IN THE EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

FILED
JAN 11 2019
CLERK OF COURT

* * * * *

Brendan James Nasby, Petitioner,	Case No. A-19-788126-W
vs.	Dept. No. Dept. XIX
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

JURISDICTION.

The Petitioner, Brendan James Nasby, is presently imprisoned at: Lovelock Correctional Center, Pershing County, Nevada.

Petitioner's petition challenges present custody and attacks a void judgment.

GROUNDS PRESENTED

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

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I. STATEMENT OF THE CASE.

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

On January 30, 2002, Nasby filed a post-conviction petition for writ of habeas corpus in this Court.[2] This Court denied the petition on March 27, 2006. An Order to that effect was filed on, or about, April 26, 2006. Nasby appealed the denial of the petition to the Nevada Supreme Court, which upheld the denial on June 18, 2007. Nev. Sup. Ct. No. 47130.

On February 18, 2011, after being granted a stay of proceedings in his federal habeas action (fed. Dist. Ct. No. 3:07-cv-00304-LRH)[1], Nasby filed a second post-conviction habeas petition in this Court, which denied the petition as time and procedurally barred, and subject to laches. Case No. C154293-2. On February 8, 2012, the Nevada Supreme Court affirmed the denial of Nasby's second petition. Nev. Sup. Ct. No. 58579.

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

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

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

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

What followed is the instant petition.

II. STATEMENT OF FACTS

At the time of Nasby's trial, the law announced in Karalyn v. State, 108 Nev. 67, 75; 822 P.2d 578, 583 (1992), applied to First Degree Murder cases. Karalyn's interpretations of

NRS 200.030(1)(a) made the element of deliberation synonymous with the element of premeditation, which thus required only premeditation be defined for a jury. In turn, the State need only prove premeditation, while the elements of willfulness and deliberation automatically inferred. Under Kazalyn, a jury was not required to find the distinct element of deliberation, but only premeditation. In instructing the jury on premeditation at Nasby's trial, the Court used instructions consistant with the law of Kazalyn, known as the "Kazalyn Instructions". Specifically, the Kazalyn instruction instructs the jury that a killing resulting from premeditation is willful, deliberate, and premeditated murder, and then defines only premeditation. See (Jury Instruction No. 12). At trial, defense counsel objected to this instruction, instead offering, Defense "A". (T.T. Vol. VI, pg. 3). The Court rejected Defense "A". (T.T. Vol. VI, pg. 5). The jury was also given an instruction for Second Degree Murder, which stated that, "all murder that is not first degree, is second degree." See (Jury Instruction No. 13). The jury ultimately concluded Nasby was guilty of conspiracy to commit murder, and First Degree Murder with the use of a deadly weapon. He was later sentenced to 4 to 10 yrs. for the conspiracy, and two consecutive terms of 20 yrs. to Life for the murder with the use of a deadly weapon. The Judgment of Conviction was filed on December 2, 1999.

Nasby appealed, but before his Opening Brief was filed, the Nevada Supreme Court decided Byford v. State, 994 P.2d 700, 116 Nev. 215 (2000). In Byford, the court said that "deliberation remains a critical element of the mens rea necessary for first-degree murder". Id. at 235-36. "In order to establish first-degree murder, the premeditated killing must also have been done deliberately". Id. Byford then goes on to say that "[b]ecause deliberation is a distinct element of mens rea for first-degree murder, we direct the district courts to cease instructing juries that a killing resulting from premeditation is 'willful, deliberate, and premeditated murder.' Further, if a jury is instructed seperately on the meaning of premeditation, it should also be instructed on the meaning of deliberation." Id. Byford then set forth new instructions to be provided to the jury

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

On Direct Appeal, Nasby raised the claim that, "The Court Failed To Instruct The Jury On Willfulness, Deliberation, and Premeditation (Inst 12)". In this claim, Nasby argued that the decision in Byford applied to his case. The Nevada Supreme Court, citing to Bridge v. State, 11 Nev. ___, 6 P.3d 1000 (2000) and Garner v. State, 116 Nev. ___, 6 P.3d 1013 (2000), erroneously rejected Nasby's Kazalyn/Byford claim for the sole reason that, "Nasby was tried prior to the decision in Byford."[3]

In 2008, the Nevada Supreme Court decided Nika v. State, 124 Nev. 1272, 198 P.3d 839 (2008). In Nika at P.3d 850, the Court said that: 1) Byford announced a change of law; 2) that it erroced in Garner, supra; 3) that it overruled Garner to the extent that Garner declined to apply Byford to cases pending on direct appeal; 4) that, as a matter of due process, the change in law announced in Byford does apply to cases that were not final when Byford was decided; and 5) due process requires the conviction be set aside.

As Nasby's case is one that was pending on direct appeal, and not final, at the time Byford was decided — the decision in Byford, per Nika, applied to Nasby's case.

While on appeal from the denial of his fourth post-conviction petition, Nasby raised five issues in his appeal brief. The first issue was raised ~~on appeal~~ for the first time on appeal, and was: "The 8th Judicial District Court Lacked Jurisdiction And Authority." This brief was filed on December 23, 2016, and argued that the Nevada Supreme Court's Nika decision retroactively divested this court of its jurisdiction to try and convict Nasby of 1st degree murder under the law of Kazalyn. The Court of Appeals failed to address this issue in its order of affirmance. Nev. Sup. Ct. No. 70626. After being informed of the U.S. Sup. Ct.'s ruling in Montgomery v. Louisiana, 136 S. Ct. 718, 193 L.Ed.2d 599 (2016), Nasby asserted the ruling in his NRAP 40 Petition

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.

For Rehearing, on July 28, 2017. See (NRAP Rule 40 Petition, Nev. Sup. Ct. No. 70626). Nasby repeated this in his NRAP 40B Petition for Review By The Supreme Court. See (NRAP Rule 40B Petition, pg. 7, ln. 8-12, Nev. Sup. Ct. No. 70626). Both of Nasby's Rule 40 and Rule 40B petitions were denied without explanation.

III. ARGUMENT.

A. This Petition Can Not Be Barred.

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

1) Nasby Is Challenging The Existence Of A Valid Judgment Of Conviction, Under NRS 34.360, 34.480, and 34.500(3) — Not The Validity Of That Judgment Of Conviction.

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

When interpreting NRS 34.720, the Supreme Court held that it was evident from Nevada's statutory scheme that when a habeas corpus petition seeks relief from a conviction or sentence, then a post-conviction petition for writ of habeas corpus is the exclusive remedy. McConnell v. State, 125 Nev. 246, 248; 212 P.3d 307, 310 (2009).

The Supreme Court also held that, "[A]ny remedy that [. . . .] allows a person to raise a claim that is outside the scope of a post-conviction petition for writ of habeas corpus is not subject to the exclusive remedy language in NRS 34.724(2)(b) regardless of whether the remedy is or is not incident to the proceedings in the trial court." Harris v. State, 329 P.3d 619 (Nev. 2014), at Fn. 1.

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

of substance ~~and~~ required by law, rendering it void. (NRS 34.500(3)). That process being void, Nasby has no valid Judgment of Conviction or sentence to request relief from. (NRS 34.720). As a result, there is no legal cause for Nasby's imprisonment and he is entitled to release on habeas corpus. (NRS 34.490). See Also - Re Smith, 35 Nev. 80, 123; 126 P. 655 (1912) ("A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment.").

On the face of the record, it is clear that Nasby was tried under an inapplicable law (Kuzalyn's interpretation of NRS 200.030(1)(a)), when, per Nika, the required application was Byford's interpretation of NRS 200.030(1)(a). The only real question is — was the change in law announced in Byford a new substantive rule? Based on Nevada and U.S. Supreme Court precedence, Nasby answers, "Yes."

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

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

"Either a judgment is void or it is valid. Determining which it is may well present a difficult question, but when that question is resolved, the court must act accordingly." Garcia v. Ideal Supply Co., Inc., 110 Nev. 493, 495-96; 874 P.2d 752, 753 (1994). "By the same token, there is no time limit on an attack on a judgment as void . . . Even the requirement that the [petition] be made within [one year], which seems literally to apply . . . cannot be enforced with regard to this class of [petition]. 11 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 2862 (1973)." Id.

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

In Re Center Wholesale, Inc., 759 F.2d 1440, 1448 (9th Cir. 1985) "[I]f a judgment is void, a [petition] to set it aside may be brought at anytime". Id. at 1448." Moreover, a void judgment cannot acquire validity because of laches". Id. No passage of time can make valid, a void judgment. Therefore, any delay in Nasby bringing his petition "is irrelevant and the [petition] was timely." Id.

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

Montgomery v. Louisiana, 136 S. Ct. 718, 193 L.Ed.2d 599 (2016), was decided in mid-2016, published soon after, and made available to Nevada prisons some time after publication. When Nasby was informed of the case, in approximately July 28, 2017, his case was pending on appeal. This Court would not have jurisdiction to entertain Nasby's petition until the remittitur was issued by the appellate court. However, Nasby attempted, and did assert, the application of Montgomery and Welch v. U.S., 578 U.S. ___, 194 L.Ed.2d 387 (2016) in a petition for rehearing filed in the Court of Appeals. (Nev. Sup. Ct. No. 70626.) Thus, Nasby asserted the Montgomery and Welch cases within one year of their availability, or more accurately accessability, to him. Since remittitur was issued on Nasby's fourth petition, on May 18, 2018, only 8 months had past. Then, Nasby's fifth petition, which was originally filed as a NRS 34.360 petition in the 11th Jud. Dist. Ct. then transfered to this Court and construed as a NRS 34.724 petition under his orginal case number, was also pending on appeal since June 27, 2017 up until remittitur was issued on November 16, 2018. (Nev. Sup. Ct. No. 73412). Not even two months had past since this Court could retain jurisdiction of Nasby's case and the instant petition. See - Rippo v. State, 132 Nev. Adv. Op. 11, 2016 Nev. LEXIS 92, at *24 (2016); and Hathaway v. State, 119 Nev. 252 (2003).

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

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

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

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

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

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

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

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

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

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

in Yates v. Evatt, 500 U.S. 391, 414; 114 L.Ed.2d 432, 455; 111 S.Ct. 1884 (1991), saying:

"Given the nature of the instruction here, then, to determine from the 'entire record' that the error is 'harmless' would be to answer a purely hypothetical question, viz., whether, if the jury had been instructed correctly, it would have found that the State proved the existence of [deliberation] beyond a reasonable doubt. Such a hypothetical inquiry is inconsistent with the harmless-error standard announced in Chapman v. California, 386 U.S. 18, 24, 17 L.Ed.2d 705, 87 S.Ct. 824, 24 ALR3d 1065 (1967), and reiterated by the Court today. '[T]he issue under Chapman is whether the jury actually rested its verdict 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 Ballenbach 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 whether guilt has been found by a jury according to the procedure and standards appropriate 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 satisfaction of a jury."

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

"'If jury instructions omit an element of the offense, constitutional error results because the jury has been precluded from finding each fact necessary to convict a defendant.' Martinez v. Borg, 937 F.2d 422, 424 (9th Cir. 1991). Such an error cannot be harmless. Under recent Supreme Court authority, we may no longer consider the strength of evidence and determine whether it was so clear that the jury would have found the element of a crime to exist, had it been properly instructed, but instead, we must determine whether the jury was actually able to consider that evidence under the instructions given by the court. When proof of an element has been completely removed from the jury's determination, there can be no inquiry into what evidence the jury considered to establish that element because 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 effectively instructed to disregard the [deliberation] element of the offense. Sullivan v. Louisiana, 124 L.Ed.2d 182, 113 S.Ct. 2078, 2082 (1993)."

d. The Error Is Plain.

"Had the members of the jury been correctly instructed in this case, they could have [returned a guilty verdict for 2nd degree murder.]" Hicks v. Oklahoma, 447 U.S. 343, 346; 65 L.Ed.2d 175, 180; 100 S.Ct. 2227 (1980). "The possibility that the jury would have returned a [verdict of 2nd degree murder instead of the 1st degree murder it did return] is thus substantial. It is, therefore, wholly incorrect to say 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 700, 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, 198 P.3d 839, 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 820, 59 P.3d at 472. As the Supreme Court noted in Schriro 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

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

So, as acknowledged by Nevada, and the United States Supreme Courts, changes in law, such as Byford, are described normally as "new substantive rules." Nika making Byford retroactively applicable to Nasby's case, means that, because Nasby was convicted under the law of Kazalyn, which is clearly contrary to the law of Byford, Nasby's conviction and sentence were imposed in violation of a substantive rule.

Thus, Nasby's Judgment Of Conviction and sentence, are void, and this Court must relieve him of his unlawful confinement — as it has no authority to leave it in place. Montgomery, supra.

IV. CONCLUSION.

Wherefore, Nasby respectfully request this Court: ① Grant his petition for Writ of Habeas Corpus; ② Order relief from his unlawful imprisonment per NRS 34.360 to 34.680, inclusive; and ③ Whatever else this Court deems full and fair.

EXECUTED at Lovelock Correctional Center, on this 7th day of January, 2019.

By: [signature]
Brendan Nasby #63618
Lovelock Corr. Ctr.
1200 Prison Rd.
Lovelock, NV 89419
(Petitioner In Pro Se)

V. VERIFICATION.

Under penalty of perjury, the undersigned declares that he is the petitioner, "Nasby" named in the foregoing "Petition For Writ Of Habeas Corpus" and knows the contents thereof; that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and as to such matters he believes them to be true; and that the foregoing is rendered without notary per NRS 208.165.

Dated this 7th day of January, 2019.

By: Brendan Nasby #63618
(Petitioner In Proper)

VI AFFIRMATION PURSUANT TO NRS 239B.030

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

Dated this 7th day of January, 2019.

By: Brendan Nasby #63618
(Petitioner In Proper)

VII. CERTIFICATE OF SERVICE

I, Brendan Nasby, hereby certify that on this 7th day of January, 2019, I mailed to the clerk, and caused to be served by the Clerk's Electronic Filing/Service, the foregoing "Petition For Writ Of Habeas Corpus (NRS 34.360/34.480/34.500(3) - Attack On A Void Judgment) to:

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

2) 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 Proper)

FILED
JAN 11 2019
CLERK OF COURT

PIFP
Brendan Nasby #63618
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419
Petitioner In Pro Se

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

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

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

APPLICATION TO PROCEED IN FORMA PAUPERIS

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

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

Dated this 7th day of January, 2019.

Brendan Nasby #63618
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419
Petitioner In Pro Se

A-19-788126-W
PIFP

RECEIVED
JAN 11 2019
CLERK OF THE COURT

LCL FORM 24.012
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. Aboutt $1,200.00 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

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.

Brandon D. Nasby #63618
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

Petitioner In Pro Se

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NAME & BACK # B. Nasby #63618

2A/24

Case No. _____

Dept. No. _____

RCVD IMBANK'18DEC12

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.

Keri Tilka

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

RECEIVED
JAN 11 2019
CLERK OF THE COURT

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

Petitioner In Pro Se

FILED
JAN 25 2019
CLERK OF COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

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

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

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 22 day of Jan, 2019.

District Court Judge BN

A-19-788126-W
OIFP

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CLERK OF THE COURT

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JAN 17 2019
CLERK OF THE COURT

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

Lovelock Correctional Center

U.S. POSTAGE PITNEY BOWES
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8th Jud. Dist. Ct.
Clark County Clerk
200 Lewis Ave.
Las Vegas, NV 89155-23-11

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JAN 3 0 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, 2019, at the hour of 8:30 A.M. o'clock for further proceedings.

District Court Judge

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CLERK OF THE COURT

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

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

FILED
FEB 05 2019
CLERK OF COURT

IN THE EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

* * * * *

Brendan James Nasby, Petitioner, v. Renee Baker (Warden), et al, Respondent.	Case No. A-19-788126-W Dept. No. 19 Date Of Hearing Time Of Hearing

MOTION FOR APPOINTMENT OF COUNSEL

COMES NOW, the Petitioner, Brendan James Nasby, proceeding in Pro Se, before this Honorable Court, in the above-captioned action, respectfully submitting this Motion For Appointment of Counsel.

This motion is made and based on NRS Ch. 34, the attached Points And Authorities, as well as, all other papers, pleadings, and documents on file within this case.

POINTS AND AUTHORITIES

I. STATEMENT OF FACTS.

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

2) The merits of the claim presented in Nasby's Petition, are of Constitutional dimension, and the substantive issues and procedural requirements of this

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CLERK OF THE COURT

case are difficult and incomprehensible to him.

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

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

5) Due to decisions made by the Nev. Dept. of Corr., Nasby is limited in his access to legal materials.

6) Nasby only has access to the material in the prison's law library, via institutional mail, using a paging system, which delays the reception of needed legal materials., e.g., On day1, an inmate may realize what he may need to order from the law library. He must wait until day2 to order that material in the morning. If the request was specific enough, he'll receive the requested materials, in the afternoon, on day3. He then must wait until day4 to request shepards of the received material. On day5, he'll receive the list of shepards cases. He'll have to wait until day6 to request some of the cases listed in the received shepards. On day7, he'll receive those requested cases. This is an example of how the process works when everything runs smoothly, but more often than not, an inmate will receive the wrong materials instead of the ones requested, or the requested materials are later discovered to be useless after reviewing them. This process is also extended due to the law library being closed on the weekends. To add, the fact that an inmate may only possess ten (10) items at one time, which includes right or wrong case cites, also prevents timely filings.

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

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

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

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

10) Prison legal assistants are not permitted to assist or give legal advice to inmates at LCC. Thus, not only is Nasby not allowed access to the prison law library and denied the assistance of someone trained in the law, but ~~these~~ inmates in a position to possibly assist him are not permitted to assist him.

11) Nasby is indigent, can not afford to pay for legal copies, and the prison has refused to make legal copies for him, because he has reach the prison's $100.00 copy-work-credit-limit.

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

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

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

II. ARGUMENT.

Discretion lies with the Court to appoint counsel under NRS 34.750. Crump v. Warden, 113 Nev. 293, 934 P.2d 247, 254 (1997). The Court is to consider: (1) the complexity of the issues; (2) whether Nasby comprehends the issues; (3) whether counsel is necessary to conduct discovery; and (4) the severity of Nasby's sentence.

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

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

The Nevada Supreme Court's decision in Rogers v. State, 267 P.3d 802, 127 Nev. Adv. Rep. 88 (2011) further supports the need for the appointment of counsel, when it ruled that, "District court abused its discretion in denying appellant's petition for a writ of habeas corpus without appointing counsel under Nev. Rev. Stat. § 34.750(1), because appellant moved for appointment of counsel, claimed he was indigent, and failure to appoint counsel prevented the meaningful litigation of appellant's petition." (emphasis added).

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

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

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

must know the specific case number or specific citation of any other materials to be reviewed." Koerschner v. Warden, 506 F. Supp. 2d 849, 856 (2007). "Over and above the difficulty of knowing specifically what to request in advance, it would be exceedingly difficult for anyone, much less, a lay inmate, to prepare and file meaningful legal papers to present constitutional claims under such restrictions on access to, retention, and use of supporting authority. Moreover, even for an inmate who knows what he needs to see in advance, he must attempt to convey his requests through and to persons who potentially have attained the reading level only of a freshman in highschool. Worse yet, if the inmate does not know what specific citations or materials to ask for in advance, his only recourse is to ask for assistance from a person who may only have a ninth grade reading level and a clean recent disciplinary record as his qualifications, who then will ask another similarly 'qualified' inmate in the not improbable event that he does not know the answer." Id. at 860. "The Court therefore is not sanguine that the Lovelock procedures satisfy the minimum constitutional standard under Bounds and Lewis of providing adequate access to the courts by assisting inmates 'in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.' The Lovelock procedures quite arguably provide the appearance of both but the substance of neither." Id. at 861. Dispite the admonishing of the Federal Court, the same conditions ~~exist~~ continued to exist in 2013 (See - Rose v. LeGrand, 2013 U.S. Dist. LEXIS 84750 at Fn. 2), and as Nasby has shown, these conditions exist today. However, in both Koerschner and Rose, the court ruled that these conditions warranted the appointment of counsel.

In regards to litigation following the initial filing of legal papers, such as a reply or a response to a motion to dismiss, the U.S. Supreme Court, in Bounds at 826 said:

> "Moreover, if the State files a response to a prose pleading, it will undoubtedly contain seemingly authoritative citations. Without a library, an inmate will be unable to rebut the State's argument. It is not enough to answer that the Court will

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

Further, in Gluth v. Ari. Dept. of Corr., 951 F.2d 1504, 1507-08 (9th Cir. 1991) the court said: "[I]f the state denies a prisoner reasonable access to a law library, the state must provide that prisoner legal assistance." (emphasis added).

So, although Nasby has no right to counsel in habeas corpus proceedings, the State, in light of its denial of adequate access to the prison law library and someone trained in the law, must provide Nasby with legal assistance. This Court has discretion to grant the appointment of counsel, and the U.S. Supreme Court explained that Nasby can seek "a lawyer" to remedy imminent injury (Harbury, supra). But even more to the point — This Court is charged with the duty of ensuring an indigent defendant meaningful access to the courts. Lewis v. Casey, 518 U.S. 343, 349 (1996); Bounds, at 828. And See - Missouri v. Jenkins, 515 U.S. 70, 88, 89, 137 LEd 2d 63, 115 S Ct. 2038 (1995) ("[T]he nature of the ..... remedy is to be determined by the nature and scope of the constitutional violation"). In this instance, the appropriate remedy would be to appoint counsel to represent Nasby. Not appointing counsel will only result in the continued denial of Nasby's fundamental constitutional right to meaningful access to the courts.

Although Nasby need only meet but one (1) of the enumerated criteria of NRS 34.750 in order to merit appointment of counsel, he meets all of them. He also presents a classic example of one meriting counsel under the interest of justice test bespoken by the 9th Circuit. Indeed, Nasby's sentence, coupled with the other factors set forth above, demonstrate that appointment of counsel to him would not only satisfy justice, but fundamental fairness, as well.

III. CONCLUSION.

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

Date this 31st day of January, 2019.

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

IV. AFFIRMATION PURSUANT TO NRS 239B.030.

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

Dated this 31st day of January, 2019.

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

V. CERTIFICATE OF SERVICE.

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

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

2) 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 Nasby #63618
Lovelock Correctional Center
1200 Prison Road
Lovelock, NV 89419

Lovelock Correctional Center

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8th Jud. Dist. Ct.
Steven D. Grierson, Clerk of the Court
200 Lewis Ave.
Las Vegas, NV 89155

INMATE LEGAL
MAIL CONFIDENTIAL
89101$6300C075

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Dept. XIX

District Court

MEMO

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.

Case No. A-19-798126-W

Dept. No. 19

IN THE EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

Brendan James Nksby,

Petitioner,

vs.

Renee Baker (Warden), et al.,

Respondent.

