

No. _____

19-5552

IN THE

SUPREME COURT OF THE UNITED STATES

FILED

JUL 29 2019

OFFICE OF THE CLERK
SUPREME COURT, U.S.

KEVIN DEVONN SUTTON

(Your Name)

— PETITIONER

vs.

THE STATE OF NEVADA

— RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE COURT OF APPEALS OF THE STATE OF NEVADA
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

KEVIN D. SUTTON #61281

(Your Name)

1200 PRISON ROAD

(Address)

LOVELOCK, NEVADA 89419

(City, State, Zip Code)

(Phone Number)

RECEIVED

AUG -6 2019

OFFICE OF THE CLERK
SUPREME COURT, U.S.

QUESTION(S) PRESENTED

Whether Sutton IS Actually INNOCENT OF First Degree Murder?

Does The Court OF Appeal's Decision Violate Sutton's Rights To Equal Protection And DUE PROCESS?

LIST OF PARTIES

☒ All parties appear in the caption of the case on the cover page.

☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

TABLE OF CONTENTS

OPINIONS BELOW.....	1
JURISDICTION.....	1-2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4-7
REASONS FOR GRANTING THE WRIT	8-11
CONCLUSION.....	12

INDEX TO APPENDICES

- APPENDIX A Order of Affirmance by the State Court of Appeals
- APPENDIX B Order Denying Rehearing
- APPENDIX C Order Denying Petition for Review by the State Supreme Court
- APPENDIX D Findings of Fact, Conclusion of Law and Order of the State District Court
- APPENDIX E Order Granting Motion to Stay Remittitur Pending the Filing of this petition.
- APPENDIX F Order of Affirmance by the State Court of Appeals in the case of Nasby v. State, Docket No. 70626 Unpublished

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
<u>Bousley v. U.S.</u> , 523 U.S. 614 (1998) _____	8, 11,
<u>Byford v. State</u> , 116 Nev. 215, 994 P.2d 700 (2000) _____	5, 6, 8, 10, 11,
<u>Calderon v. Thompson</u> , 523 U.S. 538, 549 (1998) _____	11,
<u>In Re Winship</u> , 397 U.S. 358 (1970) _____	9,
<u>Kazalyn v. State</u> , 108 Nev. 67, 82 P.2d 578 (1992) _____	4
<u>Nashy v. State</u> , Docket No. _____	11,
<u>Nika v. State</u> , 124 Nev. 1272, 198 P.3d 839 (2008) _____	6, 8,
<u>Schulp v. Delo</u> , 513 U.S. 298, 327 (1995) _____	8, 10, 11,

STATUTES AND RULES

28 U.S.C. § 1257(a) _____	2
NEV. REV. STAT. § 200.010(1) _____	3, 10,
NEV. REV. STAT. § 200.030(1)(a) _____	3, 10,
NEV. RULES OF App. PROC. 40(a)(3) _____	1,
NEV. RULES OF App. PROC. 40B(a) _____	2,
NEV. REV. STAT. § 174.035(1) _____	12

OTHER

IN THE
SUPREME COURT OF THE UNITED STATES
Petition For Writ OF CERTIORARI

PETITIONER RESPECTFULLY PRAYS THAT A WRIT OF CERTIORARI ISSUE TO REVIEW
the judgment below.

I.

Opinions Below

THE ORDER OF AFFIRMANCE by the COURT OF APPEALS OF THE STATE OF NEVADA, APPEARS
AT APPENDIX A to the petition AND IS UNPUBLISHED.

THE ORDER DENYING REHEARING by the COURT OF APPEALS OF THE STATE OF NEVADA,
APPEARS AT APPENDIX B to the petition AND IS UNPUBLISHED.

THE ORDER PETITION FOR REVIEW by the NEVADA SUPREME COURT, APPEARS AT
APPENDIX C to the petition AND IS UNPUBLISHED.

THE FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF the 8th JUDICIAL
DISTRICT COURT OF NEVADA, APPEARS AT APPENDIX D to the petition AND IS
UNPUBLISHED.

II.

