

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

BRENDAN JAMES NASBY — PETITIONER

vs.

THE STATE OF NEVADA — RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

THE COURT OF APPEALS OF THE STATE OF NEVADA

PETITION FOR WRIT OF CERTIORARI

BRENDAN JAMES NASBY

I.D.No. 63618

Lovelock Correctional Center

1200 Prison Road

Lovelock, Nevada 89419

(Petitioner In Pro Se)

QUESTION(S) PRESENTED

WHETHER NASBY CAN BE ACTUALLY INNOCENT OF FIRST DEGREE MURDER IF HE IS STILL PRESUMED FACTUALLY INNOCENT OF THE NECESSARY ELEMENT OF DELIBERATION.

WHETHER THE NEVADA SUPREME COURT, BY WAY OF NIKA v. STATE, RETROACTIVELY DIVESTED THE STATE DISTRICT COURT OF ITS JURISDICTION TO TRY AND CONVICT NASBY OF FIRST DEGREE MURDER.

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	2
STATEMENT OF THE CASE	3-10
REASONS FOR GRANTING THE WRIT	10-16
CONCLUSION.....	17

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 — Order Of Affirmance By The State Supreme Court

APPENDIX E — Findings Of Fact, Conclusions Of Law And Order Of The State District Court

APPENDIX F — Statutory Provisions Involved - 1. NRS 34.726(1); 2. NRS 34.800;
3. NRS 34.810(2) & (3)

TABLE OF AUTHORITIES CITED

<u>CASES</u>	<u>PAGE NUMBER</u>
<u>Bounds v. Smith</u> , 430 U.S. 817 (1977) _____	15
<u>Bousley v. U.S.</u> , 523 U.S. 614 (1998) _____	12
<u>Bridges v. State</u> , 11 Nev. —, 6 P.3d 1000 (2000) _____	4
<u>Byford v. State</u> , 116 Nev. 215, 994 P.2d 700 (2000) _____	4, 5, 6, 7, 8, 9, 10, 11, 12, 15
<u>Chapman v. California</u> , 386 U.S. 18, 17 L.Ed 2d 705 (1967) _____	9
<u>Clark v. Arizona</u> , 548 U.S. 735 (2006) _____	11
<u>Colwell v. State</u> , 118 Nev. 807, 59 P.3d 463 (2003) _____	14
<u>Ex Parte Rosenblatt</u> , 19 Nev. 439 (1887) _____	16
<u>Ex Parte Siebold</u> , 100 U.S. 371 (1880) _____	16
<u>Galloway v. Truesdell</u> , 83 Nev. 13 (1967) _____	15
<u>Garner v. State</u> , 116 Nev. —, 6 P.3d 1013 (2000) _____	4, 5, 15
<u>In Re Winship</u> , 397 U.S. 358 (1970) _____	11, 12
<u>Johnson v. Avery</u> , 393 U.S. 483 (1969) _____	14
<u>Kazalyn v. State</u> , 108 Nev. 67, 82 P.2d 578 (1992) _____	3, 8, 9, 10, 12, 15, 16
<u>Landreth v. Malik</u> , 221 P.3d 1265, 125 Nev. Adv. Rep. 61 (2009) _____	14, 15
<u>Lewis v. Casey</u> , 518 U.S. 343 (1996) _____	15
<u>Missouri v. Jenkins</u> , 515 U.S. 70, 137 L.Ed 2d 63, 115 S.Ct. 2038 (1995) _____	15
<u>Nika v. State</u> , 124 Nev. 1272, 198 P.3d 839 (2008) _____	5, 6, 7, 9, 10, 11, 15, 16
<u>Sullivan v. Louisiana</u> , 508 U.S. 275 (1993) _____	11
<u>U.S. v. Gaudin</u> , 515 U.S. 506 (1995) _____	12

STATUTES AND RULES

28 U.S.C. § 1257(a) _____	2
Nev. Rev. Stat. § 34.726 _____	2, 7, 12
Nev. Rev. Stat. § 34.800 _____	2, 7, 12

Nev. Rev. Stat. § 34.910	2, 7, 12
Nev. Rev. Stat. § 200.030(1)(a)	2, 3, 11, 13, 16
Nev. Rules of App. Proc. 40(a)(3)	1
Nev. Rules of App. Proc. 40 B(a)	2
Nev. Rules of Civ. Proc. 59(e)	7, 8

CONSTITUTIONAL AMENDMENTS

U.S. Const. Amend. V	2, 6
U.S. Const. Amend. VI	2, 6
U.S. Const. Amend. XIV	2, 6

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 Denying Petition For Review By the Nevada Supreme Court, appears at Appendix C to the petition and is unpublished.

