

FILED

JUN 04 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY J. F. F.
DEPUTY CLERK

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

Brendan James Nasby,
Appellant,
vs
The State of Nevada,
Respondent.

No. 81484-COA

NRAP RULE 40. PETITION FOR REHEARING

BRENDAN JAMES NASBY

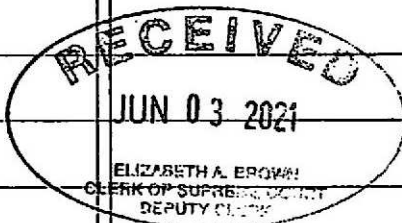
I.D. NO. 63618

LOVELOCK CORRECTIONAL CENTER

1200 PRISON ROAD

LOVELOCK, NEVADA 89419

(APPELLANT IN PRO SE)



21-15995

JURISDICTION

On April 28, 2021, this Court's Order Of Affirmance was filed. On May 31, 2021, Appellant mailed the instant Petition For Rehearing to the Clerk of this Court.

This Court has jurisdiction to revisit its own orders and correct its own mistakes, upon Petition for rehearing or sua sponte.

ISSUES PRESENTED

Issue One: This Court Mistakenly States That Nasby Did Not Claim That He Was Denied Access To Legal Materials Or Denied The Ability To File For Relief. (Order Of Aff. pg. 1.)

Issue Two: This Court Overlooks The Fact That If NRS Ch. 34's Post Conviction Procedural Bars Are Applicable To Facial Challenges And Subject Matter Jurisdiction Challenges, Those Procedural Bars Are A Violation Of The Separation Of Powers And Unconstitutional.

Issue Three: This Court Overlooks The Fact That A Facially Unconstitutional Statute Proscribes No Facts And The Nev. Supreme Court Has Equated Factual Innocence And A Conviction Under An Unconstitutional Statute.

Issue Four: This Court Mistakenly States That Nasby Failed To Show How Dist. Court's Erroneous Order And Failure To Properly Notice The Hearing Affected His Substantial Rights.

1 I. STATEMENT OF THE CASE

2 On February 27, 2020, Appellant Brendan James Nasby (Nasby)
3 filed his petition for writ of habeas corpus. Dist. Ct. Case No.
4 A-19-788126-W. The District Court denied the petition on June
5 4, 2020. Nasby appealed, and his Opening Brief was filed on
6 December 21, 2020. On April 28, 2021, this Court issued its
7 Order of Affirmance. Following an extension of time, Nasby
8 filed the instant Petition for Rehearing.
9

10 II. SUPPORTING FACTS AND ARGUMENT

11 In this Petition for Rehearing, Nasby identifies (A) when
12 this Court has overlooked or misapprehended a material fact in
13 the record or a material question of law in the case, and (B) when
14 this Court has overlooked, misapplied or failed to consider a
15 statute, procedural rule, regulation, or decision directly
16 controlling a dispositive issue in the case. (N.R.A.P. 40(c)(2)(A)(B)).
17 See Also - In Re Duaneau, 104 Nev. 784, 769 P.2d 1271 (1988).
18

19 Issue One⁴: This Court Mistakenly States That Nasby Did Not
20 Claim That He Was Denied Access To Legal Materials or
21 Denied The Ability To File For Relief. (Order of Aff. pg 4).

22 Nasby, specifically claimed that the State's "official interference"
23 "prevented discovery of the instant claims", which caused the delay
24 in filing the instant petition, and that the official interference was
25 the State's denial of physical access to the prison's law library
26 and the reduction of access to the materials in the law library to
27 a paging only system, which requires Nasby to be clairvoyant
28 and specifically request research on topics he's never heard of.