JURISDICTION

THE ORDER OF AFFIRMANCE by the NEVADA COURT OF APPEALS WAS FILED ON
MARCH 14, 2019. A COPY OF THAT DECISION APPEARS AT APPENDIX A. NEVADA RULES
OF APPELLATE PROCEDURE 40(a)(3) STATES THAT A DECISION BY THE COURT OF APPEALS
RESOLVING A CLAIM FOR POSTCONVICTION RELIEF, IS FINAL FOR PURPOSES OF EXHAUSTION
OF STATE REMEDIES IN SUBSEQUENT FEDERAL PROCEEDING.

A TIMELY PETITION FOR REHEARING WAS THEREAFTER DENIED ON APRIL 24, 2019. A COPY
OF THE ORDER DENYING REHEARING APPEARS AT APPENDIX B.

NEVADA RULE OF APPELLATES PROCEDURE 40 B(a) STATES THAT A DECISION OF THE COURT OF APPEALS IS A FINAL DECISION THAT IS NOT REVIEWABLE BY THE SUPREME COURT EXCEPT ON PETITION FOR REVIEW.

A TIMELY PETITION FOR REVIEW BY THE NEVADA SUPREME COURT WAS THEREAFTER DENIED ON JUNE 7, 2019. A COPY OF THE ORDER DENYING PETITION FOR REVIEW APPEARS AT APPENDIX C.

THE JURISDICTION OF THIS COURT IS INVOKED UNDER 28 U.S.C. § 1257(a).

III.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- 1) U.S. Constitution, Amendment V: "No person shall [....] be deprived of life, liberty, or property without due process of Law"
- 2) U.S. Constitution, Amendment VI: "IN all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed."
- 3) U.S. Constitution, Amendment XIV, section 1: No state shall [....] deprive any person of life, liberty or property, without due process of Law nor deny to any person within its jurisdiction the equal protection of the Laws.
- 4) This petition implicates N.R.S. 200.010(i).
- 5) This petition implicates N.R.S. 200.030(i)(a).
- 6) This petition implicates N.R.S. 174.035(1) "A defendant may plead not guilty, guilty or, with consent of the court, nolo contendere. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of nolo contendere without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and consequences of the plea."

IV.

STATEMENT OF THE CASE

ON November 20, 1996, the State Filed AN INFORMATION charging KEVIN DEVONN SUTTON (hereinafter "Sutton") with ONE COUNT OF MURDER with USE OF A deadly weapon. THEREAFTER, SUTTON ENTERED INTO negotiations with the State. The State Filed AN AMENDED INFORMATION pursuant to those negotiations on February 19, 1999, charging Sutton with First Degree MURDER with USE OF A DEADLY WEAPON. ON the same day, A Guilty Plea Agreement was Filed in Open Court wherein Sutton pleaded Guilty to the charge AS ALLEGED in the AMENDED INFORMATION. At the time OF SUTTON'S plea of guilty, 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 N.R.S. 200.030(1)(a) MADE the ELEMENT OF deliberation SYNONYMOUS with the ELEMENT OF premeditation, which thus required only premeditation be presented by the State At the entry OF SUTTON'S plea AS the sole ELEMENT defining First Degree MURDER. IN EXCHANGE FOR SUTTON'S plea, the State Agreed to stipulate to A sentence OF 20 years to Life in the NEVADA DEPARTMENT OF CORRECTIONS plus AN equal SEPARATE AND distinct sentence OF 20 years to Life FOR the USE OF A deadly WEAPON.

ON April 22, 1999, the 8th Judicial District Court sentenced Sutton to the given stipulated sentence OF 20 years to Life FOR the First Degree MURDER plus AN equal SEPARATE AND distinct sentence OF 20 years to Life FOR the USE OF A deadly WEAPON. Sutton's Judgment OF Conviction WAS ENTERED ON May 5, 1999.

Sutton Filed A Notice OF Appeal ON April 30, 1999. The NEVADA SUPREME COURT Affirmed Sutton's Conviction AND sentence ON June 11, 2001. SUTTON V. STATE, Docket No. 34165 (ORDER OF AFFIRMANCE, June 11, 2001). Remittitur issued ON July 9, 2001.

While Sutton's Appeal was pending in the Nevada Supreme Court, 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. Nev. at 235-36. "In order to establish first-degree murder, the premeditated killing must also have been done deliberately." Id. Byford then went on to define the element of deliberation: [as the process of determining upon a course of action to kill as a result of thought including weighing the reasons for and against the action and considering the consequences of the action. A deliberate determination may be arrived at in a short period of time, but in all cases the determination must not be formed in passion, or if formed in passion, it must be carried out after there has been time for the passion to subside and deliberation to occur. A mere unconsidered and rash impulse is not deliberate, even though includes the intent to kill.]