The Order Of Affirmance by the Nevada Supreme Court, appears at Appendix D 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 E to the petition and is unpublished.

II.

JURISDICTION

The Order of Affirmance by the Nevada Court of Appeals was filed on July 12, 2017. 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 proceedings.

A timely petition for rehearing was thereafter denied on September 15, 2017. A copy of the order denying rehearing appears at Appendix B.

Nevada Rules of Appellate 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 November 29, 2017. 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"
- 4) This Petition implicates NRS 200.030(1)(a), which is set forth as follows:
 1. Murder of the first degree is murder which is:
 - (a) Perpetrated by means of poison, lying in wait or torture, or by any other kind of willful, deliberate and premeditated killing
- 5) This Petition implicates NRS 34.726(1) which appears at Appendix F.1
- 6) This Petition implicates NRS 34.800 which appears at Appendix F.2
- 7) This Petition implicates NRS 34.810(2) & (3) which appear at Appendix F.3

IV.

STATEMENT OF THE CASE¹

On August 11, 1998, 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. (St. Case No. C154293). Represented by counsel, Nasby proceeded to trial in the 8th Judicial District Court of Nevada on October 13, 1999. 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 only premeditation be ~~defined~~ 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 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 defines only premeditation. See (Jury Instruction No. 12). At Nasby's trial, defense counsel objected to this instruction, instead offering, Defense "A". (Trial Transcripts (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 Inst. 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. 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

¹ The record citations, for all pleadings not included in the Appendix, will be referenced in the same manner that they were in the State Appellate and Supreme Courts.

Sentence with the possibility of parole for Count II - Murder With Use Of A Deadly Weapon, plus an equal and consecutive term of life with 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. 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. 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 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 separately on the meaning of premeditation, it should also be instructed on the meaning of deliberation." Id.

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. Citing to Bridges v. State, 11 Nev. —, 6 P.3d 1000 (2000) and Garner v. State, 116 Nev. —, 6 P.3d 1013 (2000), the Nevada Supreme Court erroneously rejected Nasby's Kazalyn/ Byford claim for the sole reason that, "Nasby was tried prior to the decision in Byford." (App. D). That order 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 the State district court. Ground Three of that petition was: "Petitioner's Right To Due Process Under The U.S. Constitution Was Violated When The Court Failed To Instruct The Jury On Willfulness, Deliberation, and Premeditation (Inst. 12)". The State district court dismissed this claim, per the law of the case doctrine, and 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. See -

(Nasby v. State, Nev. Sup. Ct. No. 47130).

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 said that, 1) Byford announced a change of law; 2) that it errored in Garner, supra; 3) that it overruled Garner to the extent that Garner declined to apply Byford to cases pending on direct appeal; and 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.

On February 18, 2011, after being granted a stay of proceedings in his federal habeas action (3:07-cv-00304-LRH), Nasby filed a second post-conviction habeas petition in the State district court, in which, Nasby's Ground Four was: "The Trial Court Failed To Instruct The Jury On Willfulness, Deliberation, and Premeditation; Instruction (12)". In this ground, Nasby argued that Byford applied to his case. The State district court denied the petition as time and procedurally barred, and subject to laches. (C154293-2). While he was housed at Ely State Prison (ESP) in Ely, Nevada, Nasby did not know of, nor did the State provide an adequate method for him to know of, the Nevada Supreme Court's decision in Nika. Because of this, Nasby did not, and could not, present an argument of "cause and prejudice" which included the Nika decision. Nasby appealed the denial. On February 8, 2012, the Nevada Supreme Court affirmed the denial of Nasby's second petition. See (Nasby v. State, Nev. Sup. Ct. No. 58579).

Nasby was not represented by counsel when he filed his second petition. In fact, Nasby has not been represented by counsel since "Anthony Sgro, Esq." in 2007. Since the Nevada Supreme Court's 2008 decision in Nika, Nasby has never had access to a law library or the assistance of someone trained in the law.