29 See - (Op. Brief, pg. 25-26).

1 This Court is correct in that inmates do not have a constitu-
2 tional right to conduct generalized research (Affirmance, pg. 2).
3 However, inmates do have a constitutional right to "[t]he tools
4 [...] that inmates need in order to attack their sentences, direct-
5 ly or collaterally". Lewis v. Casey, 518 U.S. 343, 355 (1996); e.g.
6 Silva v. Vittoria, 658 F.3d 1090, 1102 (9th Cir. 2011). And the U.S.
7 Supreme Court explains that Bounds guarantees "the conferral of
8 a capability - the capability of bringing contemplated challenges
9 to sentences or conditions of confinement before the courts."
10 Lewis, 518 U.S. at 356. "When any inmate shows that an action-
11 able claim of this nature [...] has been lost or rejected, or that the
12 presentation of such a claim is currently being prevented, because
13 this capability of filing suit has ~~been~~ not been provided, he demon-
14 strates that the State has failed to furnish 'adequate law libraries
15 or adequate assistance from persons trained in the law.'" Lewis, *supra*.
16 "Insofar as the right vindicated by Bounds is concerned, 'meaningful
17 access to the courts is the touchstone,' and the inmate therefore
18 must go one step further and demonstrate that the alleged short-
19 comings in the library or legal assistance program hindered his eff-
20 orts to pursue a legal claim. He might show, for example, that a
21 complaint he prepared was dismissed for failure to satisfy some
22 technical requirement which, because of deficiencies in the
23 prison's legal assistance facilities, he could not have known. Or
24 that he had suffered arguably actionable harm that he wished to
25 bring before the courts, but was so stymied by the inadequacies
26 of the law library that he was unable even to file a complaint."
27 Lewis, 518 U.S. at 351. Nasby did exactly that.

28 While the State is not required to help Nasby discover a claim,

1 the State is required to provide the capability of discovering the
2 claim and may not actively prevent, or interfere in, a claimant's dis-
3 covery. See - E.g. Silva v. Vittorio, 655 F.3d 1090, 1102-03 (9th Cir. 2011).
4 If Nasby could have possibly discovered the instant claims using
5 the prison's law library, but the State interfered with his ability to
6 access the materials in that law library, which ultimately prevent-
7 ed the discovery of the claims, which in turn, denied him the
8 capability of timely filing the claims — then, this constitutes
9 "official interference". The State has an affirmative duty to prov-
10 ide meaningful access to the courts. Bounds v. Smith, 430 U.S. 917,
11 821 (1977). The State's chosen method of providing meaningful acc-
12 ess to the court is a method that they already know is constitut-
13 ionally inadequate. See - (Op. Brief, pp. 19-20 and listed citations). The
14 State's paging system, requires inmates to know in advance what
15 materials he needs to consult in order to request and research them.
16 Nasby SERIOUSLY ask this Court to explain how anyone without
17 supernatural powers, can specifically request research on some-
18 thing they've never heard of?

19 And, as this Court pointed out, Nasby filed six previous petitions and
20 is a "prolific filer who frequently access the courts." (Affirmance, pg. 2).
21 However, as the U.S. Supreme Court necessarily implies, dismissal of
22 those frequent filings demonstrates the lack of "meaningful access".
23 Lewis, 518 U.S. at 351. It also demonstrates Nasby's exercise of
24 due diligence. Nasby does not sit around and wait to file a claim,
25 but instead, he immediately files whenever he discovers an actionable
26 claim.

27 Ultimately, a determination of the adequacy of the States chosen
28 method of providing meaningful access to the court is necessary

1 to address Nasby's good cause argument. Since this is a mixed
2 question of law and fact, an evidentiary hearing may be nec-
3 essary and the district court is constitutionally required to
4 make a factual determination. Remand is required for this pur-
5 pose alone.

6
7 Issue Two: This Court Overlooks The Fact That If NRS Ch. 34's Post Conviction
8 Procedural Bars Are Applicable To Facial Challenges And Subject-
9 Matter Jurisdiction Challenges, Those Procedural Bars Are A
10 Violation Of The Separation Of Powers And Unconstitutional.

11 The Nevada Supreme Court, in as recently as 2010, re-established
12 that a procedural statute that conflicts with a pre-existing pro-
13 cedural rule, violates the separation of powers doctrine and
14 such a statute is of no effect. Berkson v. Lepome, 126 Nev.
15 492, 499; 245 P.3d 560, 565 (2010).