ORDER APPOINTING COUNSEL

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

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

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

IT IS SO ORDERED.

Dated this ___ day of _____, 2019.

_____

District Court Judge

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FEB 13 2019
CLERK OF THE COURT

Brendan Nasby
I.D. No. 69618
Lovelock Corr. Ctr.
1200 Prison Rd.
Lovelock, NV 89419
(Petitioner In Pro Se)

FILED
FEB 05 2019
CLERK OF COURT

IN THE EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

* * * * *

Brendan James Nasby, Petitioner, v. Renee Baker (Warden), et al., Respondent.	Case No. A-19-788126-W Dept. No. 19 Date Of Hearing Time Of Hearing

MOTION FOR APPOINTMENT OF COUNSEL

COMES NOW, the Petitioner, Brendan James Nasby, proceeding in Pro Se, before this Honorable Court, in the above-captioned action, respectfully submitting this Motion For Appointment of Counsel.

This motion is made and based on NRS Ch. 34, the attached Points And Authorities, as well as, all other papers, pleadings, and documents on file within this case.

POINTS AND AUTHORITIES

I. STATEMENT OF FACTS

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

2) The merits of the claim presented in Nasby's Petition, are of Constitutional dimension, and the substantive issues and procedural requirements of this

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CLERK OF THE COURT

case are difficult and incomprehensible to him.

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

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

5) Due to decisions made by the Nev. Dept. of Corr., Nasby is limited in his access to legal materials.

6) Nasby only has access to the material in the prison's law library, via institutional mail, using a paging system, which delays the reception of needed legal materials., e.g., On day1, an inmate may realize what he may need to order from the law library. He must wait until day2 to order that material in the morning. If the request was specific enough, he'll receive the requested materials, in the [redacted] afternoon, on day3. He then must wait until day4 to request shepards of the received material. On day5, he'll receive the list of shepards cases. He'll have to wait until day6 to request some of the cases listed in the received shepards. On day7, he'll receive those requested cases. This is an example of how the process works when everything runs smoothly, but more often than not, an inmate will receive the wrong materials instead of the ones requested, or the requested materials are later discovered to be useless after reviewing them. This process is also extended due to the law library being closed on the weekends. To add, the fact that an inmate may only possess ten (10) items at one time, which includes right or wrong case cites, also prevents timely filings.

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

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

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

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

10) Prison legal assistants are not permitted to assist or give legal advice to inmates at LCC. Thus, not only is Nasby not allowed access to the prison law library and denied the assistance of someone trained in the law, but [redacted] inmates in a position to possibly assist him are not permitted to assist him.

11) Nasby is indigent, can not afford to pay for legal copies, and the prison has refused to make legal copies for him, because he has reach the prison's $100.00 copy-work-credit-limit.

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

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

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

II. ARGUMENT

Discretion lies with the Court to appoint counsel under NRS 34.750. Crump v. Warden, 113 Nev. 293, 934 P.2d 247, 254 (1997). The Court is to consider: (1) the complexity of the issues; (2) whether Nasby comprehends the issues; (3) whether counsel is necessary to conduct discovery; and (4) the severity of Nasby's sentence.

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

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

The Nevada Supreme Court's decision in Rogers v. State, 267 P.3d 802, 127 Nev. Adv. Rep. 88 (2011) further supports the need for the appointment of counsel, when it ruled that, "District court abused its discretion in denying appellant's petition for a writ of habeas corpus without appointing counsel under Nev. Rev. Stat. § 34.750(1), because appellant moved for appointment of counsel, claimed he was indigent, and failure to appoint counsel prevented the meaningful litigation of appellant's petition." (emphasis added).

Nasby has a fundamental constitutional right to meaningful access to the courts, which requires the State to assist him in the preparation and filing of meaningful legal papers by providing him with adequate law libraries or adequate assistance from persons trained in the law. Bounds v. Smith, 430 U.S. 817, 52 L.Ed.2d 72 (1977).

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

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

must know the specific case number or specific citation of any other materials to be reviewed." Koerschner v. Warden, 506 F.Supp.2d 849, 856 (2007). "Over and above the difficulty of knowing specifically what to request in advance, it would be exceedingly difficult for anyone, much less, a lay inmate, to prepare and file meaningful legal papers to present constitutional claims under such restrictions on access to, retention, and use of supporting authority. Moreover, even for an inmate who knows what he needs to see in advance, he must attempt to convey his requests through and to persons who potentially have attained the reading level only of a freshman in high school. Worse yet, if the inmate does not know what specific citations or materials to ask for in advance, his only recourse is to ask for assistance from a person who may only have a ninth grade reading level and a clean recent disciplinary record as his qualifications, who then will ask another similarly 'qualified' inmate in the not improbable event that he does not know the answer." Id. at 860. "The Court therefore is not sanguine that the Lovelock procedures satisfy the minimum constitutional standard under Bounds and Lewis of providing adequate access to the courts by assisting inmates 'in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.' The Lovelock procedures quite arguably provide the appearance of both but the substance of neither." Id. at 861. Despite the admonishing of the federal court, the same conditions ~~exist~~ continued to exist in 2013 (See - Rose v. LeGrand, 2013 U.S. Dist. LEXIS 84750 at fn. 2), and as Nasby has shown, these conditions exist today. However, in both Koerschner and Rose, the court ruled that those conditions warranted the appointment of counsel.

In regards to litigation following the initial filing of legal papers, such as a reply or a response to a motion to dismiss, the U.S. Supreme Court, in Bounds at 826 said:

"Moreover, if the State files a response to a prose pleading, it will undoubtedly contain seemingly authoritative citations. Without a library, an inmate will be unable to rebut the State's argument. It is not enough to answer that the Court will

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

Further, in Gluth v. Ariz. Dept. of Corr., 951 F.2d 1504, 1507-08 (9th Cir. 1991) the court said: "[I]f the state denies a prisoner reasonable access to a law library, the state must provide that prisoner legal assistance." (emphasis added).

So, although Nasby has no right to counsel in habeas corpus proceedings, the State, in light of its denial of adequate access to the prison law library and someone trained in the law, must provide Nasby with legal assistance. This Court has discretion to grant the appointment of counsel, and the U.S. Supreme Court explained that Nasby can seek "a lawyer" to remedy imminent injury (Harbury, supra). But even more to the point — This Court is charged with the duty of ensuring an indigent defendant meaningful access to the courts. Lewis v. Casey, 518 U.S. 343, 349 (1996); Bounds, at 826. And See - Missouri v. Jenkins, 515 U.S. 70, 88, 89, 137 L.Ed.2d 63, 115 S.Ct. 2038 (1995) ("[T]he nature of the ..... remedy is to be determined by the nature and scope of the constitutional violation"). In this instance, the appropriate remedy would be to appoint counsel to represent Nasby. Not appointing counsel will only result in the continued denial of Nasby's fundamental constitutional right to meaningful access to the courts.

Although Nasby need only meet but one(1) of the enumerated criteria of NRS 34.750 in order to merit appointment of counsel, he meets all of them. He also presents a classic example of one meriting counsel under the interest of justice test bespoken by the 9th Circuit. Indeed, Nasby's sentence, coupled with the other factors set forth above, demonstrate that appointment of counsel to him would not only satisfy justice, but fundamental fairness, as well.

III. CONCLUSION.

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

Date this 31st day of January, 2019.

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

IV. AFFIRMATION PURSUANT TO NRS 239B.030.

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

Dated this 31st day of January, 2019.

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

V. CERTIFICATE OF SERVICE.

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

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

2) Brendan Nasby #63618
Care of LCC Law Librarian
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419
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By: Brendan Nasby #63618
(Petitioner In Pro Se)

Brendan Nasby #63618
Lovelock Correctional Center
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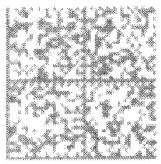
Lovelock Correctional Center



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Brendan Nasby
I.D.No. 63618
Lovelock Corr. Ctr.
1200 Prison Rd.
Lovelock, NV 89419
(Petitioner-In-Probe)

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27

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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A-19-788126-W
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Notice of Motion
4818652

A

Dept. XIX

District Court

MEMO

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 Nasby, 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 Nasby #63618
care of LCC Law Library
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1200 Prison Road
Lovelock, Nevada 89419
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By: Brendan Nasby #63618
(Petitioner In Pro Se)

Brendan Nasby #63618
Lovelock Corr. Ctr.
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Lovelock, NV 89419

Lovelock Correctional Center

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Lovelock Corr. Ctr.
1200 Prison Rd.
Lovelock, NV 89419
(Petitioner In Pro Se)

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27

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 Date Of Hearing: March 25, 2019 Time Of Hearing: 8:30 A.M.

A-19-788126-W
NOTC
Notice
4822235

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 L.Ed.2d 387 (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, 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

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contrary to law and, as a result, void. See Siebold, 100 U.S., at 376, 25 LEd 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." [1]

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

Although the Court of Appeals ruled that Welch and Montgomery did not provide good cause to overcome the procedural bars on the ground that Byford did not announce a new constitutional rule, it said: "We note the district court erred by finding that Welch and Montgomery did not provide good cause to overcome the procedural bars on the ground that Byford did not announce a new substantive rule." [3] Thus, based on this statement, Welch and Montgomery do establish good cause on the ground that Byford announced a new substantive rule.

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

Dated this 7th day of March, 2019.

Respectfully Submitted,

By: Brendan Nasby #63618
(Petitioner In Proper)

Fn. 1. Petition, pg. 10, lns. 10-15.
2. Petition, pg. 6, lns. 7-11.
3. Branham, at Fn. 4.

CERTIFICATE OF SERVICE

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

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

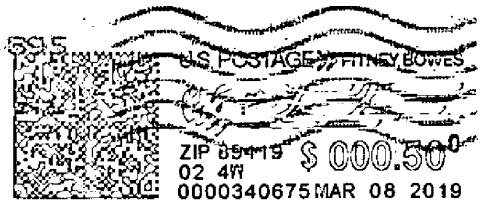
2) Brendan Nasby #63618
Care of LCC Law Librarian
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419
lcclawlibrary@doc.nv.gov

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

-3-

Brendan Nasby #636148
Lovelock Corr. Ctr.
1200 Prison Rd.
Lovelock, NV 89419

Lovelock Correctional Center RENO NV 895



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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
(98C154293-2)

DEPT NO: XIX

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

DATE OF HEARING: March 25, 2019
TIME OF HEARING: 08:30 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 Response to Defendant's Petition For Writ Of Habeas Corpus (Post-Conviction).

This 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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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ARGUMENT

I. DEFENDANT'S FIFTH PETITION IS PROCEDURALLY BARRED

A. The Procedural Bars are Mandatory

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

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

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

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

B. Defendant's Petition is Barred by Laches

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

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

C. Defendant's Motion is Time Barred

The mandatory provision of NRS 34.726(1) states:

> Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed ***within 1 year after entry of the judgment of conviction*** or, if an appeal has been taken from the judgment, ***within 1 year after the 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:

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

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

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

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

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

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

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

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

> 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, the instant Petition must be denied.

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

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

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

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

A-19-788126-W
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Reply
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IN THE EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

Brendan Nasby, Petitioner, vs. Renee Baker (Warden) et.al., Respondent.	Case No. A-19-788126-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 Judgment.

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.

On January 30, 2019, this Court issued its "Order For Petition For Writ Of Habeas Corpus", in which, this Court, after reviewing the petition "determined that a response would assist [it] in determining whether [Nasby] is illegally imprisoned and restrained of his [ ] liberty, and **good cause appearing** therefore," ~~and~~ ordered Respondent, "within 45 days after the date of its Order," to answer or otherwise respond to the Petition and file a return in accordance with the provisions of NRS 34.360 to 34.830, inclusive." The Court's order further ordered the matter be placed on the Court's calendar on March 25, 2019. See (Order For Petition For Writ Of Habeas Corpus).

On March 13, 2019, twelve (12) days before the Court's hearing on the petition and five (5) days before their 45 days were expired, the State filed its Response to the petition. Nasby was served the Response, by mail. It arrived at the prison on March 18, 2019, and was delivered to Nasby the following day, on March 19, 2019, six (6) days before the Court's hearing, including non-judicial days.

What followed is the instant pleading.

I. ARGUMENT.

A. Applicable Law.

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

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

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

defense or any redundant, immaterial, impertinent, or scandalous matter." NRCP 12(f).

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

B. The State's Affirmative Defenses Are Waived.

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

Although the State's response is, for the most part, a disguised boiler plate motion to dismiss, it is, nonetheless, the "State's Response To Defendant's Petition For Writ Of Habeas Corpus (Post-Conviction)", (Response, pg. 1), and not a Motion To Dismiss Petition. However, the exclusive remedy for the State to assert its affirmative defenses, is a pre-response motion to dismiss, and not a Response, in habeas corpus proceedings under NRS Ch. 34. See (NRS 34.800(2)). A pre-response motion to dismiss would allow Nasby due notice and the statutorily allotted 15 days to rebut, or respond to, the State's assertions. See (NRS 34.750(4)). Asserting affirmative defenses and arguments for dismissal in a Response to the Petition, only 12 days before the hearing, fails to provide Nasby the due notice and 15 days to respond, which he is entitled to. EDCR 2.20(h), won't even permit Nasby to respond, rebut, or reply, as nothing is to be filed within 5 days of the hearing. 15 days after

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

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

C. Reply To State's Response.

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

Fn. 1- Nasby also request this Court strike, or otherwise, disregard the "Statement of 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.

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

A statute, is its interpretation. Following Byford . . . . Kazalyn's definition of first-degree murder — ~~[illegible]~~ is no longer first-degree murder. Kazalyn's definition is now outside the scope of NRS 200.030(1)(a). In this instance, there is no difference between a conviction under an unconstitutional statute, and a conviction under an inapplicable interpretation of a statute, as neither is lawfully applicable from the very moment they are applied. See (Same Comparison in Montgomery v. Louisiana, 136 S.Ct. 718, 731-32; 193 L.Ed. 2d 599, 616-17 (2016)). And so it goes — "A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment." ReSmith, 35 Nev. 80, 123 (912) (quoting Ex parte Siebold, 100 U.S. 371, 25 L.Ed 717). Nasby has no judgment of conviction under Byford's interpretation of NRS 200.030(1)(a) which, per Nika v. State, 124 Nev. 1272, 198 P.3d 839, 850 (2008), applies to his case. This is why Nasby believes, he is not challenging the validity of his judgment of conviction or sentence — but instead, the very existance of a judgment of conviction. The lack of a judgment of conviction brings his petition squarely within the scope of a NRS 34.360 petition challenging a void judgment.

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

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

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

Furthermore, dictum from the Court Of Appeals of Nevada's decision in Branham v. Baca, 134 Nev. Adv. Rep. 99 (Dec. 13, 2018) is dispositive in this case.[2] Although the Court of Appeals ruled that Welch and Montgomery did not provide good cause to overcome the procedural bars on the ground that Byford did not announce a new constitutional rule, it said: "We note the

Fn. 2 - In a March 12, 2019 "Notice To The Court," filed in this Court and served on Respondent, Nasby requested the Court take Notice of the dictum in this case and consider it in the instant action.

district court erred by finding that Welch and Montgomery did not provide good cause to overcome the procedural bars on the ground that Byford did not announce a new substantive rule." Branham, at Fn1. Thus, based on this statement, Welch and Montgomery do establish good cause on the ground that Byford announced a new substantive rule.

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

D. If Necessary, NRCP 59(e) Relief Is Warranted.

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

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

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

II. CONCLUSION.

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

Dated this 26th day of March, 2019.

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

III. VERIFICATION.

Under penalty of perjury, the undersigned declares that he is the petitioner "Nasby" named in the foregoing "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" and knows the contents thereof; that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and as to such matters he believes them to be true; and that the foregoing is rendered without notary per NRS 208.165.

Dated this 26th day of March, 2019. By: Brendan Nasby #63618
(Petitioner In Pro Se)

IV. AFFIRMATION PURSUANT TO NRS 239B.030.

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

Dated this 26th day of March, 2019.

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

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; NRCP 12(f) Motion To Strike; And If Necessary, NRCP 59(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. THOMAN
Chief Deputy District Attorney
Nevada Bar #012649
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney For Respondent.

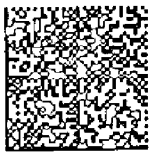
3) Brendan Nasby #63618
Care of LCC Law Librarian
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419
lcclawlibrary@doc.nv.gov

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

[redacted]-10-

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

Lovelock Correctional Center



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

FILED
APR 01 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 PLEADING

Please take notice that the hearing on Petitioner's "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" will be heard on _____, 2019 in Department _____ Floor _____ Courtroom _____ at the hour of _____ AM/PM.

Dated this 26th day of March, 2019.

Brendan Nasby #63618
(Petitioner In Pro Se)

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DISTRICT COURT

CLARK COUNTY, NEVADA

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Brendan Nasby, Plaintiff(s)	Case No.: A-19-788126-W
vs.	Department 19
Renee Baker Warden, Defendant(s)	

NOTICE OF CHANGE OF HEARING

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

STEVEN D. GRIERSON, CEO/Clerk of the Court

By: /s/Michelle McCarthy
Michelle McCarthy, Deputy Clerk of the Court

CERTIFICATE OF SERVICE

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

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

Brendan Nasby
LCC
1200 Prison Road
Lovelock NV 89419

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

Steven B Wolfson

/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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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ARGUMENT

I. DEFENDANT IS NOT ENTITLED TO POST-CONVICTION COUNSEL

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

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

> [a] petition may allege that the Defendant is unable to pay the costs of the proceedings or employ counsel. If the court is satisfied that the allegation of indigency is true and the petition is not dismissed 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:
>
> (a) The issues are difficult;
>
> (b) The Defendant is unable to comprehend the proceedings; or
>
> (c) Counsel is necessary to proceed with discovery.

NRS 34.750.

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

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

CONCLUSION

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

DATED this 8th day of April, 2019.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #

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 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

FCL
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
CHARLES W. THOMAN
Chief Deputy District Attorney
Nevada Bar #12649
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

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

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

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

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FINDINGS OF FACT, CONCLUSIONS OF LAW

PROCEDURAL BACKGROUND

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

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

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

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

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

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

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

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

ANALYSIS

I. DEFENDANT'S FIFTH PETITION IS PROCEDURALLY BARRED

A. The Procedural Bars are Mandatory

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

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

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

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B. Defendant's Petition is Barred by Laches

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

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

C. Defendant's Motion is Time Barred

The mandatory provision of NRS 34.726(1) states:

> Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed ***within 1 year after entry of the judgment of conviction*** or, if an appeal has been taken from the judgment, ***within 1 year after the 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:

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

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

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

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

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

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

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

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

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

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

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

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

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

ORDER

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

DATED this 9th day of April, 2019.

DISTRICT JUDGE

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

BY
CHARLES W. THOMAN
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

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Steven D. Grierson
CLERK OF THE COURT

NEO

DISTRICT COURT
CLARK COUNTY, NEVADA

BRENDAN NASBY,

Petitioner,

vs.

RENEE BAKER WARDEN; ET AL,

Respondent,

Case No: A-18-788126-W

Dept No: XIX

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

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

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

STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Debra Donaldson
Debra Donaldson, Deputy Clerk

CERTIFICATE OF E-SERVICE / MAILING

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

☑ By e-mail:
Clark County District Attorney's Office
Attorney General's Office – Appellate Division-

☑ The United States mail addressed as follows:
Brendan Nasby # 63618
1200 Prison Rd.
Lovelock, NV 89419

/s/ Debra Donaldson
Debra Donaldson, Deputy Clerk

FCL
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
CHARLES W. THOMAN
Chief Deputy District Attorney
Nevada Bar #12649
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

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

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

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

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FINDINGS OF FACT, CONCLUSIONS OF LAW

PROCEDURAL BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ANALYSIS

I. DEFENDANT'S FIFTH PETITION IS PROCEDURALLY BARRED

A. The Procedural Bars are Mandatory

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

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

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

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B. Defendant's Petition is Barred by Laches

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

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

C. Defendant's Motion is Time Barred

The mandatory provision of NRS 34.726(1) states:

> Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed ***within 1 year after entry of the judgment of conviction*** or, if an appeal has been taken from the judgment, ***within 1 year after the 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:

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

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

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

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

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

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

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

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

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

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

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

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

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

ORDER

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

DATED this 9th day of April, 2019.

DISTRICT JUDGE

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

BY
CHARLES W. THOMAN
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
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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 In Pro Se)

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5/2/2019 12:20 PM
Steven D. Grierson
CLERK OF THE 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 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: Brendan James Nasby #63618
(Petitioner In Pro Se)

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. THOMAN
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)

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
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Steven D. Grierson
CLERK OF THE COURT

NEO

DISTRICT COURT
CLARK COUNTY, NEVADA

BRENDAN NASBY,

Petitioner,

vs.

RENEE BAKER WARDEN; ET AL,

Respondent,

Case No: A-18-788126-W

Dept No: XIX

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

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

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

STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Debra Donaldson
Debra Donaldson, Deputy Clerk

CERTIFICATE OF E-SERVICE / MAILING

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

☑ By e-mail:
Clark County District Attorney's Office
Attorney General's Office – Appellate Division-

☑ The United States mail addressed as follows:
Brendan Nasby # 63618
1200 Prison Rd.
Lovelock, NV 89419

/s/ Debra Donaldson
Debra Donaldson, Deputy Clerk

FCL
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
CHARLES W. THOMAN
Chief Deputy District Attorney
Nevada Bar #12649
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

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

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

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

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FINDINGS OF FACT, CONCLUSIONS OF LAW

PROCEDURAL BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ANALYSIS

I. DEFENDANT'S FIFTH PETITION IS PROCEDURALLY BARRED

A. The Procedural Bars are Mandatory

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

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

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

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B. Defendant's Petition is Barred by Laches

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

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

C. Defendant's Motion is Time Barred

The mandatory provision of NRS 34.726(1) states:

> Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed ***within 1 year after entry of the judgment of conviction*** or, if an appeal has been taken from the judgment, ***within 1 year after the 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:

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

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

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

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

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

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

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

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

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

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

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

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

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

ORDER

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

DATED this 9th day of April, 2019.