On December 9, 2014, Nasby filed his third post-conviction petition in the State district court. (98C154293-2). In it, he raised six grounds, none of which, included the Kazalyn/Byford issue. The district court denied Nasby's third petition. Nasby appealed. On September 11, 2015, the Nevada Supreme Court affirmed

the denial. (Nev. Sup. Ct. No. 67580).

Between the months of August and November 2015, Nasby was informed, by inmate "Kevin Sutton" at Lovelock Correctional Center, in Lovelock, Nevada, about the Nevada Supreme Court's decision in Nika, supra. Upon researching the Nika case, Nasby filed the fourth, and instant, post-conviction habeas corpus petition in the State district court on January 5, 2016. Along with his fourth petition, Nasby also filed a Motion For Appointment of Counsel; a Motion to Extend Prison Copywork Limit; a Memorandum In Support of Petition; an Affidavit In Support of Petition; a Supplemental Memorandum In Support of Petition; and a Notice to the Clerk, Court, and all Interested Parties.

Nasby's fourth 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 fourth petition was untimely filed. (App. F. 1). The petition was also successive. (App. F. 3). The petition was procedurally barred absent a demonstration of good cause and actual prejudice (App. F). Moreover, because the State specifically pleaded laches, Nasby was required to overcome the rebuttable presumption of prejudice. (App. F. 2).

In his fourth petition, Nasby claimed he had good cause to excuse the procedural bars as a result of inadequate access to legal materials and because he is actually innocent. He asserted he received flawed jury instructions on the elements 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 he objected to the jury instruction at trial, then raised the issue on direct appeal and in his first post-conviction petition, but his claims were denied on the basis the holding in Byford did not apply to him, because his conviction predates Byford. Nasby pointed out that that decision was overruled by the court's Nika decision. Nasby also asserted he was unable to adequately argue good cause and prejudice to consider his jury instruction claim in his second postconviction petition for writ of habeas corpus, 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 Nevada Supreme Court's decision in Nika, 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~~ first two post-conviction petitions, and the error in rejecting his prior claims is good cause for re-raising the claim in the instant petition.

On April 4, 2016, the State district court denied both Nasby's petition and his Motion for Appointment of Counsel. The State district court filed a rather boiler plate "Finding of Facts, Conclusions of Law and Order" on May 9, 2016, reflecting its oral pronouncement, in of which, the State district court ruled that Nasby did not demonstrate good cause to overcome the time and procedural bars of NRS 34.746, NRS 34.800, and NRS 34.810. (App.E). On May 18, 2016, Nasby filed a Motion To Alter or Amend Judgment NRCP 59(e). On June 8, 2016, the State district court denied Nasby's 59(e) Motion. On June 9, 2016, Nasby filed his Notice of Appeal. On June 30, 2016, the State district court filed its order denying Nasby's 59(e)

Motion.

On December 23, 2016, Nasby filed his Opening Appeal Brief, in which, he raised the following issues:

Issue One - The 8th Judicial District Court Lacked Jurisdiction And Authority.

Issue Two - Nasby's Due Process Rights Were Violated Because The Change In Law Announced In *Byford v. State*, Was Not Applied To His Case On Direct Review, And He Is Actually Innocent Of 1st Degree Murder.

Issue Three - Nasby Is Being, And Has Been, Denied Meaningful Access To The Court.

Issue Four - The District Court Abused Its Discretion And Errored In Not Appointing Counsel And For Failing To Address And Grant Nasby's Motion To Extend Prison Copywork Limit.

Issue Five - The District Court Abused Its Discretion And Erroneously Denied Nasby's 59(e) Motion.

The State Appellate court issued its Order of Affirmance on July 12, 2017. However, although the state district court ruled that Nasby failed to show good cause, the state appellate court assumed the contrary and then, sua sponta, searched the trial record and presented evidence ~~that~~, 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." (App. A, pg. 4). The court effectively found the necessary element of deliberation, sua sponta, and determined that the State met its burden of production, but speaks nothing 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)." (App. A, pg. 5). Essentially, the court determined that the State need not meet its burden of persuasion to maintain a conviction and that Nasby can not demonstrate prejudice or actual innocence,

based on his presumption of innocence.

On August 2, 2017, Nasby's Petition for Rehearing was filed. In that petition, Nasby raised the following issues:

Issue One - This Court Failed To Address Nasby's Challenge To The 8th Judicial District Court's Jurisdiction.