16 The legislature did not give the Courts power to settle a case or
17 controversy, the power to issue writs of habeas corpus upon petition,
18 or the power to issue all other writs proper and necessary to the com-
19 plete exercise of their jurisdiction. That power was granted to
20 the Courts by the Constitution. (Art. 6 § 6(1) Nev. Const). Thus,
21 the legislature cannot take that power away nor abridge or dim-
22 inish it. Pacific Live Stock Co. v. Ellison Ranching Company, 46 Nev. 351,
23 360; 213 P.700, 703 (1923). The judiciary has the inherent power
24 to govern its own procedures and is entrusted with rule-making and
25 other incidental powers reasonable and necessary to carry out the
26 duties required for the administration of justice and to economic-
27 ally and fairly manage litigation. Berkson, supra. The Court's use
28 of the concepts of claim & issue preclusion, exhaustion requirements,
abuse of writ doctrine and the like, is well established. Berkson,

1 126 Nev. at 500; 245 P.3d at 565-66. In fact, NRS 34.910 is
2 essentially the abuse of the writ doctrine codified. Per the
3 abuse of the writ doctrine, the failure to raise a claim in
4 an earlier proceeding or pleading, constitutes a waiver of the
5 claim. However, subject matter jurisdiction can never be
6 waived or forfeited, U.S. v. Cotton, 539 U.S. 625, 630 (2002);
7 and whether a court lacks subject matter jurisdiction can be
8 raised by the parties at any time. Landreth v. Malik, 721 P.3d
9 1265, 1267 (2009). See also (NRC P 12.1(3)). The reason that
10 subject matter jurisdiction can be raised at any time and can never be
11 waived is because if a court lacked subject matter jurisdiction
12 a judgment issued by it is not merely voidable but is in fact void.
13 See: State v. Sustach, 108 Nev. 223; 826 P.2d 959 n* 3 (1992); Landreth,
14 721 P.3d at 1270; Re Smith, 35 Nev. 80, 124-25 (1912).

15 NRS Ch. 34's post conviction procedural bars mandatory applica-
16 tion to facial challenges and subject matter jurisdiction challenges,
17 "unduly hampers the judiciary's ability to manage litigation
18 through the application of the doctrines [and court rules], and
19 as a result, runs afoul of separation of powers principles."
20 Berkson, 126 Nev. at 497-98.

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22 Issue Three: This Court Overlooks The Fact That A Facially Unconstitutional
23 Statute Proscribes No Facts And The Nev. Supreme Court
24 Has Equated Factual Innocence And A Conviction Under An
Unconstitutional Statute.

25 An unconstitutional statute is as no law and proscribes no facts
26 or conduct. Re Smith, 35 Nev. at 123 (quoting Ex Parte Siebold, 100 U.S.
27 371 (1880)). How can one not be factually innocent, if the factual
28 conduct is not criminal under any valid criminal statute?

1 The Nevada Supreme Court even equated the entitlement of
2 relief to one whose conduct is not criminal and to one whose conduct
3 is prohibited by an unconstitutional statute.
4 "Analogous to this now well-established rule that before or after
5 conviction the court will discharge, on habeas corpus, a person who
6 is held under an unconstitutional act of the legislature, reasons
7 are quite as apparent for holding that an accused person will be dis-
8 charged under writ of habeas corpus, where he is held for some act
9 which the law does not make criminal. Certainly a citizen who has
10 not infringed any statute is as much entitled to his liberty and to be
11 free from prosecution as the person who has violated an uncon-
12 stitutional act, and the court is as much without jurisdiction."
13 Re Smith, 35 Nev. at 123-24. And, as Nasby pointed out, federal
14 courts also agree that one is actually innocent of a crime if
15 the statute which proscribes the factual conduct is factually
16 unconstitutional. See - (Op-Brief, pg. 18-19; and listed citations).

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18 Issue Four: This Court Mistakenly States That Nasby Failed To
19 Show How Dist. Court's Erroneous Order And Failure
20 To Properly Notice The Hearing Affected His Substantial
21 Rights.