DISTRICT JUDGE

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

BY
CHARLES W. THOMAN
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

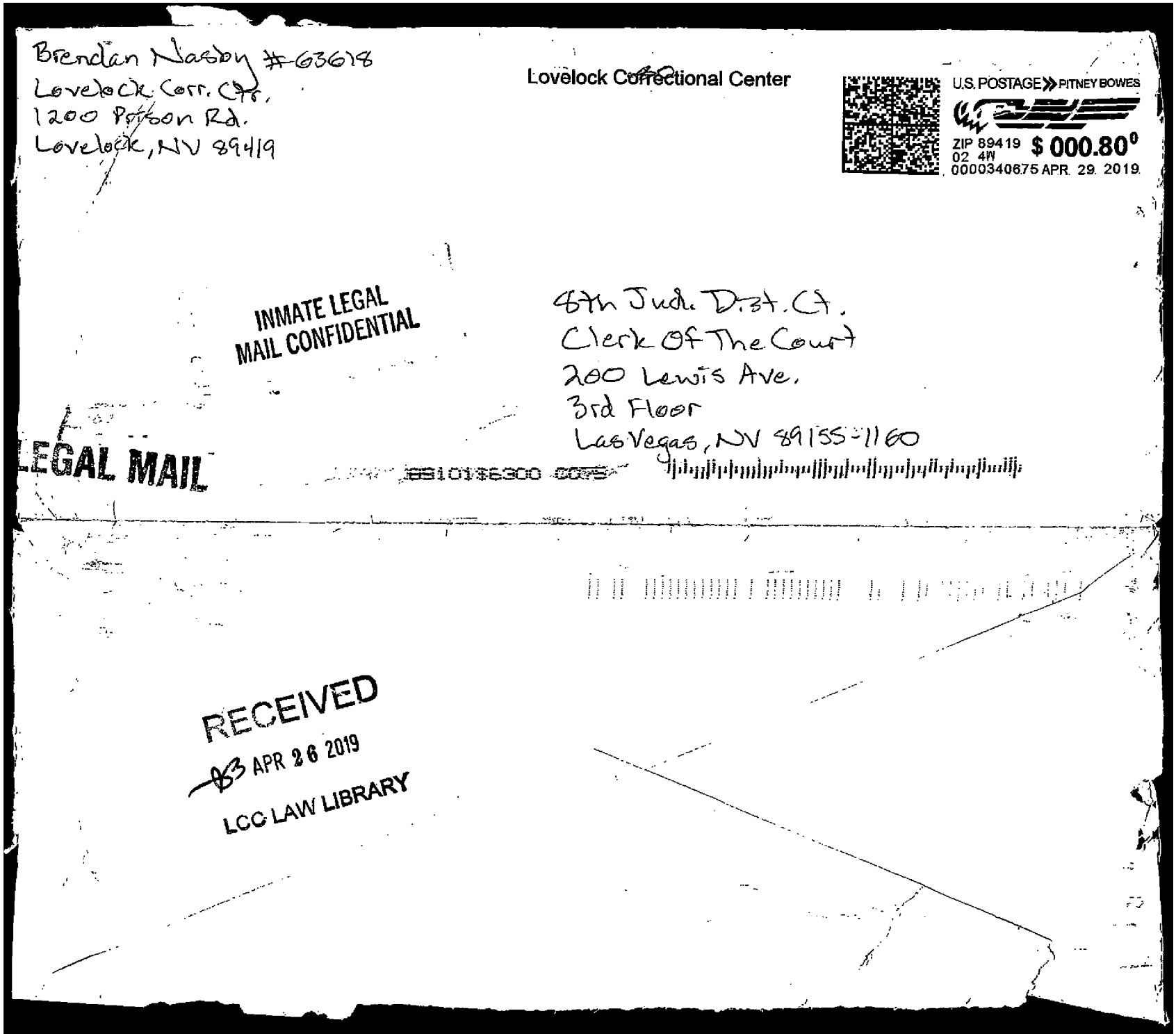
  Attorney: Zadrowski, Bernard B.

- 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.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Lovelock, NV 89419
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ASTA

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

BRENDAN JAMES NASBY,

Plaintiff(s),

vs.

RENEE BAKER (WARDEN),

Defendant(s),

Case No: A-19-788126-W

Dept No: XIX

CASE APPEAL STATEMENT

1. Appellant(s): Brendan James Nasby

2. Judge: William D. Kephart

3. Appellant(s): Brendan James Nasby

Counsel:

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

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

Counsel:

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

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

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

BRENDAN NASBY,

Plaintiff(s),

vs.

RENEE BAKER WARDEN; ET AL.,

Defendant(s).

Case No: A-19-788126-W

Dept No: XIX

CERTIFICATE OF RE-SERVICE

I HEREBY CONFIRM that the Notice of Entry of Findings of Fact Conclusions of Law and Order originally filed on April 15, 2019 has been served on the Office of the Clark County District Attorney and the Office of the Attorney General via electronic service.

All other respective party(ies) and their counsel(s), if any, have already received copies via U.S. Mail when initially filed.

Steven D. Grierson, Clerk of the Court

s/Debra Donaldson
Debra Donaldson, Deputy Clerk

Ungermann, Heather

From: Donaldson, Debra
Sent: Wednesday, July 24, 2019 10:10 AM
To: 'motions@clarkcountyda.com'; 'wiznetfilings@ag.nv.gov'; Ungermann, Heather
Subject: FW: Filing Accepted for Case: A-19-788126-W; Brendan Nasby, Plaintiff(s)vs.Renee Baker Warden, Defendant(s); Envelope Number: 4146760

From: efilingmail@tylerhost.net [mailto:efilingmail@tylerhost.net]
Sent: Monday, April 15, 2019 3:16 PM
To: Donaldson, Debra
Subject: Filing Accepted for Case: A-19-788126-W; Brendan Nasby, Plaintiff(s)vs.Renee Baker Warden, Defendant(s); Envelope Number: 4146760

Filing Accepted

Envelope Number: 4146760
Case Number: A-19-788126-W
Case Style: Brendan Nasby, Plaintiff(s)vs.Renee Baker Warden, Defendant(s)

The filing below was accepted through the eFiling system. You may access the file stamped copy of the document filed by clicking on the below link.

Filing Details	
Court	Clark District Criminal/Civil
Case Number	A-19-788126-W
Case Style	Brendan Nasby, Plaintiff(s)vs.Renee Baker Warden, Defendant(s)
Date/Time Submitted	4/15/2019 3:13 PM PST
Date/Time Accepted	4/15/2019 3:15 PM PST
Accepted Comments	Auto Review Accepted
Filing Type	Notice of Entry - NEO (CIV)
Filing Description	Notice of Entry of Findings of Fact, Conclusions of Law and Order
Activity Requested	EFile
Filed By	Debra Donaldson
Filing Attorney	

Document Details	
Lead Document	A788126.041519_neo_dd.pdf
Lead Document Page	11

Count	
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FEB 27 2020
CLERK OF COURT

IN THE EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

* * * * *

Brendan Nasby, Petitioner,	Case No. A-19-788126-W
vs.	Dept. No. Dept. XIX
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 - Facial Challenge To A Statute)

BRENDAN NASBY
I.D. NO. 63618
LOVELOCK CORRECTIONAL CENTER
1200 PRISON ROAD
LOVELOCK, NEVADA 89419
(PETITIONER IN PRO SE)

RECEIVED
FEB 27 2020
CLERK OF THE COURT

A-19-788126-W
PWHC
Petition for Writ of Habeas Corpus
4899579

JURISDICTION.

The Petitioner, Brendon Nasby, is presently imprisoned at: Lovelock Correctional Center, Pershing County, Nevada.

Petitioner's petition challenges present custody, is a facial challenge to the constitutionality of two statutes, and attacks a void judgment.

GROUNDS FOR RELIEF.

Ground One: Because The Law Under Which He Is Imprisoned Is Unconstitutional, Nasby's Conviction And Sentence Are Void, And There Is No Legal Cause For His Imprisonment.

I. STATEMENT OF THE CASE

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

On January 30, 2002, Nasby filed a post-conviction petition for writ of habeas corpus in this Court.[1] This Court denied the petition on March 27, 2006. An Order to that effect was filed on, or about, April 26, 2006. Nasby appealed the denial of the petition to the Nevada Supreme Court, which upheld the denial on June 18, 2007. Nev. Sup. Ct. No. #71302.

On February 19, 2011, after being granted a stay of proceedings in his federal habeas action (Fed. Dist. Ct. No. 3:07-cv-00304-LRH)[2], Nasby filed a second post-conviction habeas petition in this Court, which denied the petition as time and procedurally barred, and subject to laches. Case No. C154293-2. On February 9, 2013, the Nevada Supreme Court affirmed the denial of Nasby's second petition. Nev. Sup. Ct. No. 58579.

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

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

On January 5, 2016, Nasby filed his fourth post-conviction petition in this Court, Case No. 98C154293-2. On April 4, 2016, this Court denied Nasby's petition. An order to that effect was filed on May 9, 2016. Nasby appealed. The Court of Appeals issued its Affirmance on July 12, 2017. COA No. 70626. On February 27, 2018, Nasby filed his Petition For Writ of Certiorari in the U.S. Supreme Court. That petition was denied on March 14, 2018, and the Nevada Supreme Court issued its Remittitur on May 18, 2018.

On January 26, 2016, Nasby filed an NRS 34.360 petition in the 11th Jud. Dist. Ct. Case No. PI16-1002. The 11th Jud. Dist. Ct. transfered that petition to this Court on August 11, 2016. After construing the petition as one requesting post-conviction relief and assigning Nasby's original case number to it (Case No. 98C154293-2), this Court denied Nasby's petition on May 15, 2017. On June 27, 2017, Nasby filed his Notice of Appeal. The Court of Appeals Affirmed on August 14, 2018. COA No. 73412. On November 16, 2018, Remittitur issued.

On January 11, 2019, Nasby filed a Petition For Writ of Habeas Corpus, in this Court. Case No. A-19-785126-W. On March 25, 2019, this Court denied Nasby's petition. An order to that effect was filed on April 12, 2019. Nasby appealed. That appeal is currently pending in the Nev. Sup. Ct. Sup. Ct. No. 78744.

What followed is the instant petition.

II. STATEMENT OF FACTS.

A. Overview: At Nasby's trial, it was represented to the jury that, on the night of July 16, 1998, around 10:30 p.m., Nasby, Jeremiah Deskin (hereinafter "Deskin"), Jemmie Burnside, and Jotee Burnside, members of the L.A Crazy Rider's Gang, were at Nasby's home. Deskin, and the Burnside Brothers, drove to Michael Beasley's home at approximately 10:00 p.m. Michael Beasley (hereinafter "Beasley"), also a member of the L.A Riders, would ultimately be shot and killed in the desert that night. Deskin and the Burnsides found Beasley at his home. Deskin and the Burnsides lured

Beasley to go for a ride under the pretense that they would drive into the desert to shoot a new gun and smoke marijuana. Beasly asked his aunt to watch his son, while he went with his friends.

Deskin, and only Deskin, testified tentatively that in June of 1998, some conversation took place in which Nasby asked the gang members whether Beasley should be killed. The conversation allegedly took place approximately one month prior to Beasley's death. When directly asked whether he had a say about Beasley being killed, Deskin stated, "No, I was never asked." (T.T. Vol. III, pg. 78-79). Deskin testified that after picking up Beasley, the four men drove back to Nasby's home and picked him up, and then went into the desert. (T.T. Vol. III, pg. 94, ln. 8-11). Once the group arrived at the desert, Deskin testified that he saw Nasby shoot Beasley. (T.T. Vol. III, pg. 101, ln. 19-20). Then Deskin, the Burnsides, and Nasby drove back to Nasby's house. (T.T. Vol. III, pg. 109, ln. 2-5). Nasby has always maintained that he was not in the desert and that he was not involved in the murder for two weeks between the murder and Nasby's arrest, rumors were being spread and repeated about Nasby being the one who killed Beasley. These rumors continued to spread up until Nasby's trial, over a years later. (T.T. Vol. IV, pg. 22; Vol. V, pg. 21-22; Vol. V, pg. 155-68; Vol. III, pg. 230-31). This would explain how different people could tell similar stories which all, however, contain blatant falsities that are belied by the record.

Police interviewed both Burnside brothers, who both told the police that the shooter was Damien Vanlewis aka "Sugarbear". Charles Damien Vanlewis (hereinafter "Vanlewis"), was also a member of the L.A. Crazy Riders. (T.T. Vol. V, pg. 109, ln. 3; pg. 110, ln. 17; pg. 138, ln. 12-18). After negotiating deals with the State, the Burnsides changed their statements and implicated Nasby in the shooting, although they did not testify that they witnessed Nasby shoot anyone. (T.T. Vol. V, pg. 86-141).

On August 4, 1998, the police executed a search warrant on the Nasby residence. (T.T. Vol. IV, pg. 148). Nasby was arrested at that time. Nasby voluntarily showed Det. Bizek a nine millimeter pistol. (T.T. Vol. IV, pg. 153, ln. 9-16). Nasby told the officers that

he had purchased the weapon after the death of Beasley (T.T. Vol. IV, pg. 154, ln. 19-21). In fact, Dt. Buczek stated that Nasby was cooperative with him and not disruptive or violent in any way (T.T. Vol. IV, pg. 154, ln. 3-5).

The weapon was later identified as the murder weapon (T.T. Vol. V, pg. 29, ln. 8-19). At the scene of the crime, in addition to bullet casings, the crime scene analyst impounded 3 Winston cigarette butts and photographed 2 foot wear impressions (T.T. Vol. V, pg. 244, ln. 1-3; pg. 245, ln. 18-22; pg. 246, ln. 12-20). When police executed the search warrant to Nasby's home, the crime scene analyst impounded and photographed approximately 7 pairs of shoes (T.T. Vol. IV, pg. 74, ln. 10-20). The crime scene analyst also retrieved multiple cigarette butts from Nasby's home. They were Kools, Benson & Hedges, and a generic brand. No Winston cigarettes were found in Nasby's home. (T.T. Vol. IV, pg. 75, ln. 12; pg. 76, ln. 1). DNA test were ran on the Winston cigarettes recovered from the scene of the murder, and there was no match to Nasby, the Burnsides, Deskin, or Beasley (T.T. Vol. IV, pg. 161, ln. 1-2). Van Lewis was never tested for a match, although the presence of an unknown suspect's DNA at the scene of the crime is apparent.

B. More Pertinent Facts: On October 11, 1999 through October 19, 1999, Nasby's trial took place. 17 witnesses were called by the State. The following summarizes some of the evidence and witnesses put forth by the State to support its case-in-chief.

Deskin testified that there was a meeting a month prior to the killing, in which Nasby asked the members of the gang whether or not Beasley should be killed. When asked whether or not he had a say about Beasley being killed, Deskin replied, "No. I was never asked." When asked what the response was from the other gang members at the meeting, he responded that everyone else pretty much said that Beasley should not be killed (T.T. Vol. III, pg. 77-79). Deskin testified that he did not remember who, on July 16, 1998, said that the group was going to go out to the desert and shoot Beasley (T.T. Vol. III, pg. 82-83). Deskin testified that Nasby would forgive a

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$100 debt if Deskin picked up Beasley. (T.T. Vol. III, pg. 82, ln. 10-15). Later in Deskin's testimony, he is caught in two lies. One regarding the testimony about the reason why he participated in the crime being because he owed Nasby a $100 debt, and the other about whether or not he was a member of a Las Vegas gang which rivals Nasby's gang. Turns out, he was in a rival gang. (T.T. Vol. III, pg. 122-134) This is not an insignificant fact. Deskin was the only accomplice that testified that Nasby killed Beasley. Deskin testified that "someone" told him that they were going to say that they were going to pick up Beasley to smoke some weed and do some target shooting with Beasley's new gun, but he does not know who told him that. (T.T. Vol. III, pg. 84) Deskin, and only Deskin, testified that once the group was in the desert, and while Beasley was looking for something they could use as target practice, Nasby moved up from behind Beasley and shot him from behind; Beasley fell down to one knee, Nasby moved closer to him and shot him again; Nasby and his codefendants then got back into the car, but as the car was starting to turn around, Nasby exited the car, walked over to Beasley, stood over his head, and shot him a third time, this time in the head. (T.T. Vol. III, pg. 101-107). The fatal flaw in Deskin's testimony, is that it is belied by the record evidence. Beasley was only shot twice. Thus, Deskin ~~testimony~~ could not have witnessed Nasby shoot Beasley 3 times. If it had been rapid fire (Boom, Boom, Boom), maybe Deskin could have been mistaken about how many times Beasley was shot, but Deskin testified that he witnessed Nasby shoot Beasley 3 distinct times. Dr. Jordan was the coroner, and testified that Beasley was shot twice — once in the back, exiting the chest, and once in the head. Two shots, 3 wounds. (T.T. Vol. III, pg. 162 & 186). Deskin's testimony is blatantly false. For this blatantly false testimony, accomplice Deskin received a virtual slap on the wrist — the significantly lighter sentence of probation, with a suspended sentence of one to three years. This benefit was withheld from Deskin until after his false testimony as well. (T.T. Vol. III, pg. 138-40). The jury was also instructed that, "If you believe that a witness has lied about any material fact in the case you may disregard the entire testimony of that witness or any portion of his testimony which

is not proved by other evidence." (Jury Instruction No. 27).

Tommie Burnside, a ~~co~~codefendant, not only testified that there was never an agreement to kill Beasley (T.T. Vol. V, pg. 103-04), but that there was also no plan to pick up Beasley so that he could be taken into the desert and shot. (T.T. Vol. V, pg. 92-93). In fact, Tommie testified that the plan was only to go to the desert to do some target shooting and while there, ~~[illegible]~~ Beasley was shot. (T.T. Vol. V, pg. 112-13). Tommie testified that he, his brother Jotee, Nasby, Beasley, and Deskin drove to the mountains. He testified that Beasley was shot and that he, his brother, and Deskin did not shoot Beasley. He also testified that, on August 4, 1998, he gave a prior inconsistent statement implicating Sugar Bear as the shooter, and as the person who planned to kill Beasley. (T.T. Vol. V, pg. 111, ln. 12-15; pg. 110, ln. 7-17). He received 12 to 30 months for his involvement.

Jotee Burnside, a codefendant, testified that Nasby was not with the group when he, his brother, and Deskin picked up Beasley at his home. (T.T. Vol. V, pg. 121, ln. 15-18). He testified that he, Nasby, his brother, Deskin, and Beasley traveled to the desert. (T.T. Vol. V, pg. 122, ln. 10-12). He testified that he had given another version of the story to the police on August 4, 1998, in which he implicated Sugar Bear as the shooter. He received a sentence of 12 to 30 months for his involvement. (T.T. Vol. V, pg. 139, ln. 9-18). He also testified that he did not know that Beasley would be killed. (T.T. Vol. V, pg. 135).

Both Burnsides brothers originally told police that Vanlewis killed Beasley. After hearing about the deal the State made with Deskin for the false story he told. (T.T. Vol. V, pg. 132-33 & pg. 142-43), the Burnsides changed their statements and implicated Nasby. After the Burnsides were granted parole, but before their release, they were called by the State to testify at Nasby's trial. Prior to testifying, the State threatened to file contempt charges against ~~[illegible]~~ them and revoke their paroles, if they did not testify against Nasby. (T.T. Vol. V, pg. 113 & 139). Still, the Burnsides' testimony contradicts Deskin's, regarding premeditation and deliberation, and

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they were never asked if they saw Nasby shoot Beasley or if they saw [redacted] who shot Beasley.[3] Instead, the prosecutor finished their testimony for them in his closing argument, explaining that the reason they did not id. Nasby as the shooter was because they didn't want to be labled snitches. (T.T. Vol. VI, pg. 65-66).

Britny Adams, a member of the LA Crazy Riders, testified that on August 4, 1998 she gave a statement to police where she explains that Vanlewis confessed to her that he killed Beasley. (T.T. Vol. V, pg. 162-168). After being charged with 3 major felonies, one carrying a life sentence, Adams agreed to testify against Nasby in exchange for a plea deal that reduced the 3 felonies to one misdemeanor battery. (T.T. Vol. V, pg. 186-188). Adams testified to witness intimidation and also testified that Nasby insisted that she make her August 4, 1998 statement to police.

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

Taneesha Banks, former girlfriend of Beasley and mother of his child, testified that she was beaten up by Britny Adams on August 1, 1998, and that Adams told her to keep her mouth shut about Nasby (T.T. Vol. IV, pg. 22, ln. 1-22), as she was spreading the rumor of Crystal Bradley's false version of Beasley's death.

At the time of Nasby's trial, the law announced in Kazalyn v. State, 108 Nev. 67, 75; 82 P.2d 578, 583 (1992), applied to first-degree murder cases. Kazalyn's interpretation of NRS 200.030(1)(a) made the element of deliberation synonymous with the element of premeditation, which thus required the State to only prove premeditation, and under Kazalyn, a

Fn. 3 - As the DNA of an unknown (or untested) suspect was recovered at the scene of the crime, this omission in the Buenside's testimony is not insignificant.

jury was not required to find the distinct element of deliberation, but only premeditation. In instructing the jury on premeditation at Nasby's trial, the court used instructions consistent with the law of Kazalyn, known as the "Kazalyn Instructions". Specifically, the Kazalyn instruction instructs the jury that a killing resulting from premeditation is willful, deliberate, and premeditated murder, and then only defines premeditation. See - (Jury Instruction No. 12). At trial, defense counsel objected to this instruction, instead offering, Defense "A". (T.T. Vol. VI, pg. 3). The court rejected Defense "A". (T.T. Vol. VI, pg 5). The jury was also given an instruction for 2nd Degree murder, which stated that, "all murder that is not first degree, is second degree." See - (Jury Instruction No. 18). The jury ultimately concluded Nasby was guilty of conspiracy to commit murder, and first-degree murder with the use of a deadly weapon, as defined by Kazalyn. He was later sentenced to 4 to 10 yrs. for the conspiracy, and two consecutive terms of 20 yrs. to life for the murder with the use of a deadly weapon. The Judgment of Conviction was filed on December 2, 1999.

Nasby appealed, but before his Opening Brief was filed the Nev. Sup. Ct. decided Byford v. State, 994 P.2d 700, 116 Nev. 215 (2000). In Byford, the court said that "deliberation remains a critical element of the mens rea necessary for first-degree murder". Id. at 235-36. "In order to establish first-degree murder, the premeditated killing must also have been done deliberately." Id. Byford then goes on to say that "[b]ecause deliberation is a distinct element of mens rea for first-degree murder, we direct the district courts to cease instructing juries that a killing resulting from premeditation is 'willful, deliberate, and premeditated murder.' Further, if a jury is instructed seperately on the meaning of premeditation, it should also be instructed on the meaning of deliberation." Id. Byford then set forth new instructions to be provided to the jury in first-degree murder cases. Byford, 994 P.2d 700 at 714-15.

On Direct Appeal, Nasby raised the claim that, "The Court Failed To Instruct The Jury On Willfulness, Deliberation, And Premeditation. (Instr. 12)." In this claim,

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Nasby argued that the decision in Byford applied to his case. The Court, citing to Bridge v. State, 11 Nev. ___, 6 P.3d 1080 (2000) and Garner v. State, 116 Nev. ___, 6 P.3d 1013 (2000), erroneously rejected Nasby's Kazalyn/Byford claim stating: "Nasby's argument is without merit. Nasby was tried prior to the decision in Byford. As such, the Byford instructions were not required and the instructions that were given were sufficient." Nasby v. State, Docket No. 35319, Order Of Affirmance, pg. 6-7.

