

IN THE SUPREME COURT OF THE STATE OF NEVADA

JONATHAN EDWARD WATKINS,  
Appellant,  
vs.  
HOWARD SKOLNIK, DIRECTOR,  
NDOC,  
Respondent.

No. 56979

**FILED**

NOV 18 2011

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court dismissing a post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge.

Appellant filed his petition on October 30, 2008, nine years after issuance of the remittitur on direct appeal on September 28, 1999. Watkins v. State, Docket No. 30958 (Order Dismissing Appeal, September 1, 1999). Thus, appellant's petition was untimely filed. See NRS 34.726(1). Moreover, appellant's petition was successive because he had previously filed a post-conviction petition for a writ of habeas corpus, and it constituted an abuse of the writ as he raised claims new and different from those raised in his previous petition.<sup>1</sup> See NRS 34.810(1)(b)(2); NRS 34.810(2). Appellant's petition was procedurally barred absent a demonstration of good cause and actual prejudice. See NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3).

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<sup>1</sup>Watkins v. State, Docket No. 40651 (Order of Affirmance, May 5, 2004).

Appellant asserts that the Ninth Circuit Court of Appeals' decision in Polk v. Sandoval, 503 F.3d 903 (9th Cir. 2007), provides good cause to raise his claim that he received a flawed jury instruction on the elements of first-degree murder because the jury was given the Kazalyn instruction on premeditation. Kazalyn v. State, 108 Nev. 67, 75, 825 P.2d 578, 583 (1992), receded from by Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000).

Appellant's 2008 petition was filed more than one year after entry of Polk.<sup>2</sup> Appellant fails to provide any explanation for the entire length of his delay. See NRS 34.726(1).

Further, even if Polk provided good cause for raising his claim at this late date, appellant failed to demonstrate actual prejudice because Byford does not apply in the instant case. Byford only applies to convictions that were not final at the time that Byford was decided as a matter of due process. See Garner v. State, 116 Nev. 770, 788-89, 6 P.3d 1013, 1025 (2000), overruled on other grounds by Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002); see also Nika v. State, 124 Nev. 1272, 1285, 198 P.3d 839, 848 (2008). Because appellant's conviction was final before Byford was decided, the use of the Kazalyn instruction was not error in this case and the district court did not err in denying this claim.

Appellant also claims that the giving of the Kazalyn instruction was "so fundamental a defect as to cause a miscarriage of justice." In order to demonstrate a fundamental miscarriage of justice, a petitioner must make a colorable showing of actual innocence—factual

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<sup>2</sup>The petition was also filed approximately eight years after this court's decision in Byford.

innocence, not legal innocence. Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001); see also Calderon v. Thompson, 523 U.S. 538, 559 (1998). Appellant's claim relating to the jury instructions is not a claim regarding factual innocence and appellant fails to demonstrate that, had the jury not received the Kazalyn instruction, "it is more likely than not that no reasonable juror would have convicted him in light of . . . new evidence." Id. (quoting Schlup v. Delo, 513 U.S. 298, 327 (1995)); accord Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996). Accordingly, the district court did not err in denying appellant's fundamental miscarriage of justice claim.

Next, appellant claims that the district court erred in denying his claim that he has good cause because the State violated Brady v. Maryland, 373 U.S. 83 (1963), by failing to disclose a document entitled, "Certificate That No Inquest Be Held." Appellant claims that this document was discovered in 2005 during proceedings in federal court. Appellant failed to demonstrate why he waited nearly three years after finding the document to file his petition and thus, has not demonstrated good cause for the entire length of his delay. See NRS 34.726(1).<sup>3</sup> Therefore, the district court did not err in denying this good cause claim.

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<sup>3</sup>We note that it does not appear that the withholding of this document would have demonstrated prejudice to overcome the procedural bars, as appellant failed to demonstrate that the document was material. State v. Bennett, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003) (holding that demonstrating good cause and prejudice for an untimely and/or successive petition mirrored the second and third prongs of the components that make up a Brady violation: the evidence was withheld by the State and the evidence was material).

Finally, appellant claims that he has good cause because he did not knowingly or intelligently waive any of the constitutional claims raised in his petition and the procedural bars in Nevada are inadequate. These claims lack merit. The procedural rules are clearly outlined in the statutes, see NRS 34.726; NRS 34.800; NRS 34.810, and the procedural bars in Nevada are adequate. See State v. Dist. Ct. (Riker), 121 Nev. 225, 236, 112 P.3d 1070, 1077 (2005); see also Clem v. State, 119 Nev. 615, 623, n.43, 81 P.3d 521, 527 n.43 (2003); Pellegrini, 117 Nev. at 884, 60, 34 P.3d at 535. Therefore, the district court did not err in dismissing the petition as procedurally barred, and we

ORDER the judgment of the district court AFFIRMED.

Douglas, J.  
Douglas

Hardesty, J.  
Hardesty

Parraguirre, J.  
Parraguirre

cc: Hon. Patrick Flanagan, District Judge  
Law Office of Thomas L. Qualls, Ltd.  
Attorney General/Carson City  
Washoe County District Attorney  
Washoe District Court Clerk