Sutton filed his first pro per Post-Conviction Petition for Writ of Habeas Corpus on March 25, 2002. The State filed its Response on May 16, 2002. Sutton was subsequently appointed counsel, and filed a Supplement to his first petition on July 26, 2002. The State filed a Response on September 13, 2002. The 8th Judicial District Court conducted a hearing on Sutton's first petition on October 24, 2002, and subsequently denied Sutton's first petition, finding that Sutton's plea was voluntary and that he received effective assistance of counsel. The Findings of Fact, Conclusions on Law, and Order was filed on November 12, 2002.

Sutton filed a Notice of Appeal on November 5, 2002. The Nevada Supreme Court affirmed the denial of Sutton's first petition on July 8, 2004. Sutton v. State, Docket No. 40477 (Order of Affirmance July 8, 2004). Remittitur issued on August 3, 2004.

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 NEVADA SUPREME COURT STATED THAT Byford WAS A NEW CHANGE OF LAW THAT APPLIES TO CASES THAT WERE NOT FINAL WHEN Byford WAS DECIDED.

ON MARCH 6, 2018, Sutton FILED A POST-CONVICTION PETITION FOR WRIT OF HABEAS CORPUS — CLAIMING ACTUAL INNOCENCE WHICH CONSISTED OF THREE(3) ITEMS OF "NEW EVIDENCE;"

EVIDENCE (1): Sutton PRESENTED A SWORN AFFIDAVIT STATING THAT HE WAS UNDER THE INFLUENCE OF ALCOHOL (AT THE MOMENT OF THE CRIME) WHICH IMPAIRED HIS ABILITY TO FORM "deliberation."

EVIDENCE (2): Sutton PRESENTED A PSYCHIATRIC EVALUATION/TREATMENT REPORT CONDUCTED BY LEONORA K. PETTY, M.D. STATING THAT Sutton WAS LEGALLY INSANE AT THE MOMENT OF THE CRIME; AND

EVIDENCE (3): Sutton PRESENTED THE STATEMENT OF RAFAEL JENNINGS (THE VICTIM'S FRIEND) ATTESTING TO THE FACT THAT THE VICTIM WAS JEALOUS OF Sutton AND DESIRED TO POSSESS A LOVE-AFFAIR WITH Sutton's GIRLFRIEND IMPLYING THAT Sutton HAD NO MALICE TOWARDS THE VICTIM.

THE STATE FILED A RESPONSE ON APRIL 26, 2018. THE STATE FAILED TO REFUTE Sutton's "NEW EVIDENCE."

ON MAY 11, 2018, Sutton FILED A REPLY TO THE STATE'S RESPONSE.

ON MAY 15, 2018, THE 8th JUDICIAL DISTRICT COURT DENIED Sutton's POST-CONVICTION PETITION FOR WRIT OF HABEAS CORPUS — CLAIMING ACTUAL INNOCENCE¹; Sutton FILED A NOTICE OF APPEAL ON AUGUST 21, 2018 IN THE NEVADA SUPREME COURT. Sutton's APPEAL WAS LATER TRANSFERRED TO THE COURT OF APPEALS FOR THE STATE OF NEVADA.

THE STATE COURT OF APPEALS FILED AN "ORDER OF AFFIRMANCE" ON MARCH 14, 2019. APP. A. ORDER DENYING REHEARING WAS FILED APRIL 24, 2019. APP. B. PETITION FOR REVIEW WAS DENIED BY THE NEVADA SUPREME COURT ON

JUNE 7, 2019. Sutton Filed in the NEVADA Supreme Court A "Motion To Stay Remittitur pending the Filing of A petition For A Writ OF CERTIORARI with the United States Supreme Court; ORDER Granting Motion WAS Filed July 3, 2019. App. E.



REASONS FOR GRANTING THE PETITION

Sutton hereby incorporates the facts and arguments supplied in his "Statement of The Case."

A. WHETHER SUTTON IS ACTUALLY INNOCENT OF FIRST DEGREE MURDER?

"To be credible," a claim of actual innocence must be based on reliable evidence not presented at trial. Schulp v. Delo, 513 U.S. 298, 324, 115 S. Ct. 851, 865 (1995).