In 2008, the Nev. Sup. Ct. decided Nika v. State, 124 Nev. 1272, 198 P.3d 839 (2008). In Nika, at P.3d 850, this Court said that: 1) Byford announced a change of law; 2) that Byford was a matter of interpreting a state statute; 3) that it erroed in Garner, supra; 4) that it overruled Garner to the extent that Garner declined to apply Byford to cases pending on direct appeal; 5) that, as a matter of due process, the change in law announced in Byford does apply to cases that were not final when Byford was decided; and 6) due process requires the conviction be set aside.

As Nasby's case is one that was pending on direct appeal, and not final, at the time Byford was decided — the decision in Byford, per Nika, applied to Nasby's case.

In August 2015, Nasby was informed, by inmate "Kevin Sutton" at Lovelock Correctional Center, in Lovelock, Nevada, about the Nika decision. Upon researching the Nika case, Nasby filed his 4th post-conviction petition in this Court on January 5, 2016. Nasby's petition contained this one ground: "Petitioner's Due Process Rights, Under The 5th, 6th, And 14th Amendments, Were Violated Because The Change In Law Announced In Byford v. State, Was Not Applied To Petitioner's Case On Direct Review, And He Is Actually Innocent Of 1st Degree Murder." Nasby's petition was untimely filed. NRS 34.726(1). The petition was also successive. NRS 34.810. The petition was procedurally barred, absent a demonstration of good cause and actual prejudice. Moreover, because the State specifically plead laches Nasby was

required to overcome the rebuttable presumption of prejudice. NRS 34.800. In his 4th petition, Nasby claimed he had good cause to excuse the procedural bars based on the denial of meaningful access to the court resulting from inadequate access to legal materials and because he is actually innocent. He asserted he received flawed jury instructions on the element of first-degree murder because the jury was given the Kazalyn Instruction on premeditation and therefore, the State was not required to prove all three elements of first-degree murder beyond a reasonable doubt. He argued that because the State was not required to prove willfulness, deliberation, and premeditation, the State did not actually prove beyond a reasonable doubt, that he committed first-degree murder. He further asserted there was no testimony or argument presented regarding deliberation and without the State proving deliberation beyond a reasonable doubt, he is actually innocent of first-degree murder, because he is still presumed innocent of deliberation. Nasby pointed out that he objected to the jury instructions at trial, then raised the issue, both, on direct appeal and in his first post-conviction petition, but his claims were denied on the sole basis that the holding in Byford did not apply to him, because his conviction predates Byford. Nasby pointed out that that decision was also overruled by the Court's Nika decision. Nasby ~~points~~ also asserted he was unable to adequately argue good cause and prejudice to consider his jury instruction claim in his second post-conviction petition, ~~was~~ due to inadequate access to legal materials. He further asserted that due to inadequate access to legal materials, he only recently found out about the Court's Nika decision, which held Byford announced a new rule that must be applied to convictions, such as his, that were not final at the time Byford was announced. Finally, Nasby argued his jury instruction claim should not be barred by laches because he exercised due diligence by objecting to the instruction at trial, raising the claim on direct appeal, and then again in his first two post-conviction petitions, and the error in rejecting his prior claims is good cause for re-raising the

claim in his fourth petition. On April 4, 2016, this Court denied Nasby's 4th petition and Motion for appointment of counsel. This Court filed a rather boiler plate "Finding of Facts, Conclusions Of Law and Order", which was prepared by the State and miscored the State's Opposition to Nasby's petition, on May 9, 2016, inofwhich, the Court held that Nasby did not demonstrate good cause to overcome the time and procedural bars of NRS 34.726, NRS 34.800, and NRS 34.810. See-(Finding of Facts, Conclusions of Law and Order, filed 5/9/16).

On June 9, 2016, Nasby appealed. On December 23, 2016, Nasby filed his Opening Appeal Brief, inofwhich, he raised 5 issues. The Appellate Court, as well as the Nev Sup. Ct., denied Nasby's sequest for appointment of counsel, and later issued its Order of Affirmance on July 13, 2017. However, although this Court ruled that Nasby failed to show good cause, the appellate court, contrary to the district court's ruling, assumed that Nasby did demonstrate good cause, but then, sua sponte, searched the trial record and presented evidence, one assumes, pertaining to the element of deliberation. The court then determined that Nasby could not demonstrate prejudice or that a fundamental miscarriage of justice will result "because the evidence presented at trial was sufficient to establish beyond a reasonable doubt that the killing of the victim was premeditated and Nasby acted willfully and with deliberation when killing the victim". See-(Nasby v. State, COA No. 70676, Order of Affirmance, pg 4) The court effectively found the necessary element of first-degree murder (deliberation), sua sponte, and necessarily determined that the State met its burden of production, but neither speaks or implies, anything of the State's burden of persuasion. The court then cited to "Byford, 116 Nev. at 233-34, 994 P.2d at 712-13 (concluding that giving the Kazalyn instruction was not reversible error when the evidence was 'clearly sufficient' to establish all elements of first-degree murder)." See-(Order of Affirmance, pg. 5). Eccentially, the court necessarily implied that the State need not meet its burden of persuasion to obtain, and maintain, a conviction and that Nasby cannot demonstrate

prejudice or actual innocence, based on his presumption of innocence.

C. Facts Supporting Prejudice: As Nasby swore as true, and the Court of Appeals assumed, Nasby is a lay prisoner and has been without the assistance of counsel and without adequate access to an adequate law library, since 2007. Nasby admits that, while litigating his 4th petition, he did not know how to, or what evidence would, demonstrate the element of deliberation, until the Court of Appeals educated him in its order of affirmance. Although the State, as a matter of fortune, and according to the Court of Appeals, may have presented evidence of deliberation at Nasby's trial, all Nasby knew, was that the State, in prosecuting its case, did not argue the distinct element of deliberation, as it was not required at that time. This is why Nasby, in his 4th petition, argued that the State failed to prove or present any evidence of the deliberation element. See (Nasby v. State, COA No. 70626, Order of Affirmance, pg. 2). Because of the Legislature's failure to give clear guidance as to the meanings of the 3 necessary elements of NRS 200.030(1)(a), it was not until the Court of Appeals educated him that Nasby was actually given notice that the alleged conduct falls within the scope of the statute. Had Nasby had actual notice he may not have committed the alleged conduct, knowing its consequences; he may have had a better defense at trial; and he would have addressed the following when litigating his 4th petition:

1) Analyzing the facts in evidence to determine prejudice, there is at least sufficient equality in the evidence to require a finding of prejudice, and therefore reversal. In fact, the Court of Appeals' version of facts rely exclusively on the testimony of one of Nasby's codefendants, Mc Deskin. See (Nasby v. State, COA No. 70626, Order of Affirmance, pg. 4). But Deskin's testimony is contradicted by Nasby's other codefendants. And Deskin's testimony, on multiple counts, is contradicted by the record.

Only Deskin testified that: (a) there was a plan; and (b) Nasby hatched this all-

eged plan. But the record contradicts this. The record shows that Tommie Burnside testified that there was no agreement about anything. (T.T. Vol. V, pg. 103-04). Specifically, at the time they picked up Beasley, Tommie said, there was no plan to kill Beasley. (T.T. Vol. V, pg. 92-93). Tommie testified that the only plan was to go to the desert to do some target shooting and while there, Beasley was shot. (T.T. Vol. V, pg. 112-13). These facts not only contradict Deskin's testimony (including that Wesby planned Beasley's demise) but certainly negates any deliberation on the part of Wesby or anyone. The testimony of Tommie Burnside on this issue must be weighed at least equally with Deskin's testimony.

Moreover, Tommie originally told Detective Bucek that it was someone named Sugar Bear who came to him to ask if he thought Beasley should die, and that it was Sugar Bear who wanted Beasley killed and who ultimately shot Beasley. (T.T. Vol. V, pg. 110-11). Tommie later changed his story and testified at trial that Sugar Bear was not there at the time of the shooting. He clarified that this was the only change in his story, which means that his statements regarding Sugar Bear attempting to plan the fate of Beasley are unchanged. (T.T. Vol. V, pg. 110-13). In light of this change in his story, it is worth noting that Tommie testified that he took a plea bargain for accessory to murder and was sentenced to 12 to 36 months and had already been paroled at the time of his testimony. The District Attorney told him, and his brother Jotee Burnside, that if they did not testify, he could hold them in contempt, which would violate their parole. (T.T. Vol. V, pg. 113 & 139).

2) Contrary to Deskin's testimony, Jotee Burnside also testified that he was aware of no plan to kill Beasley that night. (T.T. Vol. V, pg. 135). Jotee also confirmed that when they were driving in the desert, he was not sure who had the gun. (T.T. Vol. V, pg. 131-35). The testimony of Jotee, when combined with the testimony of Tommie Burnside on this issue, is more than double the weight of Deskin's contrary testimony. This is important, because the U.S. Sup. Ct. has mandated that if the evidence is evenly balanced, then the Court must find reversible error.

O'Neal v. McAninch, 513 U.S. 432, 434-35 (1995). The result is that, considering the evidence at issue, the weight falls at least double against any finding of deliberation.

3) Deskin's own testimony contradicts itself. Deskin testified that no one called or orginized a meeting. (T.T. Vol. III, pg. 76-77). Deskin testified that he didn't remember who said that the group was going to pick up Beasley to smoke some weed and do some target shooting with Beasley's new gun, but he doesn't know who told him that. (T.T Vol. III, pg. 84).

4) Due to Jury Instruction #27, the jury may have disregarded Deskin's testimony, in whole or just in regards to deliberation. Jury Instr. #27 instructs the jury that if they "believe that a witness has lied about any material fact in the case, [they] may disregard the entire testimony of that witness or any portion of his testimony which is not proved by other evidence".

Deskin is caught in two lies. One, regarding the testimony about his motive for participating in the crime being because he owed Nasby a $100 debt, and the other about his denial about being in a Las Vegas gang which rivals Nasby's. (T.T. Vol. III, pg. 122-34). However, a lie more material to the case, is Deskin's testimony regarding the actual murder of Beasley. Deskin, and only Deskin, testified that he witnessed Nasby shoot Beasley THREE seperate and distinct times. (T.T. Vol. III, pg. 101-07). The Court of Appeals even determined that this is testimony that the jury heard. See - (Nasby v. State, COA No. 70626, Order of Affirmance, pg. 4). The fatal flaw in Deskin's testimony, is that it is belied by the record evidence. Beasley was only shot twice. Thus, Deskin could not have witnessed Nasby shoot Beasley three times. If it had been rapid fire (Boom-Boom-Boom), maybe Deskin could have been mistaken about how many times Beasley was shot, but Deskin testified that he witnessed Nasby shoot Beasley 3 distinct times — each time with its own distinct facts. Dr. Robert Jordan was the coroner, and testified that Beasley was shot twice — once in the back, exiting the chest, and once in the head. 2 shots —

3 wounds. (T.I.Vol. III, pg.167 & 186). Deskin's testimony is blatantly false. For this blatantly false testimony, that the Court of Appeals solely relied upon, accomplice Deskin received a virtual slap on the wrist — the significantly lighter sentence of probation, with a suspended sentence of one to three years. This benefit was withheld from Deskin until after he testified about what his attorney and Metro PD agreed on as well. (T.I.Vol. III, pg.138-40).

Accomplice testimony is already suspect, and Deskin's false testimony regarding the happenings of the murder & and other things, would have caused the jury to disregard Deskin's testimony in accordance with Jury Instn #27, "Jurors are presumed to follow the instructions that they are given." U.S. v. Olano, 507 U.S. 725, 740 (1993). However, the Kazalyn instruction prevents the jury from disregarding Deskin's testimony regarding deliberation. The State's evidence of deliberation is particularly weak and not so great that it precluded a verdict of 2nd degree murder. Chambers v. McDaniel, 549 F.3d 1191, 1200-01 (9th Cir. 2008).

5) A conclusion that this error was not harmless is further bolstered by the prosecutions heavy reliance on the instruction in his closing argument. The prosecutor read the premeditation instruction aloud (T.I.Vol. VII, pg.25), and erroneously reiterated that "2nd degree murder is all other murders still with malice aforethought, [...] but not with that added mixture of premeditation. The reason why we are here to ask you to find the defendant guilty of first degree murder is because the facts clearly indicated that this was a premeditated, willful act with malice aforethought to kill Michael Beasley." (T.I. Vol VII, pg.31). The prosecutor repeatedly argued to the jury that Nasby had engaged in premeditation — the only mens rea element that Kazalyn required it to find — through successive thoughts of the mind. (T.I.Vol. VII, pg.28-35). The prosecutor even gave examples, using movie scenes, and focusing on timing of the murders in these examples, demonstrating premeditation. (T.I.Vol. VII, pg.29-30). "[T]he court's instructions failed to identify as an independent element deliberation. Because the prosecutor relied on that failure in his closing argument, repeatedly returning to the language of the in-

struction itself in arguing the ~~[illegible]~~ premeditated murder theory [...] the error was not harmless. As we are in 'grave doubt', we conclude that [Nesby] was prejudiced." Riley v. McDaniel, 756 F.3d 719, 726-27 (9th Cir. 2015).

All other relevant facts are presented in the Argument, herein.

III ARGUMENT

A. This Petition Should Not Be Barred

As a preliminary matter — The strictures of NRS 34.726, 34.800, and 34.810 should not be a bar to this petition for the following reasons:

1) Nasby's Judgment Of Conviction Is Void.

"A void judgment, is "[a] judgment that has no legal force or effect, the invalidity of which may be asserted by any party whose rights are affected at any time and any place, whether directly or collaterally • from its inception, a void judgment continues to be absolutely null. It is incapable of being confirmed, ratified, or enforced in any manner or to any degree. One source of a void judgment is the lack of subject-matter jurisdiction." Black's Law Dictionary; Abridged 9th Ed.; Bryan A. Garner, Editor In Chief.

The provisions of NRS 34.720 to 34.830, inclusive, apply only to petitions for writs of habeas corpus in which the petitioner: Request relief from a judgment of conviction or sentence in a criminal case; or challenges the computation of time that he has served. (NRS 34.720 Scope of Provisions). When interpreting NRS 34.720, the Nevada Supreme Court held that it was evident from Nevada's statutory scheme that when a habeas corpus petition seeks relief from a conviction or sentence, then a post-conviction petition for writ of habeas corpus is the exclusive remedy. McConnell v. State, 125 Nev. 246, 248; 212 P.3d 307, 310 (2009).

The Supreme Court also held that, "[A]ny remedy that [. . .] allows a person to raise a claim that is outside the scope of a post-conviction petition for writ of habeas corpus is not subject to the exclusive remedy language in NRS 34.724(2)(b) regardless of whether the remedy is or is not incident to the proceedings in the trial court." Harris v. State, 329 P.3d 619, at Fn. 1 (Nev. 2014). NRS 34.724 is available if a petition challenges the validity of a conviction or sentence.

It appears that both NRS 34.720 and 34.724 presuppose a judgment of conviction. However, if the judgment of conviction is void, then there is no judgment of conviction or sentence to either request relief from or challenge the validity of. If the judgment of conviction is void, a post-conviction petition under NRS 34.720 or 34.724 is unavailable.

However, NRS 34.360 allows Nasby to prosecute a writ of habeas corpus to inquire

into the cause of his unlawful imprisonment. (NRS 34.360). Nasby's petition claims that he is in custody by virtue of process, from this Court, when the jurisdiction of the Court had been exceeded (NRS 34.500(1)); when the process is defective in some matter of substance required by law, rendering it void (NRS 34.500(3)); and where Nasby has been imprisoned on a criminal charge under a statute that is unconstitutional (NRS 34.500(8)). That process being void, Nasby has no Judgment of Conviction or Sentence to request relief from. (NRS 34.720). As a result, there is no legal cause for Nasby's imprisonment and he is entitled to release on habeas corpus (NRS 34.480). See Also - Re Smith, 35 Nev. 80, 123; 126 P. 655 (912) ("A conviction under it is not merely erroneous, but is illegal and void, and cannot be legal cause of imprisonment").

A challenge that a statute is unconstitutional on its face can be considered even when raised for the first time in habeas petitions because if a statute upon which a conviction is based in unconstitutional, it is void from its inception, is no law, confers no rights, bestows no power on anyone, and justifies no act performed under it. When a statute is unconstitutional, it is as if it had never been passed. Re Smith, supra. A challenge that a statute is facially unconstitutional affects the jurisdiction of a court to render judgment against a defendant. See Re Smith, 35 Nev. at 124-25. Stated more artfully, an unconstitutional statute is stillborn. A court does not annul the statute, for it was already lifeless. It had been fatally smitten by the Constitution at its birth. Hence, Nasby's continued confinement violates his right to due process, as the State is precluded from relying on a statute that is unconstitutional on its face.

Even if Nasby had to make his challenge in a NRS 34.720 & 34.724 petition, the strictures of NRS 34.726, 34.800, and 34.810 cannot be enforced, as an attack on a void judgment can be made at any time.

"Either a judgment is void or it is valid. Determining which it is may well present a difficult question, but when that question is resolved, the court must act accordingly." Garcia v. Federal Supply Co., Inc., 110 Nev. 493, 495-96; 874 P.2d 752, 753 (1994). By the same token,

there is no time limit on an attack on a judgment as void . . . Even the requirement that the [petition] be made within [one year], which seems literally to apply . . . cannot be enforced with regard to this class of [petitions]. 11 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 2862 (1973)." Id. "A judgment is not void merely because it is erroneous. It is void only if the court that rendered judgment lacked jurisdiction of the subject matter, or of the parties, or if the court acted in a manner inconsistent with due process of law. See 11 C. Wright & A. Miller, Federal Practice And Procedure § 2862 at 198-200 (1973) and cases cited therein." In Re Center Wholesale, Inc., 759 F.2d 1440, 1448 (9th Cir. 1985). "[I]f a judgment is void, a [petition] to set it aside may be brought at anytime." Id. at 1448. "Moreover, a void judgment cannot acquire validity because of laches." Id. No passage of time can make valid, a void judgment. Therefore, any delay in Nasby bringing his petition" is irrelevant and the [petition] was timely" Id.

Understandably, the procedural default rules are mandatory (State v. 8th Jud. Dist. Ct. (Riker), 121 Nev. 225, 231; 112 P.3d 1070, 1074 (2005)), and "[t]he necessity for a workable system dictates that there must exist a time when a criminal conviction is final." Id. However, there is "no legitimate expectation of finality in an illegal sentence." Miranda v. State, 114 Nev. 385, 386; 956 P.2d 1377, 1378 (1998). And, "no resources marshaled by a state [such as procedural bars] could preserve a conviction or sentence that the Constitution deprives the State of power to impose. See Mackey, 401 U.S. at 693, 91 S.Ct. 1160, 28 L.Ed.2d 404 (opinion of Harlan, J.) ("There is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose")." Montgomery v. Louisiana, 136 S.Ct. 718, 732; 193 L.Ed.2d 599, 617 (2016).

Therefore, Nasby's petition is either proper under NRS 34.360, or if proper under NRS 34.720 & 34.724, is not subject to the procedural bars.

2) Because The Statute Under Which Nasby Is Imprisoned Is Unconstitutional On Its Face, He Is Actually Innocent.

In the context of a claimed procedural default, a petitioner is excused from complying with State procedural requirements if he can make a persuasive showing that he is actually innocent of the charges against him, because to hold otherwise would effect a fundamental miscarriage of justice. See (Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

"Because the state law under which [he is imprisoned, is] unconstitutional, [Nasby] is by necessity actually innocent of a violation of the law.' It is well settled that if the statute under which appellant has been convicted is unconstitutional, he has not in the contemplation of the law engaged in criminal activity; for an unconstitutional statute in the criminal area is to be considered no statute at all.' Hiett v. United States, 415 F.2d 664, 666 (5th Cir. 1969), cert. denied, 397 U.S. 936, 25 L.Ed.2d 117, 90 S.Ct. 941 (1970). Although 'courts have framed the actual innocence factor differently, . . . the core idea is that the petitioner may have been imprisoned for conduct that was not prohibited by law.' Reyes-Requena v. United States, 243 F.3d 893, 903 (5th Cir. 2001). Here, [Nasby] has made a showing of actual innocence, because he cannot be held to have violated the facially unconstitutional statute upon which [his conviction] was based. See Hiett, 415 F.2d at 666; Reyes, 753 S.W.2d at 383-84; Jefferson v. State, 751 S.W.2d 502, 502-03 (Tex. Crim. App. 1988); Cartier, 2001 Tex. App. LEXIS 2828, 2001 WL 454532, at *2. [Being] unconstitutional [NRS 200.030(1)(a)] was 'void from its inception and conferred no right or benefit.' Reyes, 753 S.W.2d at 384. Clearly, 'the incarceration of one whose conduct is not criminal inherently results in complete miscarriage of justice.' Reyes-Requena, 243 F.3d at 904 (quoting Davis v. United States, 417 U.S. 333, 346, 41 L.Ed.2d 109, 94 S.Ct. 2298 (1974)). Consequently, to preclude [Nasby] from pursuing [state] habeas corpus relief would, in this context, effect a fundamental miscarriage of justice." Alexander v. Johnson, 217 F.Supp.2d 780, 792 (2001). Cf. Re Smith, 35 Nev. 80, 123, 126 P. 655 (1912) (the rule being settled here that [any person held in custody because charged with an act forbidden by an unconstitutional statute, will be discharged upon habeas corpus, it naturally follows that a person charged with the commission of an act which is not made criminal by any statute is at least as innocent as a person who has committed some act forbidden by an unconstitutional statute]).

Because the statute under which Nasby is ~~imprisoned~~ imprisoned is unconstitutional, Nasby, by necessity, is actually innocent of a violation of the law. As an unconstitutional law is no law and "[a] conviction under it is not merely erroneous, but is illegal and void, and cannot be legal cause of imprisonment." Re Smith, supra. Nasby cannot be held to have violated the facially unconstitutional statute. Clearly, Nasby's continued confinement for conduct not criminal results in a complete miscarriage of justice, and precluding Nasby from pursuing habeas corpus relief would effect a fundamental miscarriage of justice.

3) Good Cause And Prejudice.

"Generally, good cause means a substantial reasons; one that affords a legal excuse. In order to demonstrate good cause, a petitioner must show that an impediment external to the defense prevented him or her from complying with the state procedural default rules." Hathaway v. State, 119 Nev. 248, 252; 71 P.3d 503, 506 (2003). "An impediment external to the defense may

be demanstrated by a showing that some interference by officials made compliance impracticable." Id..