Issue Two - This Court Exceeded Its Appellate Jurisdiction.

Issue Three - This Court Applied The Incorrect Law, Analysis, And Standard Of Review.

Issue Four - This Court's Factual Determinations Are Incorrect And Need To Be Corrected For The Record.

In arguing the listed issues, Nasby first turned to the court's failure to address his Jurisdictional issue raised in his opening brief. In his opening brief, Nasby challenged the jurisdiction of the 8th Judicial District Court to, not only review his habeas petition, but to try and convict him of first-degree murder under an inapplicable law (Kazalyn). Second, Nasby addressed how the State appellate court exceeded its appellate jurisdiction by making factual determinations regarding the element of deliberation, and affirming the lower court's order based on determinations not made in the lower court's decision. Third, Nasby addressed the appellate court's misapplication of law, analysis, and review standard. The appellate court failed to recognize the actual claim that Nasby raised in his habeas petition, which was that Byford was not applied on direct review. Because Nasby objected to the Kazalyn instruction at trial, and raised the issue on Direct Appeal, he has preserved the issue for Direct Review. It was not until Nika was decided, that Nasby was entitled to Byford's application on Direct Review. The State appellate court applied a habeas analysis to Nasby's claim when, in fact, he was entitled to a Direct Review Analysis. Under Direct Review Standards, the burden is on the State (which they did not attempt to meet), and Nasby's claim maintains a presumption of prejudice. Chapman v. California, 386 U.S. 18, 23-24; 17 LED 2d 705, 710 (1967). Thus, Nasby need only demonstrate good cause for the delay in his filing (which he did),

while prejudice is presumed. Nasby also addressed the fact that everything the Nevada Supreme Court based its decision on in rejecting his Byford issue on Direct Appeal, was completely overruled by the court's own Nika decision. The state appellate court's erection of an entirely new barrier, which was not present at the time of Direct Review, violated the prohibition against judicial ex post facto. Fourth, and finally, Nasby addressed the state appellate court's incorrect description of factual occurrences, regarding the element of deliberation, and requested that those incorrect facts be corrected for the record.

On September 15, 2017, the State appellate court denied Nasby's Petition for Rehearing without explanation. (App. B).

On September 28, 2017, Nasby's Petition For Review By The Supreme Court, was filed, in which, he raised the same issues submitted in his Petition For Rehearing. On November 29, 2017, the State Supreme Court denied Nasby's Petition For Review without explanation. (App. C).

Nasby filed a timely Motion To Stay Issuance of Remittitur pending application to This Court for a writ of certiorari. The State Supreme Court granted Nasby's Motion To Stay Issuance Of Remittitur on January 4, 2018.

What followed, is the instant Petition For Writ Of Certiorari.

V.

REASON WHY THE WRIT SHOULD ISSUE

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

- A. This Court Has Not Addressed What Remains Of A Petitioner's Presumption Of Innocence Following A Retroactive Change Of Law Which Requires The State To Prove A Necessary Element Of A Crime That Was Not Proven Beyond A Reasonable Doubt At Trial.

Nasby was convicted of first-degree murder under the law of Kazalyn v. State;

108 Nev. 67, 82 P.2d 578 (1995), which did not require the State prove, or the jury to find, the distinct element of deliberation, because its interpretation of NRS 200.030(1)(a) omitted the element by making it synonymous with premeditation. Nika v. State, 124 Nev. 1272, 1283 (2008). Before Nasby's conviction became final, the Nevada Supreme Court announced a change in law, in Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000), which requires the State now distinctly prove and for a jury to distinctly find, the element of deliberation. In 2008, the Nevada Supreme Court held that the change in law announced in Byford, applied to cases like Nasby's. Nika, at 1301. Thus, due to the change in law that retroactively applies to Nasby's case, the State was required to distinctly prove to a jury, and a jury was required to find, the distinct element of deliberation. This obviously did not happen in Nasby's case.

This Court, in Clark v. Arizona, 548 U.S. 735, 766 (2006), restated the presumption in In Re Winship, 397 U.S. 358, 364 (1970) that a "defendant is innocent unless and until the government proves beyond a reasonable doubt each element of the offense". The Winship reasonable doubt standard applies in both state and federal proceedings. Sullivan v. Louisiana, 508 U.S. 275, 278 (1993). The standard protects three interests. First, it protects the defendant's liberty interest. Winship, 397 U.S. at 363. Second, it protects the defendant from the stigma of conviction. Id. And Third, it encourages community confidence in criminal law by giving "concrete substance" to the presumption of innocence. Id. at 363-64.