A defendant who plead guilty can still raise actual innocence "if he can establish that the constitutional error in his plea colloquy has probably resulted in the conviction of one who is actually innocent." Bousley v. United States, 523 U.S. 614, 623, 118 S. Ct. 1604, 1611 (1998) (internal quotations omitted). Further, a defendant, who pled guilty can demonstrate actual innocence if in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him." Id. (internal quotations omitted). This court noted that in this regard, actual innocence means factual innocence, not mere legal insufficiency. Id. (emphasis added).

In Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000), the Nevada Supreme Court ruled the crime of first degree murder require three (3) elements be proven beyond a reasonable doubt (willfulness, deliberation and premeditation), instead of just one (1) (premeditation). In Sutton's case, the state was required to present evidence to the factfinder which shows that Sutton willfully, deliberately and premeditatedly committed first degree murder or Sutton has to admit certain facts to demonstrate all 3 elements.

In Nika v. State, 124 Nev. 1272, 198 P.3d 839 (2008), the Nevada Supreme Court ruled that Byford was a new change of law and applies to all cases that were not final. Sutton's case was not final, so Byford applies to him.

SEE: Sutton v. State, Docket No. 34165.

IN the guilty plea colloquy the district court stated: " the court needs a statement as to what happened... that now brings you, Mr. Sutton, before this court as to the charge of First degree murder with use of a deadly weapon."

Sutton responded: " I shot Tyrell Nolen, and as a result of the gunshot wound, he died."

The following exchange then took place —

The district court: " Sufficient for the state, or does the state wish to add?"

The state (Mr. Wall): " That is was premeditated under the law of the state of Nevada which is what makes it First degree murder."

The district court: " Any reason to disagree with that Mr. Sutton?"

Sutton responded: " No"

The district court: Based upon those representations and the agreement by Mr. Sutton as to the statement by the state, the court would find that Mr. Sutton's plea of guilty to the amended information charging Mr. Sutton with First degree murder with use of a deadly weapon is freely and voluntarily given; further, that Mr. Sutton understands the nature and consequences of his plea and therefore, the court accepts that plea of guilty this date.

The state's representation nor Sutton's statement demonstrates that he willfully, and deliberately killed Tyrell Nolen with malice aforethought for the factfinder to accept his plea, thus proving that Sutton is guilty beyond reasonable doubt of First degree murder. The record indited above is silent as to any evidence to manifest the elements of " malice aforethought" and "deliberation," so Sutton is still presumed innocent. SEE: In re Winship, 397 U.S. 358 (1970).

N.R.S. 200.010 "MURDER" DEFINED. MURDER IS THE UNLAWFUL KILLING OF A HUMAN BEING: (1) WITH MALICE AFORETHOUGHT, EITHER EXPRESS OR IMPLIED.

N.R.S. 200.030 DEGREES OF MURDER: (1) MURDER OF THE FIRST DEGREE IS MURDER IS: (a) PERPETRATED BY MEANS OF POISON, LYING IN WAIT OR TORTURE, OR BY ANY OTHER KIND OF WILLFUL, DELIBERATE AND PREMEDITATED KILLING.

THE STATE DID NOT FULFILL ITS MANDATORY BURDEN OF PROVING THE ESSENTIAL ELEMENTS: DELIBERATION AND MALICE AFORETHOUGHT.

SUTTON PRESENTED TO THE DISTRICT COURT THREE (3) ITEMS OF RELIABLE EVIDENCE THAT WAS NOT PRESENTED AT THE PLEA COLLOQUY WHICH NEGATES THE ELEMENTS DELIBERATION AND MALICE AFORETHOUGHT THAT DEMONSTRATES HIS INNOCENCE.

SUTTON'S GUILTY PLEA LACK A FACTUAL BASIS BECAUSE NEITHER THE "EVIDENCE" NOR THE "PLEA ALLOCATION" SHOWED THAT HE DELIBERATELY (AS DEFINED IN BYFORD) KILLED THE VICTIM WITH MALICE AFORETHOUGHT.