Nasby's only access to legal materials is by and through a paging system, in-which Nasby can only obtain legal materials by specifically requesting materials, via institutional mail. He is not allowed physical access to the prison's law-library, nor does Nasby have the assistance of someone trained in the law. Thus, Nasby has been denied meaningful access to the court. Bounds v. Smith, 430 U.S. 817, 828 (1977). The 9th Circuit, as well as federal courts here in Nevada, have already settled, in binding holdings, that a paging system, standing alone, fails to provide adequate assistance. See - Toussaint v. McCarthy, 801 F.2d 1080, 1109 (9th Cir. 1986); Beerheide v. Warden, 508 F. Supp. 2d 849, 859-60 (2007); Spann v. Garcia, 1993 U.S. Dist. LEXIS 19950 (D. Nev. 1994); Spann v. Garcia, 172 F.R.D. 418, 421 (D. Nev. 1996).

Nasby, being a lay-prisoner and pro se litigant, has a hard time developing and researching legal theories and whatnot. This becomes even more complicated by the State denying him access to the prison's law library. He is unable to browse through materials, make discoveries, compare legal theories, and the paging system requires him to know, in advance, what material he would need to request. Unless he is clairvoyant, Nasby could never request research materials about things he's never heard of.

It was not until, approximately October 2019, that Nasby was told, by another inmate, about the case "U.S. v. Davis", infra., and he read it, and as a result, developed the theories and arguments presented herein. Had it not been for this other inmate informing Nasby about this case, he never would have been able to develope the legal arguments and do the needed research on the seperation of powers doctrine and vagueness doctrine. Unfortunately, the State's chosen method of providing legal assistance is inadequate and Nasby was unable to present these claims in this petition until after another inmate pointed him

in this direction in October 2019. Thus, Nasby has demonstrated that the State has prevented discovery and development of the instant claims in this petition up until this point, which constitutes "official interference" Hathaway, supra.

Seeing that it is well understood that pro se prisoners will need more time exploring their cases than trained lawyers (Toussaint, infra), applying the same time and procedural bars to him, would be unfair under the circumstances, and conflict with the due process clause of the constitution. As the 9th Circuit said:

> "Ordinarily, a prisoner should have direct access to a law library if the state chooses to provide a prison law library as its way of satisfying the mandate of Bounds. Simply providing a prisoner with books in his cell, if he request them, gives the prisoner no meaningful change to explore the legal remedies that he might have. Legal research often requires browsing through various materials in search of inspiration; tentative theories may have to be abandoned in the course of research in the face of unfamiliar adverse precedent. New theories may occur as a result of a chance discovery of an obscure or forgotten case. Certainly a prisoner, unversed in the law and the methods of legal research, will need more time or more assistance than the trained lawyer exploring his case. It is unrealistic to expect a prisoner to know in advance exactly what materials he needs to consult." Toussaint v. McCarthy 801 F2d 1080, 1109-10 (9th Cir. 1986) (quoting Williams v. Leeke, 584 F.2d 1336 (4th Cir. 1978))

Nasby hopes that this Court, uses the same logic and analysis in the instant case.

As for the prejudice — Nasby incorporates the facts and arguments from the "Grounds For Relief" herein.

Clearly, if the statute in which Nasby is imprisoned under, is facially unconstitutional, he is imprisoned for the violation of a non-law, and this is the basic of the due process deprivations. Nasby cannot be imprisoned except for violation of a valid criminal statute.

So, whether this Court allows Nasby's petition to be prosecuted under NRS 34.360 or NRS 34.720 & 34.724, the petition should not be barred.

B. Grounds For Relief.

Ground One: Because The Law Under Which He Is Imprisoned Is Unconstitutional, Nasby's Conviction And Sentence Are Void, And There Is No Legal Cause For His Imprisonment.

"Since the decision of the Supreme Court of the United States, in Ex Parte Siebold, 100 U.S. 371, 25 L.ed 717, the state courts are following the rule there laid down that the constitutionality of a law under which a person is imprisoned or convicted, is a proper matter for consideration on habeas corpus, because 'an unconstitutional law is void, and is as no law. An offense created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment.' The same courts are following this rule for the sake of harmony; and the prevailing doctrine in state courts now is that the court will review, upon habeas corpus, the question of the constitutionality of an act or ordinance under which the petitioner has been convicted, or by virtue of which he is imprisoned; and, if such an act or ordinance is found to be unconstitutional, the prisoner will be discharged." Re Smith, 35 Nev. 80, 123, 126 P. 655 (1912).

Because the statute under which Nasby is imprisoned (NRS 200.030(1)(a)) relies on NRS 193.050(3) to function, Nasby's challenge is two pronged, attacking both NRS 193.050(3) and NRS 200.030(1)(a).

1. NRS 193.050(3) Is Unconstitutional And An Invalid Delegation Of Legislative Powers And Abdication Of Legislative Duties In Violation Of Art. 3 §1, Art. 6 Of The Nevada Constitution And The Separation Of Powers Doctrine.

NRS 193.050(3) reads: "The provisions of the common law relating to the definition of public offenses apply to any public offense which is so prohibited but is not defined, or which is so prohibited but is incompletely defined."

While common law crimes are abolished in Nevada (NRS 193.050(1)), section (3) of NRS 193.050 requires the Court to look to the common law[4], relating to the definition of crimes, and apply the common law definition when defining the crime, whenever the legislature has failed to define, or has incompletely defined, a crime. Ranson v. State, 99 Nev. 766, 767; 670 P.2d 574, 575 (1983). However . . . .

"It is axiomatic that the Legislature has the power to declare certain conduct criminal and provide for its punishment. As early as 1820, in United States v. Wiltberger, 18 U.S. 76, 95 (5 Wheat), Chief Justice Marshall declared: '[T]he power of punishment

Fn. 4 - Common Law is "The body of law derived from judicial decisions, rather than from statutes or constitutions; CASE LAW." Black's Law Dictionary, Abr. 9th Ed.; Bryan A. Garner, Ed. in Chief.

is vested in the legislative, not in the judicial department. It is the Legislature, not the Court, which is to define a crime, and ordain its punishment" Woofter v. O'Donnell, 91 Nev. 756, 758; 542 P.2d 1396, 1397 (1975); see also, Villanueva v. State, 117 Nev. 667, 668; 27 P.3d 443, 445 (2001).

Nesby wonders why the Legislature would ever write a law and not define, or only partially define, the crime it proscribes, when the Legislature's duty and function is to define a crime? Entirely, or partially, defining a crime, especially when defining a necessary element of a crime, is a non-judicial function, and the Constitution mandates that it not be done by the Court. Galloway v. Truesdell, 83 Nev. 13, 20-21; 422 P.2d 237, 242-43 (1967); also (Art. 3 § 1, Art. 6 § 6 of Nev. Const.) As such, the Legislature is powerless to add to a constitutional office, duties foreign to that office, or to change, alter, or modify its constitutional powers and functions. Galloway, 83 Nev. at 36; 422 P.2d at 246.

NRS 193.050(3) allows the Legislature to avoid its constitutional duty of completely defining crimes, and instead, requires the courts define what conduct fits within the scope of a statute's prohibition. Recently, the U.S. Supreme Court, while discussing the void-for-vagueness doctrine said:

> "In that sense, the doctrine is a corollary of the separation of powers — requiring that Congress rather than the executive or judicial branch, define what conduct is sanctionable and what is not. Id. at 358, n. 7, 103 S.Ct. 1855, 75 L.Ed.2d 903 ([I]f the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, [it would] substitute the judicial for the legislative department' (internal quotation marks omitted))." Sessions v. Dimaya, 584 U.S. ___; 200 L.Ed.2d 549, 557 (2018).

The Constitution assigns legislative authority to "The Legislature of the State of Nevada." Art. 4 § 1, Nev. Const. It is for the people, through their elected representatives, to choose the rules that will govern their future conduct. Meanwhile, the Constitution assigns to judges "judicial power" to decide "cases" and "controversies". Art. 6, Nev. Const. That power does not license judges to craft new laws to govern future conduct, but only to "discer[n] the course prescribed by law" as it currently exists and to "follow it" in resolving disputes between the people over past events. Osborn v. Bank of United States, 9 Wheat. 738, 866, 6 L.Ed. 204 (1824).

From this division of duties, it comes clear that legislators may not "abdicate their responsibilities for setting the standards of the criminal law," Jordan v. DeGeorge, 341 U.S. 223, 242; 71 S.Ct. 703; 95 L.Ed 886 (1951) (Jackson, J., dissenting); see also, Galloway, supra, at Nev. 24, P2d 245. Under the Constitution, the adoption of new laws restricting liberty is supposed to be a hard business, the product of an open and public debate among a large and diverse number of elected representatives. Allowing the legislature to hand off the job of law making risks substituting this design for one where legislation is made easy with a mere handful of judges and prosecutors free to "condemn[n] all that [they] personally disapprove and for no better reason than [they] disapprove it." Jordan, supra, at 242, 71 S.Ct. 703, 95 L.Ed 886 (Jackson, J., dissenting). Nor do judges and prosecutors act in open and accountable forum of a legislature, but in the comparatively obscure confines of cases and controversies. Hamilton warned, while "liberty can have nothing to fear from the judiciary alone," it has "everything to fear from" the union of the judicial and legislative powers. The Federalist No. 78, at 466. The U.S. Supreme Court has held "that the more important aspect of the vagueness doctrine is not actual notice, but ... the requirement that a legislature establish minimal guidelines to govern law enforcement" and keep the separate branches within their proper spheres. Kolender v. Lawson, 461 U.S. 352, 358 (1983); see also, Sessions, supra, at 573-74 (Gorsuch, J., concurring).

If the Legislature has failed to define a crime, or has incompletely defined a crime, then — plain and simply — the specific criminal statute, or at least the incompletely defined portion of the criminal statute, is void-for-vagueness, as the legislature has failed to give clear, fair, or sometimes any, notice whatsoever, of what conduct is proscribed by the statute, nor does the legislature give adequate guidance to the Court.

The U.S. Supreme Court, as well as the Nevada Supreme Court, have made it very clear that law makers, and not the Court, must do the difficult job the people

elected them to do. The Legislature cannot, through NRS 193.050(3), abdicate its difficult duty of clearly defining crimes.[5] However, this is exactly what they've done. NRS 193.050(3) clearly imposes unconstitutional non-judicial powers and functions upon the Court. Galloway, at Nev. 27-28, P.2d 246-47. There is no valid way to apply NRS 193.050(3), and as such, Section (3) of the statute is facially invalid and this Court must declare it unconstitutional.

"To permit even one seemingly harmless prohibited encroachment and adopt an indifferent attitude could lead to very destructive results." Galloway, at Nev. 22, P.2d 243. "It is [the Court's] duty to maintain the supremacy of the Constitution. The courts must be wary not to tread upon the prerogatives of other departments of government or to assume or utilize any undue powers. If this is not done, the balance of powers will be disturbed and that cannot be tolerated for the strength of our system of government and the judiciary itself is based upon that theory." Id. at Nev. 31, P.2d 249.

2. As A Result Of The Legislature Failing To Define "Willful", "Deliberate", And "Premeditated" In NRS 200.030(1)(a), Section (1)(a) Of The Statute Is Void-For-Vagueness And Unconstitutional On Its Face.

Nasby hereby incorporates the facts and arguments from section 1 of Ground One herein.

"In our constitutional order, a vague law is no law at all. Only the people's elected representatives in [the Legislature] have the power to write new [state] criminal laws. And when [the Legislature] exercises that power, it has to write statutes that give ordinary people fair warning about what the law demands of them. Vague laws transgress both of those constitutional requirements. They hand off the legislature's responsibility for defining criminal behavior to [ ] prosecutors and judges, and they leave people with no sure way to know what consequences will attach to their conduct. When [the Legislature] passes a vague law, the role of courts under our Constitution is not to fashion a new, clearer law to take its place, but to treat the law as a nullity and invite [the Legislature] to try again." U.S. v. Davis, 588 U.S. ___; 204 L.Ed.2d 757, 764; 139 S.Ct. 2319, 2323 (2019).

First-degree murder is a specific intent crime, and before a conviction under section (1)(a) of NRS 200.030 can be obtained, the State must prove, and a jury must find, that the unlawful killing was also "willful, deliberate, and premeditated." (NRS 200.030(1)(a)). As such, "willfulness", "deliberation", and "premeditation" are all necessary elements of the crime

Fn. 5 - This is especially **true** when the undefined, or partially defined, crime is a specific intent crime, such as first-degree murder.

of first-degree murder under NRS 200.030(1)(a). If just one of these elements is lacking, the unlawful killing was not first-degree murder but actually second-degree murder, as all other murder in Nevada, that is not first-degree, is second degree murder. It was clearly the Legislature's intent to create a specific intent crime under NRS 200.030(1)(a). However, the Legislature failed to define these specific intent elements. "Since the days of territorial law, first-degree murder in Nevada has included killings that are 'willful, deliberate, and premeditated.' The meaning of the terms or the phrase as a whole has never been addressed legislatively." Nika v. State, 124 Nev. 1272, 1280; 198 P.3d 839, 845 (2008). "Rather, as this court observed in its 1980 decision in Ogden v. State, there is no indication that the terms have anything other than their ordinary dictionary meanings. But these ordinary dictionary meanings have varied. In different sources and at different times, the terms have been used to define each other, suggesting synonyms or overlapping connotations, or as similar concepts of mental operation differing in degree." Id.

"But strong as the presumption of validity may be, there are limits beyond which we cannot go in finding what Congress has not put into so many words or in making certain what it has left undefined or too vague for reasonable assurance of its meaning. In our system, so far at least as concerns the federal powers, defining crimes and fixing penalties are legislative, not judicial, functions. But given some legislative edict, the margin between the necessary and proper judicial function of construing statutes and that of filling gaps so large that doing so becomes 'essentially legislative, is necessarily one of degree.' U.S. v. Evans, 333 U.S. 483, 486-87 (1948). 'It is well settled in Nevada that the power to define what conduct constitutes a crime lies exclusively within the power and authority of the legislature. As such, the legislative powers may not be delegated to another branch of government.' Sheriff v. Luqman, 101 Nev. 149, 153; 697 P.2d 107, 110 (1985). (internal citations omitted)." It is basic to the principles of the due process clause of the fourteenth amendment that an individual may not be held 'criminally responsible for conduct which he could not reasonably understand to be proscribed.' The law must afford a person of ordinary intelligence the opportunity to know what is prohibited so that he may act accordingly and it must also provide explicit standards of application in order to avoid arbitrary and discriminatory enforcement. '[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.' Although the principle of definiteness is given strict application in penal statutes, it does not require impossible standards of specificity. 'The test for granting sufficient warning as to proscribed conduct will be met if there are well settled and ordinarily understood meanings for the words employed when viewed in the context of the entire statutory provision.'" (internal citations omitted) Id..

For years, the Court did not merely interpret these necessary elements as the Legislature has defined them, but instead, actually defined the elements of the statute and determined which conduct fits within the scope of the criminal statute. This is clearly a non-judicial function, and has resulted in decades of confusion, misapplication, and arbitrary and capricious applications of the provision — all due to the Legislature's failure to give clear guidance. E.g., Nika, supra, at Nev. 1279-89, P.3d 844-51.

However, "A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." Rivers v. Roadway Express, Inc., 511 U.S. 298, 312-13 (1994), e.g., U.S. v. McKie, 73 F.3d 1149, 1151 (D.C. Cir. 1996) (a court's interpretation of a substantive criminal statute generally declares what the statute meant from the date of its enactment, not from the date of the decision). It was not the Legislature who has amended this provision throughout the decades, and so, whatever the Court has determined to now be the Legislature's intent — must have ALWAYS been the Legislature's intent. However, it has been the Court's definitions and determinations, over the years, that have either included or excluded certain conduct from the statute's reach. There is no doubt that cases which were final prior to Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000), resulted in convictions under NRS 200.030(1)(a) without any evidence of deliberation, as the Court, prior to Byford, determined that "willfulness, deliberation, and premeditation" were a single phrase and that deliberation was synonymous with premeditation. See (Nika, supra, at Nev. 1283, P.3d 847). Under Byford, however, these same people could not lawfully be imprisoned under NRS 200.030(1)(a), simply by being guilty of premeditation. Unfortunately for them, Byford does not apply to those cases which were final before Byford was decided. Nashy wonders how Byford could not apply to all cases with convictions under NRS 200.030(1)(a), if the Legislature never amended the statute or supplemented it with additional definitions? The Legislature's intent has never changed. It has always intended just what Byford determined it to intend. It has been the Court, not the Legislature, who has changed the definitions of necessary elements and changed the Legislature's intentions. This function is clearly

non-judicial, but is in fact, legislative. Only the Legislature can change its intentions or definitions of crimes. The Court is to interpret the legislature's intention at the time of the law's enactment. Thus, Byford does apply to all cases under NRS 200.030(1)(a), because the Legislature has always intended it to.

In addition, the Court's interpretations in Powell v. State, Greene v. State, and Kazalyn v. State[6], making "willful, deliberate, and premeditated" a single phrase and making deliberation synonymous with premeditation, went against well established judicial cannons of statutory interpretation. The Court is never to interpret a statute in a way that renders words or phrases meaningless or superfluous. See City of Las Vegas v. Evans, 129 Nev. ___, 301 P.3d 844, 846 (2013); and Hobbs v. State, 127 Nev. 234, 237, 251 P.3d 177, 179 (2011). However, Powell, Greene and Kazalyn did just that. They failed to give each word its force, and instead, made premeditation meaningful, while making "willful" and "deliberate" meaningless or superfluous. But, the Legislature included those three words/elements at the statute's inception for a reason. Thus, each element was always required and never synonymous with eachother. The Court simply failed to give the legislature's intent its full enforcement.

Whatsmore, Powell, Greene, and Kazalyn's interpretations violated the Constitution by creating an ambiguity. The Court in Byford acknowledged that this line of authority should be abandend because, defining only premeditation and failing to provide deliberation with any independent definition "blurs the distinction between first- and second-degree murder." Byford, supra, at Nev. 235, P.3d 713. "There can be no doubt that deprivation of the right of fair warning can result not only from vague statutory language but also from judicial expansion of narrow and precise statutory language." Bouie v. Columbia, 378 U.S. 347, 352-53 (1964).

As it pertains to Nosby's case, the Court of Appeals of Nevada, in affirming the denial of Nosby's 4th petition, assumed that Nosby did demonstrate good cause, but then sua

Fn. 6 - Powell v. State, 108 Nev. 700; 838 P.2d 921 (1992); Greene v. State, 113 Nev. 157; 931 P.2d 54 (1997); Kazalyn v. State, 108 Nev. 67, 825 P.2d 578 (1992).

sponte, searched the trial record and presented evidence, one would assume, pertaining to the element of deliberation. The court then determined that Nasby could not demonstrate prejudice or that a fundamental miscarriage of justice will result "because the evidence presented at trial was sufficient to establish beyond a reasonable doubt that the killing of the victim was premeditated and Nasby acted willfully and with deliberation when killing the victim." (Nasby v. State, COA No. 70626, Order Of Affirmance, pg. 4.) The court then cited to "Byford, 116 Nev. at 233-34, 994 P.2d at 712-13 (concluding that giving the Kazalyn instruction was not reversible error when the evidence was 'clearly sufficient' to establish all elements of first-degree murder)." Id. at pg. 5. However, this analysis ignores the obvious — Neither the prosecutor, the Trial Court, Jury, or Nasby knew that "deliberation" was a distinct necessary element at the time of Nasby's trial. It just so happened that the appellate court, sua sponte, was able to locate evidence of the deliberation element in the record[7], even though the State was unaware of its necessity. Thus, the court's analysis was based on happenstance, not logic. How is Nasby expected to have defended against the State's evidence of deliberation, when at trial, "premeditation" alone, was the only necessary mens rea element at the time? The effect of the vague statute, is that it not only failed to give Nasby notice that his alleged contemplated actions would violate section (1)(a) of NRS 200.030 and result in consequences attached to it, but it also failed to give Nasby fair notice of what was required to be proven at trial and what to defend against.

"What history suggest, the structure of the Constitution confirms. Many of the Constitution's other provisions presuppose and depend on the existence of reasonably clear laws. . . [T]ake the Sixth Amendment's mandate that a defendant must be informed of the accusations against him and allowed to bring witnesses in his defense, and consider what use these rights would be if the charged crime was so vague the defendant couldn't tell what he's alleged to have done and what sort of witness he might need to rebut that charge, without an assurance that the laws supply fair notice, so much else of the Constitution risks becoming only a 'parchment barrier[]' against arbitrary power. The Federalist No. 48, pg. 308 (C. Rossiter ed. 1961) (J. Madison)." Sessions, supra, at 573.

Fn. 7 - Had Nasby been aware of what deliberation meant, and how it would have been demonstrated, Nasby could have, and would have presented the facts and arguments that negate the element of deliberation as shown on pages 12-16 of this petition herein. See - pages 12-16 of instant petition.

"The objection of vagueness is twofold: inadequate guidance to the individual whose conduct is regulated, and inadequate guidance to the triers of fact." Bouie, supra.

It would have been illogical for Nasby to present evidence defending against the element of deliberation at his trial, when under Kazalyn, deliberation was not a required distinct element at the time of trial. To require Nasby to, now, somehow pull from the record, the illogical presentation of evidence that defends against deliberation, or to require him to present new evidence, over 20 years later and without counsel, which disproves deliberation when, at Nasby's trial, the State was not even required to prove deliberation to the jury under Kazalyn — violates Nasby's 6th and 14th Amendment rights.

As Nasby's once as true, and the Court of Appeals assumed, Nasby is a lay prisoner and has been, without the assistance of someone trained in the law and without adequate access to an adequate law library, since 2007. Nasby admits that, while litigating his 4th petition, he did not know how to, or what evidence would, demonstrate the element of deliberation, until the Court of Appeals educated him in its order of affirmance. Although the State, as a matter of fortune, and according to the Court of Appeals, may have presented evidence of deliberation at Nasby's trial, all Nasby knew was that the State, in prosecuting its case, did not argue the distinct element of deliberation, as it was not required at that time. This is why Nasby, in his 4th petition, argued that the State failed to prove or present any evidence of the deliberation element. See (Nasby v. State, COA No. 70626, Order of Affirmance, pg. 2). Nasby considers himself a man of, at least, average intelligence. However, the vagueness of section (1)(a) of NRS 200.030 caused Nasby to be clueless as to what conduct falls into the scope of the statute, until the court educated him. Unfortunately, for him, by the time the court educated him, it was too late for Nasby to present his arguements and evidence which counters the States evidence of deliberation.[8]

Fn. 8 - See - Fn. 7

The vague law, and the court's several attempts to define, clarify, and enforce its elements and application, has also caused a virtual back and forth between, and within, State and federal courts.[9] "This is a task outside the bounds of judicial interpretation. It is better for [the Legislature], and more in accord with its function, to revise the statute than for us to guess at the revision it would make. That task it can do with precision. We could do no more than make speculation law." U.S. v. Evans, 333 U.S. 483, 495 (1948). It appears that the courts have been guessing as to the application and what conduct fits within the scope of the statute. How, then, could an average citizen know? How could an average citizen not be forced to guess whether his/her conduct falls within the statute?