The burden of proof consists of two parts: the burden of production and the burden of persuasion. The party bearing the burden of production must produce enough evidence to allow a fact finder to determine that the fact in question occurred. The State Appellate Court, in the instant case, determined that the State met its burden of production, regarding the elements of first degree murder. (App. A, pg. 4-5). However, this is not enough. Sullivan, 508 U.S. at 280.

The party bearing the burden of persuasion must convince the factfinder that a

fact in issue should be ~~not~~ decided a certain way. Winship, 397 U.S. at 364. The Due Process Clause places on the prosecution, the burden of persuasion on every element of the crime charged. This is the burden of proof that the State, in the instant case, did not, and could not, meet because the jury in Nasby's case could never have ^{been} convinced to find an element which they were not requested or required to find. As Nasby did not waive his right to a jury trial, a court could never determine that the State proved Nasby guilty of deliberation beyond a reasonable doubt, to the satisfaction of a jury (U.S. v. Gaudin, 515 U.S. 506, 515 (1995)), and thus, unless and until a jury is convinced, and determines, that he is guilty of deliberation Nasby's presumption of innocence of deliberation — still holds.

B. This Court Has Not Address Whether A Petitioner Can Be Actually Innocent Of A Crime, Based On His Presumed Innocence Of A Necessary Element Of That Crime.

If Nasby is still presumed innocent of deliberation, then he is factually innocent of first-degree murder. Actual innocence is factual innocence. Bousley v. U.S., 523 U.S. 614, 623-24 (1998).

One of the differences between the change in law addressed in Bousley and the change in law addressed in this case, is that in Bousley, the definition of a proven element was changed, which resulted in his acts being outside the scope of the statute. In this case, the law Nasby was convicted under (Kazalyn) actually omitted the entire element of deliberation, where the change in law that applies to him (Byford), required the essential element be proven, before conviction.

Nasby is actually innocent of first-degree murder, because he is still presumed innocent of deliberation. However, in order for Nasby to have his issue heard and gain relief, he must overcome the statutory bars of NRS 34.726 (App.F.1), NRS 34.800 (App.F.2), and NRS 34.810 (App.F.3). In order to overcome the bars, Nasby must either demonstrate "good cause and prejudice" or that he is actually

innocent and a fundamental miscarriage of justice will result for failure to review the claim.

Here is the problem — Although Nasby can, and has, demonstrated due diligence and good cause for his untimely and successive petition, he must also demonstrate prejudice, which means that he must pull from the record, evidence which may disprove deliberation, when at the time the record was created, deliberation needed not be proven or defended against. — This is irrational, if not impossible. Why would Nasby present evidence at trial, or defend against an element, that was not required to be proven at that time? That makes as much sense as presenting evidence at a theft trial that defends against elements of murder. It would be just as illogical as it sounds. However, this is what Nasby must do to demonstrate prejudice. He may also present new evidence — if he is fortunate enough to find any twenty years after the trial — which may disprove deliberation. Either way, the cause and prejudice requirement shifts the burden of ~~proof~~ production to Nasby, even though the State never met its burden of proof at trial.

The problem with the fundamental miscarriage of justice exception, is that it requires Nasby to demonstrate that, in light of all the evidence, no reasonable jurist would find him guilty beyond a reasonable doubt of first-degree murder. This shifts the burden of persuasion to Nasby as well, even though the State never met its burden of proof at trial.

The Due Process Clause does not permit the law to function this way. If this type of application is allowed, then the State would never have to prove every element of a crime. They could just simply cheat to get a conviction, and the burden of proof would shift to the defendant. NRS 200.030(1)(a) requires proof beyond a reasonable doubt before a conviction. It is unconstitutional to force Nasby, to now, disprove deliberation when, in fact, it was never proven to begin with. This is a bedrock example of unconstitutional burden shifting. The burden of proof

must always be on the State — not Nasby — unless and until he is proven guilty beyond a reasonable doubt of every element of the crime.

If actual innocence is factual innocence, and Nasby is still presumed innocent of deliberation — then he must be actually innocent of first-degree murder, and his conviction must be overturned.