B. DOES THE COURT OF APPEAL'S DECISION VIOLATE SUTTON'S RIGHTS TO DUE PROCESS AND EQUAL PROTECTION?

IN *Schlup*, THIS CASE SAID THAT TO SUSTAIN AN "ACTUAL INNOCENCE" CLAIM THE PETITIONER MUST "SHOW THAT IT IS MORE LIKELY THAN NOT THAT NO REASONABLE JUROR WOULD HAVE CONVICTED HIM IN THE LIGHT OF THE NEW EVIDENCE." 513 U.S., AT 327, 115 S. CT. AT 867 (EMPHASIS ADDED). THAT "NEW EVIDENCE" WAS TO BE EVALUATED OF COURSE, ALONG WITH THE "OLD EVIDENCE" CONSISTING OF THE TRANSCRIPT OF THE PLEA COLLOQUY/ALLOCATION. (EMPHASIS ADDED). THE HABEAS COURT WAS TO "MAKE ITS DETERMINATION CONCERNING THE PETITIONER'S INNOCENCE IN LIGHT OF ALL THE EVIDENCE." *Id.*, AT 328, 115 S. CT., AT 867 (INTERNAL QUOTATION MARKS OMITTED).

The Court of Appeals determination that "EVEN ASSUMING SUTTON'S NEW EVIDENCE IS TRUE, IT DOES NOT SHOW THAT IT IS MORE LIKELY THAN NOT THAT NO REASONABLE JUROR WOULD HAVE CONVICTED HIM IN LIGHT OF THE NEW EVIDENCE," IS FACTUALLY UNFOUNDED. BECAUSE THE (DISTRICT) HABEAS COURT AS WELL AS THE COURT OF APPEALS FAILED TO EVALUATED THE "OLD EVIDENCE" CONSISTING OF THE TRANSCRIPTS / RECORD FROM THE GUILTY PLEA HEARING TO MAKE ITS DETERMINATION CONCERNING SUTTON'S INNOCENCE IN LIGHT OF ALL THE EVIDENCE. SEE. App. A pg. 2

The Court of Appeals determination is NOT BASED ON ANY EVIDENCE BY WAY OF "OLD EVIDENCE" NOR THE "PLEA ALLOCATION" DEMONSTRATING THAT SUTTON'S CONDUCT WAS DELIBERATE AND WITH MALICE AFORETHOUGHT. LIKE IN BOUSLEY, THE EVIDENCE PRESENTED AT ~~THE~~ SUTTON'S PLEA ALLOCATION WAS INSUFFICIENT TO ESTABLISH BEYOND A REASONABLE DOUBT THAT THE KILLING OF THE VICTIM WAS DELIBERATE AND WITH MALICE AFORETHOUGHT. SEE: Byford, SUPRA, 116 NEV. AT 233-34, 994 P.2D AT 712-13.

The Court of Appeals is applying CALDERON V. THOMPSON, 523 U.S. 538, 559 (1998) (QUOTING Schlup v. Delo, 513 U.S. 298, 327 (1995)) (SETTING OUT THE TEST FOR A GETAWAY CLAIM OF ACTUAL INNOCENCE) ARBITRARILY AND CAPRICIOUSLY.

IN THE CASE OF NASBY V. STATE, NO. 70626, THE COURT OF APPEALS DETERMINED "THAT REASONABLE JUROR WOULD HAVE CONVICTED HIM," BASED ON "OLD EVIDENCE" CONSISTING OF THE TRANSCRIPT OF THE TRIAL. SEE. App. F pg. 3-6

The Court of Appeals basis for its determination in NASBY IS CONTRARY TO SUTTON'S. THUS, THIS COURT'S PRECEDENTS ARE NOT BEING APPLIED EQUALLY BY THE COURT OF APPEALS FOR THE STATE OF NEVADA. PURSUANT TO THE DEFINITION OF "DELIBERATION" DEFINED IN Byford, IT IS EVIDENT THAT SUTTON WAS NOT INFORM OF THE TRUE NATURE OF THE OFFENSE BY HIS ATTORNEY NOR THE DISTRICT COURT; NOR DID THE DISTRICT COURT DETERMINE THAT SUTTON UNDERSTOOD THE NATURE OF THE OFFENSE.

MOREOVER, the district court was without authority and jurisdiction to accept Sutton's plea pursuant to N.R.S. 174.035 because the district court did not determine that Sutton understood the nature of the charge. The district court determined that "Sutton understands the nature and consequences of his plea," as quote on page 9 in this petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Kari Butts

Date: July 24, 2019