Even using the invalid NRS 193.050(3), NRS 200.030(1)(a) would still be void for vagueness as the Nevada Supreme Court has already acknowledged that the common law is one that "varies" when defining "willful, deliberate, and premeditated." See (Nika v. State, supra, and at Fn. 19 & 20 in that case).

With that, Nasby implores this Court to enforce the Constitution and declare section (1)(a) of NRS 200.030 facially invalid, as it is unconstitutionally void for vagueness. Otherwise, what good is a Constitution if a citizen cannot assert it and enjoy the rights it has vested him, or if he cannot require the Court and his elected representatives to adhere to it? It is the law of the land, and even this Court, as well as law makers, are bound by it. The State and federal governments are built on principals asserted herein, and it is the people's faith in those principals that is the bedrock foundation. Without it — Our system of government will collapse.

Invalidating section (3) of NRS 193.050 and section (1)(a) of NRS 200.030, allows the Court to perform its proper function and uphold the Supremacy of the Constitution, and in turn, require the Legislature to perform its proper function and define this crime

Fn. 9 - See Briano v. State, 94 Nev. 422 (1978); Hern v. State, 97 Nev. 529 (1981); DePasquale v. State, 106 Nev. 842 (1990); Kazalyn v. State, 108 Nev. 67 (1992); Powell v. State, 108 Nev. 700 (1992); Greene v. State, 113 Nev. 157 (1997); Byford v. State, 116 Nev. 215 (2000); Garner v. State, 116 Nev. 770 (2000); Polk v. Sandoval, 503 F.3d 903 (9th Cir. 2007); Chambers v. McDaniel, 549 F.3d 1191 (9th Cir. 2008); Nika v. State, 124 Nev. 1272 (2008); Babb v. Lozowsky, 719 F.3d 1019 (9th Cir. 2013); Moore v. Helling, 763 F.3d 1011 (9th Cir. 2014); Riley v. McDaniel, 786 F.3d 719 (9th Cir. 2015).

with clear and adequate guidance. Anything less, allows personal beliefs, preference, and the common law, to supersede the Constitution. This, surely, could not be permitted, as our system of government and Constitution, rejects it.

IV. CONCLUSION.

Wherefore, Nasby respectfully request this Court: (1) Grant his petition for Writ of Habeas Corpus; (2) Declare NRS 193.050(3) and NRS 200.030(1)(c) unconstitutional and void-for-vagueness; (3) Order relief from his unlawful imprisonment per NRS 34.360 to 34.680, inclusive; and (4) Whatever else this Court deems full and fair.

EXECUTED at Lovelock Correctional Center, on this 21st day of February, 2020.

By: Brendan Nasby #63618
Lovelock Corr. Ctr.
1200 Prison Rd.
Lovelock, NV 89419
(Petitioner In Pro Se)

V. VERIFICATION.

Under penalty of perjury, the undersigned declares that he is the petitioner, "Nasby" named in the foregoing "Petition For Writ Of Habeas Corpus" and knows the contents thereof; that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and as to such matters he believes them to be true; and that the foregoing is rendered without notary per NRS 208.165.

Dated this 21st day of February, 2020.

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

VI. AFFIRMATION PURSUANT TO NRS 239B.030

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

Dated this 21st day of February, 2020.

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

VII. CERTIFICATE OF SERVICE

I, Brendan Nasby, hereby certify that on this 21st day of February, 2020, I mailed to the clerk, and caused to be served by the Clerk's Electronic Filing/Service, the foregoing "Petition For Writ Of Habeas Corpus (NRS 34.360/34.460/34.500 - Facial Challenge To A Statute)" to:

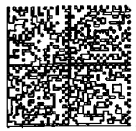
1) Attorney General
100 N. Carson St.
Carson City, NV 89701-4717

2) 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 Nasby #635618
Lovelock Corr. Ctr.
1200 Prison Rd.
Lovelock, NV 89419

Lovelock Correctional Center



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DISTRICT COURT
CLARK COUNTY, NEVADA

Brendan Nasby,

Petitioner,

vs.

Renee Baker Warden; State of Nevada,

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 February 27, 2020. 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 11th day of May, 2020, at the hour of 8:30 A.M. o'clock for further proceedings.

District Court Judge

A-19-788126-W
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Order for Petition for Writ of Habeas Corpu
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Brendan Nasby
I.D. No. 63619
Lovelock Corr. Ctr.
1200 Prison Rd.
Lovelock, NV 89419
(Petitioner In Prose)

DISTRICT COURT

CLARK COUNTY, NEVADA

* * *

Brendan Nasby, Petitioner, vs. Renee Baker Warden; State of Nevada, Respondent.	Case No. A-19-788126-WS Dept No. 19

MOTION FOR RESOLUTION OF PETITION NOTWITHSTANDING RESPONDENT'S FAILURE TO ANSWER.

COMES NOW, Petitioner, Brendan Nasby, in Pro Se, and submits his Motion For Resolution Of Petition Notwithstanding Respondent's Failure To Answer. This motion is made and based upon NRS 34.360 et seq.; all papers and documents on file herein and the following points and authorities.

POINTS AND AUTHORITIES

Petitioner filed a Petition for Writ of Habeas Corpus. On March 6, 2020, this Court filed an ORDER directing Respondents to answer or otherwise respond to the petition within 45 days thereof. See - (Attached Exhibit A - Order for Petition For Writ Of Habeas Corpus) Inclusive of the provisions of NRCP 6(a), Respondent's answer or other response was due on April 20, 2020. That time has come and gone, with Respondents having failed to respond as ordered by this Court. Petitioner herein

moves the Court to resolve his petition notwithstanding Respondents' failure to respond.

Under the circumstances of this case, it is within the court's "proper prerogative" to elect to treat Respondents' failure to answer as a confession of error and to adjudicate the petition accordingly. Orme v. 8th Jud. Dist. Ct., 105 Nev. 212, 282 P.2d 1325, 1326 (1989). Also see - Foster v. 9th Jud. Dist. Ct., 96 Nev. 4, 604 P.2d 359 (1980) (respondents' failure to answer is confession of error).

Petitioner submits, however, that like Orme, "[t]he instant petition has adequately apprised this Court of the pertinent uncontested facts and the parties' respective legal contentions," rendering an answer otherwise non-essential to its proper resolution of this matter. Id. Regardless of whether a confessed error is a required finding in this matter, this Court should decide this petition sans an answer. Indeed, Respondents' silence in this matter indicates their acquiescence that Petitioner is right, and they are wrong. Foster, 96 Nev. 4, 604 P.2d 359.

CONCLUSION

For the reasons set forth above, this Court should resolve the instant petition proceedings notwithstanding Respondents' failure to answer.

Dated this 20th day of May, 2020.

Submitted By:

Brendan Nasby #63648
(Petitioner In Pro Se)

Affirmation Pursuant To NRS 239B.030

The undersigned does hereby affirm that the preceding "Motion For Resolution Of Petition Notwithstanding Respondents' Failure To Answer" does not contain the social security number of any person.

Dated this 20th day of May, 2020.

By: Brendan Nasby #63648
(Petitioner In Pro Se)

Certificate Of Service:

I, Brendan Nasby, hereby certify that on this 20th day of May, 2020, I mailed to the clerk, and caused to be served by the Clerk's Electronic Filing/Service, the foregoing "Motion For Resolution Of Petition Notwithstanding Respondents' Failure To Answer" to:

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

2) 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)

-3-

EXHIBIT - A

"Order For Petition For Writ Of Habeas Corpus"

EXHIBIT - A

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PPOW

DISTRICT COURT
CLARK COUNTY, NEVADA

Brendan Nasby,

Petitioner,

vs.

Renee Baker Warden; State of Nevada,

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 February 27, 2020. 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 11th day of May, 2020, at the hour of 8:30 A.M. o'clock for further proceedings.

Will Kephart
District Court Judge

A-19-788126-W
OPWH
Order for Petition for Writ of Habeas Corpu
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Brendan Nasby #63618
Lovelock Corr. Ctr.
1200 Prison Rd.
Lovelock, NV 89419

Lovelock Correctional Center

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Las Vegas, NV 89155-2311

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STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
TALEEN PANDUKHT
Chief Deputy District Attorney
Nevada Bar #005734
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

BRENDAN JAMES NASBY,
#1517690,

Petitioner,

-vs-

THE STATE OF NEVADA

Respondent.

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

DEPT NO: XIX

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: JUNE 8, 2020
TIME OF HEARING: 10:15 AM

THIS CAUSE having come on for hearing before the Honorable WILLIAM D. KEPHART, District Judge, on the 8th day of June, 2020, the Petitioner not being present, proceeding in proper person, the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through ANN DUNN, Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

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FINDINGS OF FACT, CONCLUSIONS OF LAW

PROCEDURAL BACKGROUND

On November 9, 1998, the State filed an Information charging BRENDAN JAMES NASBY ("Petitioner") with: Count 1 – Conspiracy to Commit Murder; and Count 2 – Murder with use of a Deadly Weapon (Open Murder). Petitioner's jury trial began on October 11, 1999. On October 19, 1999, the jury found Petitioner guilty on both counts; as to Count 2, the jury returned a guilty verdict for First Degree Murder with use of a Deadly Weapon.

On November 29, 1999, the District Court sentenced Petitioner as follows: Count 1 – a maximum of one hundred twenty (120) months to a minimum of forty-eight (48) months in the Nevada Department of Corrections ("NDC"); and Count 2 – Life with the possibility of parole, plus an equal and consecutive term of Life with the possibility of parole for the use of a deadly weapon, to run consecutive to Count 1, with four hundred eighty (480) days credit for time served. The Judgment of Conviction was filed on December 2, 1999.

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

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

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

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

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

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

On January 5, 2016, Petitioner filed his fourth Post-Conviction Petition for Writ of Habeas Corpus, a Memorandum of Points and Authorities in Support, a Supplemental Memorandum of Points and Authorities in Support, and a Motion for Appointment of Counsel. The State filed a Response on February 23, 2016. Petitioner filed a Reply on March 10, 2016. On April 4, 2016, the District Court denied Petitioner's Petition. The Findings of Fact, Conclusions of Law were filed on May 9, 2016. On May 18, 2016, Petitioner filed a Motion to Alter or Amend Judgment N. R. Civ. P. 59(e). The State responded on June 2, 2016. On June 8, 2016, the Court denied Petitioner's Motion. Petitioner filed a Notice of Appeal on June 14, 2016. On July 12, 2017, the Nevada Court of Appeals affirmed the denial of Petitioner's fourth Petition for Writ of Habeas Corpus.

On January 26, 2016, Petitioner filed a Petition for Writ of Habeas Corpus (NRS 34.360 - Constitutional Questions/Questions of Law) in the Eleventh Judicial District Court, seeking a declaratory judgment on seven (7) allegations of trial error. The Eleventh Judicial District Court transferred Petitioner's Petition back to this Court, as this Court has proper jurisdiction

over Petitioner. On April 4, 2017, Petitioner filed a Motion for Reconsideration. The State responded on April 19, 2017. The State Responded to Petitioner's Petition on April 25, 2017. The next day, Petitioner's Motion for Reconsideration was denied. On May 10, 2017, Petitioner filed a Reply to the State's Response to Petitioner's Petition, and on May 15, 2017, the court denied Petitioner's Petition. The Findings of Fact, Conclusions of Law, and Order was filed on June 20, 2017. On June 27, 2017, Petitioner filed a Notice of Appeal. On August 14, 2018, the Nevada Court of Appeals affirmed the District Court's decision; Remittitur issued on November 30, 2018.

On January 11, 2019, Petitioner filed another Petition for Writ of Habeas Corpus. The State responded on March 13, 2019. On March 25, 2019, the District Court denied the Petition as procedurally barred, successive, and an abuse of the Writ process. On April 1, 2019, Petitioner filed a Reply to the State's Response, NRCP 12(f) Motion to Strike; and if Necessary, NRCP 59(e) Motion to Alter or Amend Judgment". On April 12, 2019, the Court entered its Findings of Fact, Conclusions of Law and Order. On May 2, 2019, Petitioner filed a Notice of Appeal. On April 10, 2020, the Nevada Court of Appeals issued its Order of Affirmance.

On February 27, 2020, Petitioner filed the instant Petition for Writ of Habeas Corpus. On June 4, 2020, Petitioner filed a "Motion for Resolution of Petition Notwithstanding Respondent's Failure to Answer". The Court did not order the State to file a response and denied the Petition on June 8, 2020.

STATEMENT OF THE FACTS

During its case-in-chief, the State presented overwhelming evidence of Defendant's guilt. This evidence included testimony that Petitioner had murdered Michael Beasley execution style, that Petitioner made admissions to two (2) different people and that Petitioner voluntarily, and without provocation, led police to the location of the murder weapon within Petitioner's house. Furthermore, the State offered evidence from Petitioner's accomplices to detail the premeditated manner in which the homicide took place.

The State called the three (3) accomplices that joined Petitioner in killing Michael. The first accomplice, Jeremiah Deskin ("Jeremiah"), testified that he knew Petitioner as a member of the gang L.A. Crazy Riders and that Petitioner was the gang leader. Jeremiah told the jury that Tommie Burnside ("Tommie") and his brother Jotee Burnside ("Jotee") were also members of the gang. Jeremiah said that one (1) month prior to the July 16, 1998 killing of Michael, Petitioner met with Jeremiah, Tommie, Jotee and another male gang member to discuss whether Michael should be killed. Jeremiah specifically recalled that Petitioner was soliciting opinions as to whether Michael should be killed because Michael was allegedly trying to take Petitioner's role in the gang. Jeremiah also related that the general consensus from the other gang members at that meeting was that Michael should not be killed.

Jeremiah further testified that on the night of the murder, he was at Petitioner's house when Petitioner called him into the garage. There inside the garage with Tommie, Petitioner told Jeremiah to go pick up Michael so that they could take him to the desert and shoot him. Jeremiah then went with Tommie and Jotee to Michael's residence. Upon returning to Petitioner's home, Petitioner displayed his Browning 9mm handgun that he had purchased from an individual named David. Jeremiah explained that the "plan" was to go to the desert to shoot guns and smoke weed, but that no one had any weed on them.

After driving out into the desert, Jeremiah recalled that he stopped his car near the edge of a wash. Jeremiah told the jury that all five (5) men got out of the car to look amongst the garbage and debris for something to use as a target. He also said that he kept the lights of his car on to illuminate the area. At this time Petitioner asked Jeremiah to move his car closer to the edge to brighten the area of the wash where old refrigerators were strewn about. After he got out of the car, Jeremiah observed Petitioner approach Michael from behind as Michael continued looking into the wash for something to use as a target. From closer than ten (10) feet away, Petitioner then raised the handgun and shot Michael in the upper back. Having never seen Petitioner approach him from behind, Michael grabbed his neck/shoulder area while dropping down onto one (1) knee. Petitioner then stepped forward and fired another shot at Michael's neck/head area which caused Michael to fall forward and roll over onto his back.

Jeremiah testified that Tommie, Jotee and Petitioner then ran back to the car after Petitioner had shot Michael for the second time. Before Jeremiah was able to start the car to leave, Petitioner jumped out, ran over to Michael and shot once more at Michael's head as Michael lay there on his back. Jeremiah recalled that when Petitioner returned to the car, he muttered something like, "Try to take me off my own set" which Jeremiah understood to mean that Petitioner believed Michael was trying to remove Petitioner from the gang.

Jeremiah further testified that on the way back to Las Vegas, Petitioner threatened Jeremiah and the Burnside brothers if any of them spoke of the killing. Jeremiah explained to the jury that he had also been charged in the death of Michael, but agreed to plead to a lesser charge in exchange for his testimony against Petitioner. The Burnside brothers, Tommie and Jotee, testified that they had been at Petitioner's house on the night of the murder and that Petitioner had shot Michael out in the desert. They also explained that they too had been charged with the death of Michael, but had agreed with the State to testify against Petitioner.

Two women next testified for the State -- Tanesha Banks ("Tanesha") and Crystal Bradley ("Crystal"). Tanesha related that she was the mother of Michael's son and had been involved in a three (3) way conversation over the telephone with Crystal and Petitioner on July 17, 1998. Tanesha stated that Petitioner sounded "panicky" when she incorrectly mentioned that she had seen Michael earlier in the morning of July 17, 1998. Tanesha also told the jury that she had been beaten by a friend of Petitioner purportedly because Tanesha had been telling people she believed Petitioner was responsible for Michael's death. Tanesha later explained that once Petitioner had been arrested, she received a threatening call from him when he was being held at the Clark County Detention Center ("CCDC").

Crystal next testified that she had been familiar with Petitioner from the L.A. Crazy Riders gang and that she had stayed in contact with the gang. She also recalled the three (3) way telephone conversation with Tanesha and Petitioner in which Petitioner abruptly told her that he needed to speak with only Crystal. Crystal then testified that during this conversation, Petitioner admitted to murdering Michael, and he planned on attempting to make it look like another gang had committed the killing. Crystal revealed that while she did not believe

Petitioner at first, she later called Secret Witness when she confirmed that Michael was indeed dead.

Brittney Adams ("Brittney") testified that she had talked to Petitioner about Michael's death and that she thought Petitioner was "covering something up." Brittney also said that Petitioner had told her Crystal and Tanesha were involved in Michael's death and that he wanted Brittney to kill Tanesha because Tanesha was blaming him for the death. Brittney explained that she drove over to Tanesha's house with her cousin and Petitioner to get Tanesha's side of the story. Petitioner offered Brittney a hammer to use in the assault of Tanesha telling her, "You can just hit her between the eyes and kill her; just kill her, cuz; just kill her." Brittney told the jury that she refused Petitioner's offer to use the hammer, but did get into a fight with Tanesha while Petitioner remained inside the car. Brittney recalled that when they left Tanesha's house, Petitioner repeatedly said to her, "You should have killed her, cuz, you should have killed her."

Jomeka Beavers ("Jomeka"), Michael's aunt, testified that she was living with Michael on the day he was murdered. She related that Michael had received a telephone call early in the evening on the night he was killed. Michael then asked Jomeka to watch his infant son while he went out with his friends. Jomeka specifically remembered that Michael got into a car with Jeremiah, whom she knew as Woodpecker, but that Charles Damion Von Lewis a.k.a. Sugar Bear was not present.

Dr. Robert Jordan ("Jordan") testified that he performed the autopsy on Michael who had three (3) bullet wounds, two (2) to the chest and one (1) to the head. Jordan explained that the Michael had one entrance wound to the back, one exit wound to the chest and one entrance wound above the left eye. Jordan also testified that the only projectiles he recovered during the autopsy were bullet fragments from Michael's skull.

Las Vegas Metropolitan Police Department ("LVMPD") homicide detectives James Buczek ("Buczek") and Thomas Thowsen ("Thowsen") testified that they had been the lead investigators into Michael's death. Buczek related that he had developed Petitioner as a suspect in the murder of Michael after he spoke with Tanesha who told him about the three (3) way

telephone conversation she had with Crystal and Petitioner. Buczek confirmed this information by speaking with Crystal and then proceeded to have a search warrant drawn up to search Petitioner's house for evidence. Petitioner was placed under arrest after the execution of the search warrant and was advised of his Miranda rights. As Buczek was transporting him to the police station, Petitioner immediately referred to a 9mm handgun as the murder weapon even though Buczek never told Petitioner what kind of weapon was used to kill Michael. Petitioner also told Buczek that the 9mm handgun was back at his house. LVMPD found the 9mm handgun in a bag under Petitioner's bed. AA Vol. 3, p. 0480. Thowsen testified that he had investigated a September 23, 1998 phone call from CCDC to Tanesha and confirmed that it had come from a phone line within CCDC. Further investigation by Thowsen revealed that two (2) phone calls had been placed from the section of CCDC where Petitioner was being held. The jury then heard from another inmate of CCDC, John Holmes ("Holmes"), who testified that Petitioner had admitted to killing Michael. Holmes stated that Petitioner told him he murdered Michael because Michael was trying to take his leadership spot in the gang.

A number of LVMPD crime scene analysts testified for the State as well. Kelly Neil ("Neil") testified that he recovered four (4) shiny, new-looking shell casings from the crime scene amidst "hundreds" of expended shell casings. Neil also recovered three (3) Winston brand cigarette butts and took photographs of footprints. Neil explained that three (3) of the four (4) shell casings he retrieved were 9mm cartridges. Randall McPhail ("McPhail") testified that he collected evidence from Petitioner's house after the search warrant had been executed. McPhail explained that he recovered a 9mm handgun, took pictures of seven (7) pairs of shoes and collected cigarette butts bearing the brands Kool, Benson & Hedges and a generic brand. A further check on the 9mm handgun revealed that it had been reported stolen from a residence in North Las Vegas.

Fred Boyd ("Boyd") next testified that he had run fingerprint analysis on the recovered shell casings and 9mm handgun, but was unable to get any tangible latent prints. Boyd also explained that he could not find a match amongst the photographs of footprint impression at the crime scene and the photographs of the seven (7) pairs of shoes from Petitioner's house.

Firearms expert Torrey Johnson ("Johnson") testified that he conducted a test fire on the 9mm handgun recovered from Petitioner's house and that the shell casings discovered at the crime scene were three (3) 9mm casings and one (1) .45 casing. Johnson also told the jury that while he could not positively find that the shell casings had been fired from the 9mm handgun seized at Petitioner's house, the casings bore marks consistent with that conclusion. Moreover, Johnson explained that based on the assumption that the coroner removed bullet fragments from Michael's skull which were the resulting cause of death, the 9mm handgun examined by Jordan was the murder weapon.

ANALYSIS

I. PETITIONER'S SEVENTH PETITION IS PROCEDURALLY BARRED

This Court FINDS that the instant Petition is time-barred, successive, and subject to the mandatory procedural bars.

A. The Procedural Bars are Mandatory

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

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

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

B. Petitioner's Petition is Time Barred

The mandatory provision of NRS 34.726(1) states:

> Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed

> ***within 1 year after entry of the judgment of conviction*** or, if an appeal has been taken from the judgment, ***within 1 year after the 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:

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

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

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

Petitioner's Judgment of Conviction was filed on December 2, 1999. He filed a Notice of Appeal on December 14, 1999, and the Nevada Supreme Court issued its remittitur on March 6, 2001. Accordingly, Petitioner had until approximately March 6, 2002, to file a post-conviction petition. The instant motion was not filed until February 27, 2020, more than eighteen (18) years later. Therefore, absent a showing of good cause, Petitioner's motion is denied as time-barred pursuant to NRS 34.726(1). NRS 34.726 can only be overcome upon a showing of good cause and prejudice or actual innocence, which Petitioner failed to

demonstrate as stated below. Accordingly, this Court finds Petitioner's Petition must be denied.

C. Petitioner's Petition is Successive and an Abuse of the Writ

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

> 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.