C. The State Courts Ignored Nasby's Claim Challenging The State District Court's Jurisdiction To Try And Convict Him Of First-Degree Murder Under An Inapplicable Law.

In Nevada, the issue of whether a court lacks subject-matter jurisdiction can be raised at anytime and can never be waived. Landreth v. Malik, 221 P.3d 1265, 1267; 125 Nev. Adv. Rep. 61 (2009). Furthermore, in Nevada, a challenge to the court's jurisdiction can be raised for the first time on appeal. Colwell v. State, 118 Nev. 807, 812; 59 P.3d 463, 467 (2002).

Ground One of Nasby's Opening Brief appealing the denial of his fourth state post-conviction petition, raised for the first time, a challenge to the state district courts jurisdiction. See - (Appellant's Opening Appeal Brief, Nev. Sup. Ct. No. 70626). However, the State Appellate Court, without explanation, failed to even address the jurisdictional challenge. (App. A). In his Petition For Rehearing, Nasby informed the appellate court that it failed to address his jurisdictional challenge and requested the court address it. See - (Petition For Rehearing). The state appellate court denied the petition for rehearing without explanation and without addressing the jurisdictional challenge. (App. B). Nasby then brought the failure to address his claim to the attention of the State Supreme Court, and requested that it address his jurisdictional challenge. See - (Petition For ~~Review~~ Review By The Supreme Court). Nasby's claim, again, went unheard with no explanation. (App. C). Nasby, regarding his jurisdictional challenge, is being denied access to the courts. Johnson v. Avery, 393 U.S.

483, 485 (1969) (prisoner's right of access to the courts may not be denied or obstructed).

The Court is charged with ensuring an indigent defendant meaningful access to the courts. Lewis v. Casey, 518 U.S. 343, 349 (1996); Bounds v. Smith, 430 U.S. 817, 828 (1977). 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"). The appropriate remedy in this instance, is to grant certiorari and address Nasby's jurisdictional challenge.

D. The State District Court Lacked Jurisdiction to Apply Kazalyn's Interpretation Of NRS 200.030(1)(a) To Nasby's Case.

In Nevada, judgments issued without authority are void as a matter of Nevada state law. Landreth v. Malik, 221 P.3d 1265, 1267; 125 Nev. Adv. Rep. 61 (2009).

In October of 1999, Nasby was convicted of first-degree murder under the law Kazalyn v. State, 108 Nev. 67, 75; 82 P.2d 578, 583 (1992) and its interpretation of NRS 200.030(1)(a). The Nevada Supreme Court, in Byford v. State, 994 P.2d 700, 116 Nev. 215 (2000), ordered the district courts to cease applying the law of Kazalyn, and announced a change in that law. Nasby raised his Byford issue on direct appeal, but the Nevada Supreme Court applied Garner v. State, 116 Nev. —, 6 P.3d 1013 (2000) in its affirmance. In Garner, the court said that Byford did not apply to cases pending on direct appeal. The Nevada Supreme Court, in Nika v. State, 124 Nev. 127a, 198 P.3d 839 (2008), overruled Garner and ruled that, as a matter of due process, the change in law announced in Byford did apply to cases pending on direct appeal when Byford was decided. It is well established in Nevada that "the expression of one thing, is the exclusion of another." Galloway v. Truesdell, 83 Nev. 13, 25-26 (1967). Thus, if the change in law ~~ann~~ announced in Byford applies to Nasby's case, the result must be, that the law of Kazalyn did not apply. The

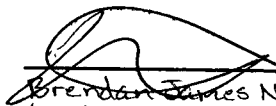
State Supreme Court, by way of Nika, retroactively divested the state district court of jurisdiction to try, convict, and adjudicate Nasby guilty of first degree murder under Kazalyn's interpretation of NRS 200.030(1)(a). The State district court, having issued a judgment of conviction for the crime of first-degree murder, under the inapplicable law, makes Nasby's judgment of conviction not merely voidable, but in fact void.

Ex Parte Siebold, 100 U.S. 371, 376-77 (1880), e.g., Ex Parte Rosenblatt, 19 Nev. 439, 442 (1887). Therefore, there is no legal cause for Nasby's imprisonment, and release from his current confinement is required. Id.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,


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(Petitioner In Pro Se)

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