22 Nasby specifically explained that when making a facial challenge
23 to the criminal statute, the general presumption regarding the statute's
24 constitutionality is reversed and the state bears the burden of demon-
25 strating the statute's constitutionality. The court order^{ed} the state to
26 respond, at which point, the state had its opportunity to meet its
27 burden. Failing to even attempt to meet its burden results in the
28 fact, ~~that~~ Nasby is imprisoned under ~~an~~ a presumed unconsti-
tutional statute and his confinement is unlawful. See - (Op-Brief,

1 pg 14-15)

2 The district court erroneously stating that it did not order
3 the state to respond effectively says that the state was not
4 told to meet its burden or given the opportunity to do so. The
5 fact is, the state was told to respond and the state waived
6 its opportunity to meet its burden and the erroneous state-
7 ment shields the state and denied Nasby of his legal entitle-
8 ment, Freedom from imprisonment under an unconstitutional statute.

10 III. RELIEF SOUGHT.

11 Wherefore, Nasby respectfully request this Court: (1) Grant
12 his Petition for Rehearing; (2) Vacate its order of affirmance;
13 (3) Address the issues in this Petition for Rehearing; (4) Reverse the
14 district court's order dismissing his petition; (5) Order the dist-
15 rict court to hear his habeas petition; (6) In the alternative,
16 order the district court grant Nasby an exdientary hearing
17 to determine Nasby's good cause arguments; (7) Grant his habeas
18 petition; (8) in the alternative, issue an order clarifying the law
19 as it pertains to this case; (9) anything else this Court deem
20 full and fair.

22 IV. CERTIFICATE OF COMPLIANCE.

23 1. I hereby certify that this brief complies with the form re-
24 quirements of NRAP 3.2(a)(4) and NRAP 3.2(a)(8) because: This
25 petition has been prepared in proportionally spaced hand writing.
26 2. I further certify that this petition complies with the
27 page limitations of NRAP 40(b)(3) because, excluding the parts
28 of the petition exempted by NRAP 3.2(a)(7)(C), it does not exceed

10 pages.

3. Finally, I hereby certify that I have read this petition brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this petition complies with all applicable Nevada Rules of Appellate Procedures, in particular NRAP 28(c)(1), which requires every assertion in the petition regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying petition is not in conformity with the requirements of the ~~Nevada~~ Nevada Rules of Appellate Procedure.

Dated this 31st day of May, 2021.

Submitted,

By: ~~Brenda Nasby #63618~~
(Appellant In Pro Se)

Footnotes:

1- Though not addressed by this Court, Nasby explained that he did not even know the challenged statute was vague until the Nev. Sup. Ct. necessarily said it was in Nika v. State. See (Op. Brief, pg. 25). Nika was not decided until 2008. As this Court acknowledged and assumed, Nasby's claim of inadequate access to legal materials constituted good cause for not raising Nika claim within one year of its decision, and when Nasby did assert Nika, he didn't know how to demonstrate a lack of deliberation to demonstrate prejudice because the law is too vague. See (Op. Brief, pg. 27-29). Thus, the instant claim was not ripe for decision until the injury occurred in this Court. This Court further, in rejecting his subsequent petitions, asserted that the law of the case foreclosed review of Nasby's attempt to demonstrate prejudice (based on his evidence demonstrating the lack of the deliberation element). At that moment is when the instant claim became ripe for decision. If the injury caused by the statute's vagueness was not complete until this Court closed its doors on Nasby's presentation of evidence disputing deliberation, then Nasby did

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not have standing to raise a claim until that rejection in case No. 70626-COA & No. 75744-COA. Thus, the instant petition could not be raised until 2020, once the case or controversy had become ripe for decision.

CERTIFICATE OF SERVICE

I, Brendan Nasby, hereby certify that on this 31st day of May, 2021, I mailed to the Clerk of the Nevada Supreme Court, and caused to be served by the Clerk's Electronic Filing/Service, the foregoing "NRA P Rule 40. Petition For Rehearing" to:

1. Attorney General
100 N. Carson St.

Carson City, NV 89710-4717

2. Clark County District Attorney
200 Lewis Ave.

Las Vegas, NV 89155-2212

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

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

Affirmation Pursuant To NRS 239B.030.

The undersigned does hereby affirm that the preceding "NRA P Rule 40. Petition For Rehearing" does not contain the social security number of any person.

Dated this 31st day of May, 2021.

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