Petitioner filed six (6) previous Petitions for Writ of Habeas Corpus (Post-Conviction) on January 30, 2002, February 18, 2011, December 9, 2014, January 5, 2016, January 26, 2016, and January 11, 2019. Each petition was duly considered and denied by the Court. Consequently, the instant petition filed on February 27, 2020, is a successive petition. Moreover, Petitioner raises similar claims as raised before. See e.g., Nasby v. State, No. 80443-COA (Order of Affirmance and Denying Petition, Apr. 10, 2020); Nasby v. State, No. 70626 (Order of Affirmance, Jul. 12, 2017). 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, Petitioner 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 Petitioner 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 is denied.

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

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

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

Petitioner failed to assert any good cause for his procedural default. Instead, he argued, as discussed, supra, that the procedural bars do not apply to him. For the reasons discussed, said procedural bars are mandatory. Moreover, Petitioner could and should have previously raised these issues in an earlier petition. As such, Petitioner failed to establish an impediment external to the defense and therefore does not constitute good cause to overcome the procedural bars. Phelps v. Director, Nevada Department of Prisons, 104 Nev. 656, 764 P.2d 1303 (1988). Accordingly, Petitioner cannot demonstrate good cause and this Petition for Writ of Habeas Corpus is denied.

III. CONSTITUTIONALITY OF NRS 193.050(3) AND NRS 200.030(1)(A)

Petitioner argued that the statutes he was imprisoned under are unconstitutional; therefore, he is actually innocent. Petition at 20, 23. Specifically, Petitioner claims NRS 193.050(3) is unconstitutional as an "invalid delegation of legislative powers and abdication of legislative duties" and NRS 200.030(1)(a) is "void-for-vagueness" since the statute does not define "willful, deliberate, and premeditated". Petition at 23-26. This Court declines to issue any determination that NRS 193.050(3) and NRS 200.030(1)(a) are unconstitutional.

To the extent that similar arguments have been raised regarding the constitutionality of NRS 200.030(1)(a), said claims are barred pursuant to the Law of the Case Doctrine. Under the law of the case doctrine, an issue that has already been decided on the merits by the Nevada Supreme Court is law of the case and the holding will not be revisited in a habeas petition. "The law of a first appeal is law of the case on all subsequent appeals in which the facts are substantially the same." Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (quoting Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969)). The law of the case doctrine may not be avoided by a more detailed and precisely focused argument made after reflection upon previous proceedings. Id. at 316, 535 P.2d at 798-99; See Nasby v. State, No. 80443-COA

(Order of Affirmance and Denying Petition, Apr. 10, 2020); Nasby v. State, No. 70626 (Order of Affirmance, Jul. 12, 2017).

ORDER

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

DATED this 29th day of June, 2020.

DISTRICT JUDGE

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

BY /s/TALEEN PANDUKHT
TALEEN PANDUKHT
Chief Deputy District Attorney
Nevada Bar #005734

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 29th day of June, 2020, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

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

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

98F11168A/TP/SW-Appeals/dd-MVU

Electronically Filed
7/1/2020 11:10 AM
Steven D. Grierson
CLERK OF THE COURT

NEFF

DISTRICT COURT
CLARK COUNTY, NEVADA

BRANDON NASBY,

Petitioner,

vs.

RENEE BAKER, WARDEN,

Respondent,

Case No: A-19-788126-W

Dept No: XIX

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

PLEASE TAKE NOTICE that on June 29, 2020, the court entered a decision or order in this matter, a true and correct copy of which is attached to this notice.

You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is mailed to you. This notice was mailed on July 1, 2020.

STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk

CERTIFICATE OF E-SERVICE / MAILING

I hereby certify that on this 1 day of July 2020, I served a copy of this Notice of Entry on the following:

☑ By e-mail:
Clark County District Attorney's Office
Attorney General's Office – Appellate Division-

☑ The United States mail addressed as follows:
Brandon Nasby # 63618
1200 Prison Rd.
Lovelock, NV 89419

/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk

FCL
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
TALEEN PANDUKHT
Chief Deputy District Attorney
Nevada Bar #005734
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

BRENDAN JAMES NASBY,
#1517690,

Petitioner,

-vs-

THE STATE OF NEVADA

Respondent.

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

DEPT NO: XIX

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: JUNE 8, 2020
TIME OF HEARING: 10:15 AM

THIS CAUSE having come on for hearing before the Honorable WILLIAM D. KEPHART, District Judge, on the 8th day of June, 2020, the Petitioner not being present, proceeding in proper person, the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through ANN DUNN, Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

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FINDINGS OF FACT, CONCLUSIONS OF LAW

PROCEDURAL BACKGROUND

On November 9, 1998, the State filed an Information charging BRENDAN JAMES NASBY ("Petitioner") with: Count 1 – Conspiracy to Commit Murder; and Count 2 – Murder with use of a Deadly Weapon (Open Murder). Petitioner's jury trial began on October 11, 1999. On October 19, 1999, the jury found Petitioner guilty on both counts; as to Count 2, the jury returned a guilty verdict for First Degree Murder with use of a Deadly Weapon.

On November 29, 1999, the District Court sentenced Petitioner as follows: Count 1 – a maximum of one hundred twenty (120) months to a minimum of forty-eight (48) months in the Nevada Department of Corrections ("NDC"); and Count 2 – Life with the possibility of parole, plus an equal and consecutive term of Life with the possibility of parole for the use of a deadly weapon, to run consecutive to Count 1, with four hundred eighty (480) days credit for time served. The Judgment of Conviction was filed on December 2, 1999.

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

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

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

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

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

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

On January 5, 2016, Petitioner filed his fourth Post-Conviction Petition for Writ of Habeas Corpus, a Memorandum of Points and Authorities in Support, a Supplemental Memorandum of Points and Authorities in Support, and a Motion for Appointment of Counsel. The State filed a Response on February 23, 2016. Petitioner filed a Reply on March 10, 2016. On April 4, 2016, the District Court denied Petitioner's Petition. The Findings of Fact, Conclusions of Law were filed on May 9, 2016. On May 18, 2016, Petitioner filed a Motion to Alter or Amend Judgment N. R. Civ. P. 59(e). The State responded on June 2, 2016. On June 8, 2016, the Court denied Petitioner's Motion. Petitioner filed a Notice of Appeal on June 14, 2016. On July 12, 2017, the Nevada Court of Appeals affirmed the denial of Petitioner's fourth Petition for Writ of Habeas Corpus.

On January 26, 2016, Petitioner filed a Petition for Writ of Habeas Corpus (NRS 34.360 - Constitutional Questions/Questions of Law) in the Eleventh Judicial District Court, seeking a declaratory judgment on seven (7) allegations of trial error. The Eleventh Judicial District Court transferred Petitioner's Petition back to this Court, as this Court has proper jurisdiction

over Petitioner. On April 4, 2017, Petitioner filed a Motion for Reconsideration. The State responded on April 19, 2017. The State Responded to Petitioner's Petition on April 25, 2017. The next day, Petitioner's Motion for Reconsideration was denied. On May 10, 2017, Petitioner filed a Reply to the State's Response to Petitioner's Petition, and on May 15, 2017, the court denied Petitioner's Petition. The Findings of Fact, Conclusions of Law, and Order was filed on June 20, 2017. On June 27, 2017, Petitioner filed a Notice of Appeal. On August 14, 2018, the Nevada Court of Appeals affirmed the District Court's decision; Remittitur issued on November 30, 2018.

On January 11, 2019, Petitioner filed another Petition for Writ of Habeas Corpus. The State responded on March 13, 2019. On March 25, 2019, the District Court denied the Petition as procedurally barred, successive, and an abuse of the Writ process. On April 1, 2019, Petitioner filed a Reply to the State's Response, NRCP 12(f) Motion to Strike; and if Necessary, NRCP 59(e) Motion to Alter or Amend Judgment". On April 12, 2019, the Court entered its Findings of Fact, Conclusions of Law and Order. On May 2, 2019, Petitioner filed a Notice of Appeal. On April 10, 2020, the Nevada Court of Appeals issued its Order of Affirmance.

On February 27, 2020, Petitioner filed the instant Petition for Writ of Habeas Corpus. On June 4, 2020, Petitioner filed a "Motion for Resolution of Petition Notwithstanding Respondent's Failure to Answer". The Court did not order the State to file a response and denied the Petition on June 8, 2020.

STATEMENT OF THE FACTS

During its case-in-chief, the State presented overwhelming evidence of Defendant's guilt. This evidence included testimony that Petitioner had murdered Michael Beasley execution style, that Petitioner made admissions to two (2) different people and that Petitioner voluntarily, and without provocation, led police to the location of the murder weapon within Petitioner's house. Furthermore, the State offered evidence from Petitioner's accomplices to detail the premeditated manner in which the homicide took place.

The State called the three (3) accomplices that joined Petitioner in killing Michael. The first accomplice, Jeremiah Deskin ("Jeremiah"), testified that he knew Petitioner as a member of the gang L.A. Crazy Riders and that Petitioner was the gang leader. Jeremiah told the jury that Tommie Burnside ("Tommie") and his brother Jotee Burnside ("Jotee") were also members of the gang. Jeremiah said that one (1) month prior to the July 16, 1998 killing of Michael, Petitioner met with Jeremiah, Tommie, Jotee and another male gang member to discuss whether Michael should be killed. Jeremiah specifically recalled that Petitioner was soliciting opinions as to whether Michael should be killed because Michael was allegedly trying to take Petitioner's role in the gang. Jeremiah also related that the general consensus from the other gang members at that meeting was that Michael should not be killed.

Jeremiah further testified that on the night of the murder, he was at Petitioner's house when Petitioner called him into the garage. There inside the garage with Tommie, Petitioner told Jeremiah to go pick up Michael so that they could take him to the desert and shoot him. Jeremiah then went with Tommie and Jotee to Michael's residence. Upon returning to Petitioner's home, Petitioner displayed his Browning 9mm handgun that he had purchased from an individual named David. Jeremiah explained that the "plan" was to go to the desert to shoot guns and smoke weed, but that no one had any weed on them.

After driving out into the desert, Jeremiah recalled that he stopped his car near the edge of a wash. Jeremiah told the jury that all five (5) men got out of the car to look amongst the garbage and debris for something to use as a target. He also said that he kept the lights of his car on to illuminate the area. At this time Petitioner asked Jeremiah to move his car closer to the edge to brighten the area of the wash where old refrigerators were strewn about. After he got out of the car, Jeremiah observed Petitioner approach Michael from behind as Michael continued looking into the wash for something to use as a target. From closer than ten (10) feet away, Petitioner then raised the handgun and shot Michael in the upper back. Having never seen Petitioner approach him from behind, Michael grabbed his neck/shoulder area while dropping down onto one (1) knee. Petitioner then stepped forward and fired another shot at Michael's neck/head area which caused Michael to fall forward and roll over onto his back.

Jeremiah testified that Tommie, Jotee and Petitioner then ran back to the car after Petitioner had shot Michael for the second time. Before Jeremiah was able to start the car to leave, Petitioner jumped out, ran over to Michael and shot once more at Michael's head as Michael lay there on his back. Jeremiah recalled that when Petitioner returned to the car, he muttered something like, "Try to take me off my own set" which Jeremiah understood to mean that Petitioner believed Michael was trying to remove Petitioner from the gang.

Jeremiah further testified that on the way back to Las Vegas, Petitioner threatened Jeremiah and the Burnside brothers if any of them spoke of the killing. Jeremiah explained to the jury that he had also been charged in the death of Michael, but agreed to plead to a lesser charge in exchange for his testimony against Petitioner. The Burnside brothers, Tommie and Jotee, testified that they had been at Petitioner's house on the night of the murder and that Petitioner had shot Michael out in the desert. They also explained that they too had been charged with the death of Michael, but had agreed with the State to testify against Petitioner.

Two women next testified for the State -- Tanesha Banks ("Tanesha") and Crystal Bradley ("Crystal"). Tanesha related that she was the mother of Michael's son and had been involved in a three (3) way conversation over the telephone with Crystal and Petitioner on July 17, 1998. Tanesha stated that Petitioner sounded "panicky" when she incorrectly mentioned that she had seen Michael earlier in the morning of July 17, 1998. Tanesha also told the jury that she had been beaten by a friend of Petitioner purportedly because Tanesha had been telling people she believed Petitioner was responsible for Michael's death. Tanesha later explained that once Petitioner had been arrested, she received a threatening call from him when he was being held at the Clark County Detention Center ("CCDC").

Crystal next testified that she had been familiar with Petitioner from the L.A. Crazy Riders gang and that she had stayed in contact with the gang. She also recalled the three (3) way telephone conversation with Tanesha and Petitioner in which Petitioner abruptly told her that he needed to speak with only Crystal. Crystal then testified that during this conversation, Petitioner admitted to murdering Michael, and he planned on attempting to make it look like another gang had committed the killing. Crystal revealed that while she did not believe

Petitioner at first, she later called Secret Witness when she confirmed that Michael was indeed dead.

Brittney Adams ("Brittney") testified that she had talked to Petitioner about Michael's death and that she thought Petitioner was "covering something up." Brittney also said that Petitioner had told her Crystal and Tanesha were involved in Michael's death and that he wanted Brittney to kill Tanesha because Tanesha was blaming him for the death. Brittney explained that she drove over to Tanesha's house with her cousin and Petitioner to get Tanesha's side of the story. Petitioner offered Brittney a hammer to use in the assault of Tanesha telling her, "You can just hit her between the eyes and kill her; just kill her, cuz; just kill her." Brittney told the jury that she refused Petitioner's offer to use the hammer, but did get into a fight with Tanesha while Petitioner remained inside the car. Brittney recalled that when they left Tanesha's house, Petitioner repeatedly said to her, "You should have killed her, cuz, you should have killed her."

Jomeka Beavers ("Jomeka"), Michael's aunt, testified that she was living with Michael on the day he was murdered. She related that Michael had received a telephone call early in the evening on the night he was killed. Michael then asked Jomeka to watch his infant son while he went out with his friends. Jomeka specifically remembered that Michael got into a car with Jeremiah, whom she knew as Woodpecker, but that Charles Damion Von Lewis a.k.a. Sugar Bear was not present.

Dr. Robert Jordan ("Jordan") testified that he performed the autopsy on Michael who had three (3) bullet wounds, two (2) to the chest and one (1) to the head. Jordan explained that the Michael had one entrance wound to the back, one exit wound to the chest and one entrance wound above the left eye. Jordan also testified that the only projectiles he recovered during the autopsy were bullet fragments from Michael's skull.

Las Vegas Metropolitan Police Department ("LVMPD") homicide detectives James Buczek ("Buczek") and Thomas Thowsen ("Thowsen") testified that they had been the lead investigators into Michael's death. Buczek related that he had developed Petitioner as a suspect in the murder of Michael after he spoke with Tanesha who told him about the three (3) way

telephone conversation she had with Crystal and Petitioner. Buczek confirmed this information by speaking with Crystal and then proceeded to have a search warrant drawn up to search Petitioner's house for evidence. Petitioner was placed under arrest after the execution of the search warrant and was advised of his Miranda rights. As Buczek was transporting him to the police station, Petitioner immediately referred to a 9mm handgun as the murder weapon even though Buczek never told Petitioner what kind of weapon was used to kill Michael. Petitioner also told Buczek that the 9mm handgun was back at his house. LVMPD found the 9mm handgun in a bag under Petitioner's bed. AA Vol. 3, p. 0480. Thowsen testified that he had investigated a September 23, 1998 phone call from CCDC to Tanesha and confirmed that it had come from a phone line within CCDC. Further investigation by Thowsen revealed that two (2) phone calls had been placed from the section of CCDC where Petitioner was being held. The jury then heard from another inmate of CCDC, John Holmes ("Holmes"), who testified that Petitioner had admitted to killing Michael. Holmes stated that Petitioner told him he murdered Michael because Michael was trying to take his leadership spot in the gang.

A number of LVMPD crime scene analysts testified for the State as well. Kelly Neil ("Neil") testified that he recovered four (4) shiny, new-looking shell casings from the crime scene amidst "hundreds" of expended shell casings. Neil also recovered three (3) Winston brand cigarette butts and took photographs of footprints. Neil explained that three (3) of the four (4) shell casings he retrieved were 9mm cartridges. Randall McPhail ("McPhail") testified that he collected evidence from Petitioner's house after the search warrant had been executed. McPhail explained that he recovered a 9mm handgun, took pictures of seven (7) pairs of shoes and collected cigarette butts bearing the brands Kool, Benson & Hedges and a generic brand. A further check on the 9mm handgun revealed that it had been reported stolen from a residence in North Las Vegas.

Fred Boyd ("Boyd") next testified that he had run fingerprint analysis on the recovered shell casings and 9mm handgun, but was unable to get any tangible latent prints. Boyd also explained that he could not find a match amongst the photographs of footprint impression at the crime scene and the photographs of the seven (7) pairs of shoes from Petitioner's house.

Firearms expert Torrey Johnson ("Johnson") testified that he conducted a test fire on the 9mm handgun recovered from Petitioner's house and that the shell casings discovered at the crime scene were three (3) 9mm casings and one (1) .45 casing. Johnson also told the jury that while he could not positively find that the shell casings had been fired from the 9mm handgun seized at Petitioner's house, the casings bore marks consistent with that conclusion. Moreover, Johnson explained that based on the assumption that the coroner removed bullet fragments from Michael's skull which were the resulting cause of death, the 9mm handgun examined by Jordan was the murder weapon.

ANALYSIS

I. PETITIONER'S SEVENTH PETITION IS PROCEDURALLY BARRED

This Court FINDS that the instant Petition is time-barred, successive, and subject to the mandatory procedural bars.

A. The Procedural Bars are Mandatory

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

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

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

B. Petitioner's Petition is Time Barred

The mandatory provision of NRS 34.726(1) states:

> Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed

> ***within 1 year after entry of the judgment of conviction*** or, if an appeal has been taken from the judgment, ***within 1 year after the 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:

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

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

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

Petitioner's Judgment of Conviction was filed on December 2, 1999. He filed a Notice of Appeal on December 14, 1999, and the Nevada Supreme Court issued its remittitur on March 6, 2001. Accordingly, Petitioner had until approximately March 6, 2002, to file a post-conviction petition. The instant motion was not filed until February 27, 2020, more than eighteen (18) years later. Therefore, absent a showing of good cause, Petitioner's motion is denied as time-barred pursuant to NRS 34.726(1). NRS 34.726 can only be overcome upon a showing of good cause and prejudice or actual innocence, which Petitioner failed to

demonstrate as stated below. Accordingly, this Court finds Petitioner's Petition must be denied.

C. Petitioner's Petition is Successive and an Abuse of the Writ

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

> 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.

Petitioner filed six (6) previous Petitions for Writ of Habeas Corpus (Post-Conviction) on January 30, 2002, February 18, 2011, December 9, 2014, January 5, 2016, January 26, 2016, and January 11, 2019. Each petition was duly considered and denied by the Court. Consequently, the instant petition filed on February 27, 2020, is a successive petition. Moreover, Petitioner raises similar claims as raised before. See e.g., Nasby v. State, No. 80443-COA (Order of Affirmance and Denying Petition, Apr. 10, 2020); Nasby v. State, No. 70626 (Order of Affirmance, Jul. 12, 2017). 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, Petitioner 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 Petitioner 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 is denied.

///

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

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

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

Petitioner failed to assert any good cause for his procedural default. Instead, he argued, as discussed, supra, that the procedural bars do not apply to him. For the reasons discussed, said procedural bars are mandatory. Moreover, Petitioner could and should have previously raised these issues in an earlier petition. As such, Petitioner failed to establish an impediment external to the defense and therefore does not constitute good cause to overcome the procedural bars. Phelps v. Director, Nevada Department of Prisons, 104 Nev. 656, 764 P.2d 1303 (1988). Accordingly, Petitioner cannot demonstrate good cause and this Petition for Writ of Habeas Corpus is denied.

III. CONSTITUTIONALITY OF NRS 193.050(3) AND NRS 200.030(1)(A)

Petitioner argued that the statutes he was imprisoned under are unconstitutional; therefore, he is actually innocent. Petition at 20, 23. Specifically, Petitioner claims NRS 193.050(3) is unconstitutional as an "invalid delegation of legislative powers and abdication of legislative duties" and NRS 200.030(1)(a) is "void-for-vagueness" since the statute does not define "willful, deliberate, and premeditated". Petition at 23-26. This Court declines to issue any determination that NRS 193.050(3) and NRS 200.030(1)(a) are unconstitutional.

To the extent that similar arguments have been raised regarding the constitutionality of NRS 200.030(1)(a), said claims are barred pursuant to the Law of the Case Doctrine. Under the law of the case doctrine, an issue that has already been decided on the merits by the Nevada Supreme Court is law of the case and the holding will not be revisited in a habeas petition. "The law of a first appeal is law of the case on all subsequent appeals in which the facts are substantially the same." Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (quoting Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969)). The law of the case doctrine may not be avoided by a more detailed and precisely focused argument made after reflection upon previous proceedings. Id. at 316, 535 P.2d at 798-99; See Nasby v. State, No. 80443-COA

(Order of Affirmance and Denying Petition, Apr. 10, 2020); Nasby v. State, No. 70626 (Order of Affirmance, Jul. 12, 2017).

ORDER

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

DATED this 29th day of June, 2020.

DISTRICT JUDGE

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

BY /s/TALEEN PANDUKHT
TALEEN PANDUKHT
Chief Deputy District Attorney
Nevada Bar #005734

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 29th day of June, 2020, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

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

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

98F11168A/TP/SW-Appeals/dd-MVU

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

Electronically Filed
7/10/2020 3:44 PM
Steven D. Grierson
CLERK OF THE COURT

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

* * * * * *

Brendan Nasby, Petitioner,	Case No. A-19-788126-W
vs.	Dept. No. 19
Renee Baker Warden; State of Nevada, Respondent.	NOTICE OF APPEAL

Notice is hereby given that Brendan Nasby, Petitioner in Pro Se, hereby appeals to the Supreme Court of the State of Nevada, from the final order Denying Petition For Writ Of Habeas Corpus[1] entered on May 11, 2020 and June 8, 2020; and Denying Motion For Resolution of Petition Notwithstanding Respondent's Failure To Answer entered on June 8, 2020.

Dated this 1st day of July, 2020.

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

Fn. 1 - See Attached Exhibit A - Affidavit Of Brendan Nasby.

RECEIVED
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CLERK OF THE COURT

12

Affirmation Pursuant To NRS 239B.030.

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

Dated this 1st day of July, 2020.

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

Certificate Of Service.

I, Brendan Nasby, hereby certify that on this 1st day of July, 2020, 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 89710-4717

2) Brendan Nasby #63618
Care of LCC Law Library
Lovelock Corr. Ctr.
1200 Prison Rd.
Lovelock, NV 89419
lcclawlibrary@doc.nv.gov

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

-2-

EXHIBIT - A

"Affidavit Of Brendan Nasby"

EXHIBIT - A

AFFIDAVIT OF BRENDAN NADOY

STATE OF NEVADA }
COUNTY OF PERSHING } ss:

COMES NOW, Brendan Nadoy, who first being duly sworn and on my own oath, do hereby depose and state the following:

1) I am Brendan Nadoy listed in this affidavit.

2) I am currently an inmate at "Lovelock Correctional Center", Pershing County; Lovelock, Nevada.

3) I mailed to the clerk of the 8th Jud. Dist. Ct., for filing my "Petition For Writ Of Habeas Corpus (NRS 34.360/34.480/34.500 - Facial Challenge To A Statute)" on February 21, 2020.

4) My Petition was filed on February 27, 2020.

5) On March 6, 2020, the district court issued its "Order For Petition For Writ Of Habeas Corpus", in which, the court ordered Respondents to answer/respond and file a return, and also set a hearing for the petition to be held on May 11, 2020 at 8:30 AM. See - (Exhibit 1).

6) On March 6, 2020, the district court also issued its "order to proceed in forma pauperis" See - (Exhibit 2); however the court docket list it being issued on March 12, 2020. See - (Exhibit 3).

7) After not hearing anything from the Respondents, or the court, regarding an answer or an outcome of the May 11th hearing, I filed a "Motion For Resolution Of Petition Notwithstanding Respondent's Failure To Answer". See - (Exhibit 3).

8) On, or about, June 25, 2020, I called my sister and asked her to print out the court's docket sheet and mail it to me.

9) On June 30, 2020, I received the requested docket sheet. See (Exhibit 3).

10) Upon reviewing the docket sheet, I saw that, not only was the May 11, 2020 hearing not listed, but a hearing was scheduled for June 8, 2020 at 10:15 AM where my petition was denied. See (Exhibit 3).

11) I never received notice of the June 8, 2020 hearing or if there was an order rescheduling the May 11, 2020 hearing. Nor have I received notice that the petition was denied.

12) In an effort to protect my right to appeal, I have filed the "Notice of Appeal" although I have received no orders or finding of facts regarding my petition.

Dated this 1st day of July, 2020.

By: Brendan Nasby #63618
Lovelock Corr. Ctr.
1200 Prison Rd.
Lovelock, NV 89419
(Affiant)

Verification Under Penalty of Perjury.

I do verify under the penalty of perjury that the above affidavit is true and correct and is stated to the best of my knowledge, and is made without benefit of a notary pursuant to NRS 208.165, as I am an incarcerated person.

By: Brendan Nasby #63618
(Affiant)

EXHIBIT - 1

"Order For Petition For Writ Of Habeas Corpus."

EXHIBIT - 1

FILED
MAR 06 2020
CLERK OF COURT

PPOW

DISTRICT COURT
CLARK COUNTY, NEVADA

Brendan Nasby,

Petitioner,

vs.

Renee Baker Warden; State of Nevada,

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 February 27, 2020. 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 11TH day of May, 2020, at the hour of 8:30 A.M. o'clock for further proceedings.

Will Kishner

District Court Judge

A-19-788126-W
OPWH
Order for Petition for Writ of Habeas Corpu
4901758

EXHIBIT - 2

"Order To Proceed In Forma Pauperis."

EXHIBIT - 2

27

FILED
MAR 0 6 2020
CLERK OF COURT

Case No. _____
Dept. No. _____

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

* * * * *

Brenden Nasby,
Petitioner,
-vs-
Renee Baker (Warden) et al.,
Respondent.

A-19-788126-W
Dept. XIX

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, Brenden 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 4th day of March, 2020.

District Court Judge

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CMC #27

A-19-788126-W
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Order to Proceed In Forma Pauperis
4903266

EXHIBIT - 3

"Page 5 Of 8th Jud. Dist. Ct. Docket Sheet
For Case No. A-19-788126-W."

EXHIBIT - 3

Comment
Notice of Entry of Findings of Fact, Conclusions of Law and Order

05/02/2019 Notice of Appeal

05/07/2019 Case Appeal Statement

07/24/2019 Certificate of Service ▾

Comment
Certificate of Re-Service

02/27/2020 Petition for Writ of Habeas Corpus ✓

02/27/2020 Application to Proceed in Forma Pauperis

03/06/2020 Order for Petition for Writ of Habeas Corpus ▾ ✓

Comment
Order for Petition for Writ of Habeas Corpus

03/12/2020 Order to Proceed In Forma Pauperis ▾ ✓

Comment
Order to Proceed In Forma Pauperis

06/04/2020 Motion ▾

Comment
Motion for Resolution of Petition Notwithstanding Respondent's Failure to Answer ✓

06/08/2020 Petition for Writ of Habeas Corpus ▾ ✓

Judicial Officer
Kephart, William D.

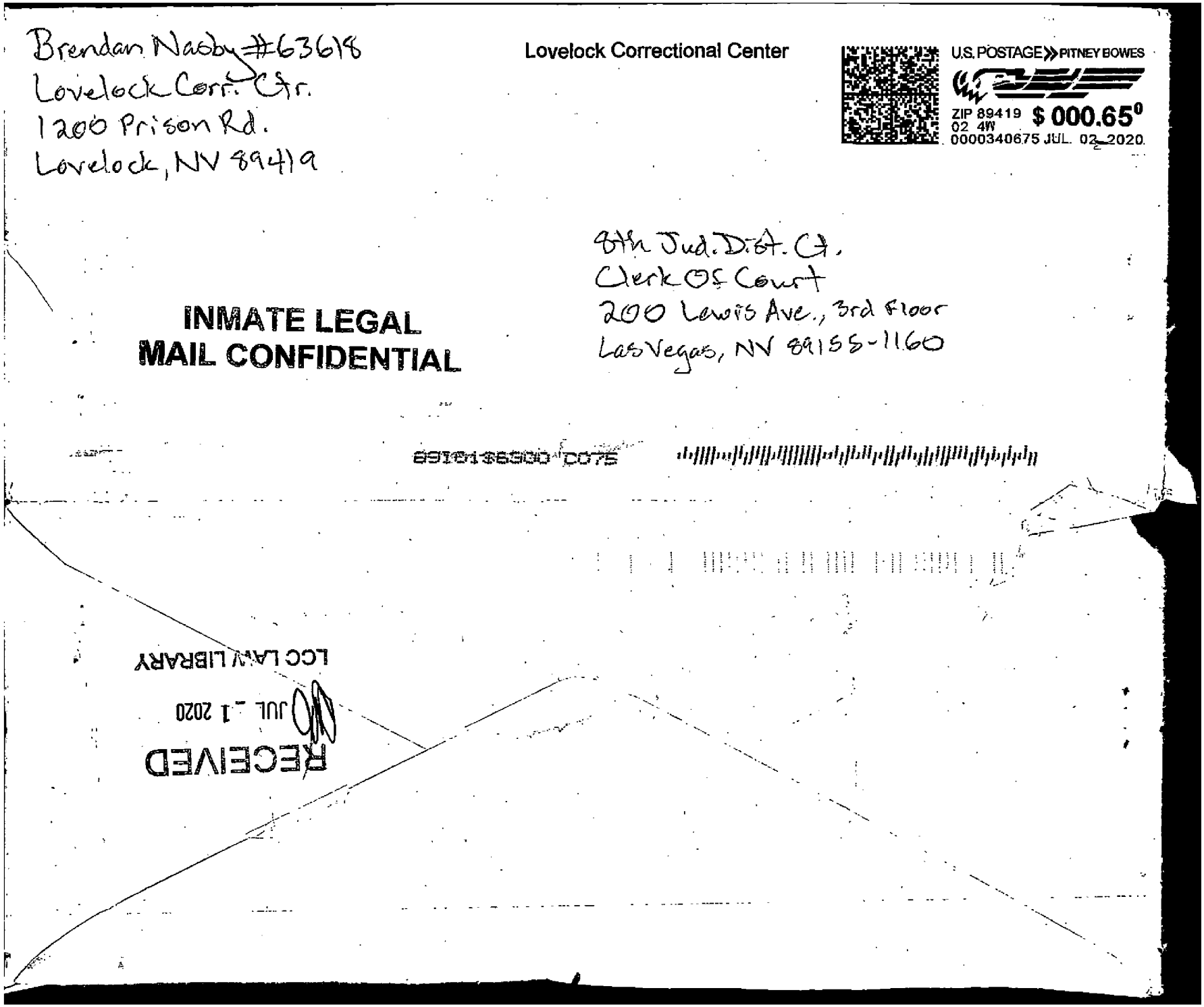
Hearing Time
10:15 AM

Result
Denied

Parties Present ▴

Defendant

Attorney: Dunn, Ann Marie


Brendan Nasby #63618
Lovelock Corr. Ctr.
1200 Prison Rd.
Lovelock, NV 89419
Lovelock Correctional Center
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Las Vegas, NV 89155-1160
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IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

BRENDAN JAMES NASBY,

Plaintiff(s),

vs.

RENEE BAKER (WARDEN),

Defendant(s),

Case No: A-19-788126-W

Dept No: XIX

CASE APPEAL STATEMENT

1. Appellant(s): Brendan Nasby

2. Judge: William D. Kephart

3. Appellant(s): Brendan Nasby

Counsel:

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

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

Counsel:

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

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, March 4, 2020
***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: Civil Writ

Type of Judgment or Order Being Appealed: Civil Writ of Habeas Corpus

11. Previous Appeal: Yes

Supreme Court Docket Number(s): 78744, 80443

12. Child Custody or Visitation: N/A

13. Possibility of Settlement: Unknown

Dated This 13 day of July 2020.

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 Nasby

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRENDAN JAMES NASBY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

BRENDAN JAMES NASBY,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK,
Respondent,
and
THE STATE OF NEVADA,
Real Party in Interest.

Supreme Court No. 78744/80443
District Court Case No. A788126

FILED
AUG - 5 2020
CLERK OF COURT

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Elizabeth A. Brown, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows:

"ORDER the judgment of the district court AFFIRMED and the PETITION DENIED"

Judgment, as quoted above, entered this 10th day of April, 2020.

A-19-788126-W
CCJA
NV Supreme Court Clerks Certificate/Judgm
4924607

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows:

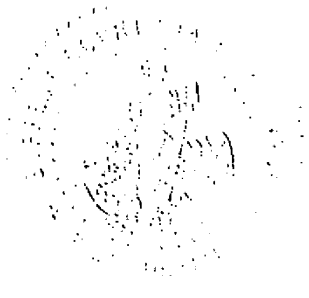
"Rehearings Denied."

Judgment, as quoted above, entered this 23rd day of June, 2020.

IN WITNESS WHEREOF, I have subscribed my name and affixed the seal of the Supreme Court at my Office in Carson City, Nevada this July 31, 2020.

Elizabeth A. Brown, Supreme Court Clerk

By: Monique Mercier
Administrative Assistant



IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BRENDAN JAMES NASBY, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 78744-COA
BRENDAN JAMES NASBY, Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, Respondent, and THE STATE OF NEVADA, Real Party in Interest.	No. 80443-COA

FILED
APR 10 2020
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE AND DENYING PETITION

Docket No. 78744-COA is an appeal from a district court order denying Brendan James Nasby's postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; William D. Kephart, Judge. Docket No. 80443-COA is an original petition for a writ of mandamus.

Docket No. 78744-COA

Nasby filed his petition on January 11, 2019, more than 17 years after issuance of the remittitur in his direct appeal. *See Nasby v. State*, Docket No. 35319 (Order of Affirmance, February 7, 2001). The State argued that Nasby's petition was not timely filed, it was successive, and it constituted an abuse of the writ. *See* NRS 34.726(1); NRS 34.810(2). And

COURT OF APPEALS
OF
NEVADA

20-13721

the State argued the petition should be denied because Nasby failed to demonstrate good cause and actual prejudice to overcome the procedural bars. *See* NRS 34.726(1); NRS 34.810(1)(b), (2), (3). The State also affirmatively pleaded laches. *See* NRS 34.800(2). The district court found that Nasby failed to demonstrate good cause to overcome the procedural bars and the petition was barred by laches because Nasby failed to overcome the presumption of prejudice to the State. Therefore, the district court denied Nasby's petition.

First, Nasby argues the district court erred by denying his postconviction petition for a writ of habeas corpus based on a finding that he did not establish good cause to overcome the procedural bars. Nasby argues that, because the district court order directing the State to file a response says "good cause appearing," the district court was precluded from denying his petition for failing to demonstrate good cause. Nasby asserts that, when a petition that is subject to procedural bars is filed, the district court must make a determination on its own regarding whether the petitioner has demonstrated good cause to overcome any procedural bars and, if the court finds no good cause has been demonstrated, it must summarily dismiss the petition. He further asserts that it is only when the district court finds that there is good cause to overcome a procedural defect that a district court can direct the State to file a response.

Nasby is mistaken. NRS 34.745(4) only directs the district court to summarily dismiss a petition when the petition is a second or successive petition and it is plain on the face of the documents before the district court that the petitioner is not entitled to relief based on any of the grounds set forth in NRS 34.810(2). When it is not plain on the face of the documents before the court that the petitioner is not entitled to relief under

NRS 34.810(2), nothing prohibits the district court from ordering the State to file a response to the petition. And, a response may assist the court in determining whether the petitioner has demonstrated good cause to overcome any procedural bars, particularly where, as here, the petition is subject to more than one procedural bar. Finally, it is clear from the record that the district court's use of "good cause appearing" was not a determination that the district court found Nasby had demonstrated good cause to overcome the procedural bars. Therefore, we conclude he is not entitled to relief on this claim.

Second, Nasby claims the district court abused its discretion by considering the State's claim of laches, ruling on his petition before the expiration of his time to file a reply, and denying his petition based on laches. Nasby also asserts the district court abused its discretion by failing to address his "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" (reply).

NRS 34.800(2) requires the State to plead laches in a motion to dismiss and mandates that the petitioner be given an opportunity to respond to the pleading before a ruling on the motion is made. Pursuant to NRS 34.750(4), a petitioner has 15 days, after service of a motion to dismiss, to file a reply to the motion.

Here, the State did not raise its allegation of laches in a motion to dismiss; rather, the State alleged laches in its response to Nasby's petition. Therefore, the State's allegation of laches was not properly raised and should not have been considered by the district court. Further, even assuming the State's allegation of laches was properly raised, it was improper for the district court to conduct the hearing on Nasby's petition

before Nasby's time to file a reply had expired and conclude that dismissal of the petition was warranted based on laches. Nasby filed his reply shortly after the district court orally denied his petition and 11 days before the district court entered its written order denying the petition. Because the district court had considered the State's allegation of laches, we also conclude the district court erred by failing to address Nasby's reply in the written order denying Nasby's petition. Nevertheless, we conclude Nasby was not and no relief is warranted based on these claims because, as discussed below, the district court properly denied the petition pursuant to the application of other procedural bars.

Third, Nasby claims the district court erred by finding his petition was subject to the procedural bars and concluding he failed to demonstrate good cause. Nasby asserts that because he was alleging that his judgment of conviction is void, it was proper to file his petition pursuant to NRS 34.360 and, therefore, the petition was not subject to any procedural bars. He further asserts that, even if the petition was filed pursuant to NRS 34.720 and NRS 34.724, the petition was not subject to any procedural bars because he was alleging his conviction was void. Finally, he argues, even if the procedural bars did apply, he demonstrated good cause to overcome the procedural bars.

Contrary to Nasby's assertion, his claim that his judgment of conviction is void based on a *Kazalyn*[1] error is still a challenge to the validity of his conviction. Therefore, the petition was properly construed as a petition filed pursuant to NRS 34.724(2) and the petition was subject to the procedural bars.

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[1]*Kazalyn v. State*, 108 Nev. 67, 825 P.2d 578 (1992), *receded from by Byford v. State*, 116 Nev. 215, 235, 994 P.2d 700, 713-14 (2000).

Nasby's underlying, substantive claim was that he was tried and convicted under an unauthorized or otherwise incorrect interpretation of NRS 200.030(1)(a) because the jury was given the *Kazalyn* instruction on premeditation for first-degree murder. Nasby argued that pursuant to the holding in *Nika v. State*, 124 Nev. 1272, 198 P.3d 839 (2008), he was entitled to the retroactive application of *Byford*, which held the State must prove willfulness, deliberation, and premeditation in order to obtain a conviction for first-degree murder.

Nasby appeared to argue the holdings in *Welch v. United States*, ___ U.S. ___, 136 S. Ct. 1257 (2016), and *Montgomery v. Louisiana*, ___ U.S. ___, 136 S. Ct. 718 (2016), provided good cause to overcome the procedural bars and he should be able to raise his underlying claim because the cases changed the framework under which retroactivity was analyzed. These cases, however, did not provide good cause to overcome the procedural bars because they did not change the law as it applied to Nasby. *Nika* already held that the holding in *Byford* applied to individuals whose convictions were not final at the time *Byford* was decided, *see Nika*, 124 Nev. at 1287, 198 P.3d at 850, and Nasby's conviction was not final when *Byford* was decided, *see Colwell v. State*, 118 Nev. 807, 820, 59 P.3d 463, 472 (2002); *see also* U.S. Sup. Ct. R. 13. Further, Nasby could not demonstrate actual prejudice to overcome the procedural bars. This court applied *Byford* to Nasby's case and concluded he could not demonstrate actual prejudice based on the giving of the *Kazalyn* instruction because the evidence presented at trial was sufficient to establish beyond a reasonable doubt that the killing of the victim was premeditated and Nasby acted willfully and with deliberation when killing the victim. *See Nasby v. State*, Docket No. 70626 (Order of Affirmance, July 12, 2017). This holding is the law of the case.

See Hall v. State, 91 Nev. 315, 315-16, 535 P.2d 797, 798-99 (1975). Accordingly, we conclude the district court did not err by denying Nasby's petition as procedurally barred.

Fourth, Nasby claims the district court erred by denying his motion for the appointment of counsel. Because Nasby's petition was procedurally barred, the underlying issue had already been resolved in a prior proceeding, the record demonstrates Nasby was able to comprehend the proceedings, and counsel was not necessary to proceed with discovery, we conclude the district court did not err by denying Nasby's request for counsel. *See* NRS 34.750(1); *Renteria-Novoa v. State*, 133 Nev. 75, 76, 391 P.3d 760, 760-61 (2017).

Docket No. 80443-COA

In this original petition for a writ of mandamus, Nasby argues the order of affirmance that was issued in his direct appeal is void because the holding in *Nika* challenged the law that applied to him. He further argues that because his *Kazalyn* instruction challenge was erroneously denied on direct appeal, he has retained all rights relating to that claim, including the appointment of counsel to assist him with raising that claim. He asserts the district court's denial of counsel to assist him with this claim has resulted in a complete denial of due process. He further argues the district court abused its discretion by not actually reviewing his fourth postconviction petition for a writ of habeas corpus and this court abused its discretion in several ways when affirming the denial of that petition. Nasby also asks this court to decide whether the holding in *Nika* retroactively divested the district court of jurisdiction to try and convict him. Finally, Nasby requests the appointment of counsel to assist him.

Nasby's claims challenging the validity of his conviction are not properly raised in a petition for a writ of mandamus because such claims must be raised in a postconviction petition for a writ of habeas corpus filed in the district court for the county in which the conviction occurred. *See* NRS 34.724(2)(b); NRS 34.738(1). Further, Nasby had an adequate opportunity, by way of a direct appeal, a petition for rehearing, or a petition for review, to challenge prior orders that were issued by the district court and this court. Therefore, this court's intervention by way of extraordinary writ is not warranted to address such challenges. *See* NRS 34.170. We conclude Nasby has failed to meet his burden and demonstrate this court's intervention by way of extraordinary writ is warranted. *See* NRS 34.160; *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004). Accordingly, we deny Nasby's request for counsel and, without deciding upon the merits of any claims raised, we deny the petition.

Having concluded Nasby is not entitled to any relief, we

ORDER the judgment of the district court AFFIRMED and the PETITION DENIED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Hon. William D. Kephart, District Judge
Brendan James Nasby
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BRENDAN JAMES NASBY, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 78744-COA
BRENDAN JAMES NASBY, Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, Respondent, and THE STATE OF NEVADA, Real Party in Interest.	No. 80443-COA

FILED

JUN 23 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER DENYING REHEARINGS

Rehearings denied. NRAP 40(c).

It is so ORDERED.

_____, C.J.
Gibbons

_____, J.
Tao

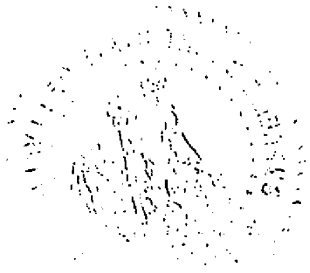
_____, J.
Bulla

COURT OF APPEALS
OF
NEVADA

(O) 1947B

20-23310

cc: Hon. William D. Kephart, District Judge
Brendan James Nasby
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk



IN THE SUPREME COURT OF THE STATE OF NEVADA

BRENDAN JAMES NASBY,
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Respondent,
and
THE STATE OF NEVADA,
Real Party in Interest.

Supreme Court No. 78744/80443
District Court Case No. A788126

REMITTITUR

TO: Steven D. Grierson, Eighth District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: July 31, 2020

Elizabeth A. Brown, Clerk of Court

By: Monique Mercier
Administrative Assistant

cc (without enclosures):
Hon. William D. Kephart, District Judge
Brendan James Nasby
Clark County District Attorney \ Alexander G. Chen, Chief Deputy District Attorney

RECEIPT FOR REMITTITUR

Received of Elizabeth A. Brown, Clerk of the Supreme Court of the State of Nevada, the REMITTITUR issued in the above-entitled cause, on AUG - 5 2020.

HEATHER UNGERMANN

Deputy District Court Clerk

RECEIVED
APPEALS
AUG - 4 2020
CLERK OF THE COURT

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

DISTRICT COURT
CLARK COUNTY, NEVADA

Writ of Habeas Corpus	**COURT MINUTES**	**June 08, 2020**

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

June 08, 2020 **10:15 AM** **Petition for Writ of Habeas Corpus**

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

COURT CLERK: Tia Everett

RECORDER: Christine Erickson

REPORTER:

PARTIES PRESENT: Dunn, Ann Marie Attorney

JOURNAL ENTRIES

- Court noted Defendant not present and in custody with the Nevada Department of Corrections. COURT ORDERED, Petition DENIED pursuant to NRS 34 writ is time barred, this is a successive petition and the Court will not declare the statute as unconstitutional.

NDC

Certification of Copy and Transmittal of Record

State of Nevada
County of Clark } **SS:**

Pursuant to the Supreme Court order dated August 4, 2020, 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 239.

BRENDAN NASBY,

Plaintiff(s),

vs.

RENE 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 11 day of August 2020.

Steven D. Grierson, Clerk of the Court

Heather Ungermann, Deputy Clerk