IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT BYFORD,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 64268

FILED

SEP 22 2016

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

*ORDER OF AFFIRMANCE*

This is an appeal from a district court order denying a postconviction petition for a writ of habeas corpus in a death penalty case. Eighth Judicial District Court, Clark County; Valorie J. Vega, Judge.

Appellant Robert Royce Byford, along with codefendants, Christopher Garth Williams and Todd Smith, drove Monica Wilkins to the desert where Byford and Williams shot Wilkins several times, killing her. Byford poured gasoline on the body and lit it. As it burned, the three men drove off. Subsequently, Byford made several admissions to other people about the murder. Byford and Williams were found guilty by a jury and sentenced to death, but this court reversed their convictions and remanded for retrial due to a violation of their Fifth Amendment right to remain silent.[1] *Murray v. State*, 113 Nev. 11, 930 P.2d 121 (1997). After retrial, Byford and Williams were again convicted. Byford received a death sentence, and Williams received a term of life in prison without the possibility of parole. This court affirmed Byford's conviction and death

[1]Smith pleaded guilty to one count of accessory to murder and agreed to testify against Byford and Williams.



16-29523

sentence. *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000). Remittitur issued on December 8, 2000.

Byford filed a timely pro se postconviction petition for a writ of habeas corpus on December 1, 2000. The district court appointed counsel and a supplemental petition was filed on September 16, 2003. After conducting an evidentiary hearing in July 2007, the district court denied the petition. This court affirmed the judgment. *Byford v. State*, Docket No. 50074 (Order of Affirmance, September 22, 2010). Remittitur issued on January 31, 2011.

Byford filed a second postconviction petition for a writ of habeas corpus on January 31, 2012, and an amended petition on February 4, 2013. The district court denied the petition on September 19, 2013. This appeal followed.

*Procedural bars*

Byford argues that the district court erred by denying his postconviction petition as procedurally barred without conducting an evidentiary hearing. Because he filed his petition a little more than 11 years after the remittitur issued on his direct appeal, the petition is untimely under NRS 34.726(1). The petition is also successive because he had previously filed a postconviction petition, NRS 34.810(1)(b)(2), and therefore is procedurally barred. To overcome the procedural defaults, Byford must demonstrate good cause and prejudice. NRS 34.726(1); NRS 34.810(3). As cause to overcome the procedural default rules, he argues that (1) first postconviction counsel was ineffective and (2) the State withheld evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963).[2]

---

[2]Byford also asserts good cause based on this court's alleged inconsistent application of the statutory procedural bars. This argument

*continued on next page . . .*

We conclude that he has not shown that he was entitled to an evidentiary hearing on any of his claims of good cause because, even taking his allegations as true, he is not entitled to relief. *See Nika v. State*, 124 Nev. 1272, 1300-01, 198 P.3d 839, 858 (2008) (setting forth standard for obtaining an evidentiary hearing).

*Postconviction counsel*

Because Byford's first postconviction counsel was appointed pursuant to statutory mandate, NRS 34.820(1), he was entitled to the effective assistance of that counsel. *Crump v. Warden*, 113 Nev. 293, 934 P.2d 247 (1997); *McKague v. Warden*, 112 Nev. 159, 912 P.2d 255 (1996). And we have acknowledged that in that circumstance a meritorious claim that postconviction counsel provided ineffective assistance may establish cause under NRS 34.810(1)(b) for the failure to present other claims in the prior postconviction proceeding. *Crump*, 113 Nev. at 304-05, 934 P.2d at 253-54. However, the postconviction-counsel claims must not be procedurally defaulted. *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). Here, the postconviction-counsel claims are subject to the time limit set forth in NRS 34.726(1), *State v. Eighth Judicial Dist. Court (Riker)*, 121 Nev. 225, 235, 112 P.3d 10170, 1077 (2005), and therefore they had to be raised within a reasonable time after they became available, *Hathaway*, 119 Nev. at 252-53, 71 P.3d at 506. As Byford filed his postconviction petition within one year after this court issued remittitur from his appeal of the district court order disposing of his first

---

. . . *continued*
lacks merit. *State v. Eighth Judicial District Court (Riker)*, 121 Nev. 225, 236, 112 P.3d 1070, 1077 (2005); *Valerio v. State*, 112 Nev. 383, 389-90, 915 P.2d 874, 878 (1996).

petition, his claims of ineffective assistance of postconviction counsel were raised within a reasonable time. *See Rippo v. State*, 132 Nev., Adv. Op. 11, ___ P.3d ___ (2016). He still must show that the postconviction-counsel claims have merit in order to overcome the procedural bars.

Byford argues that postconviction counsel was ineffective on a number of grounds. To establish that postconviction counsel was ineffective, Byford must demonstrate both deficient performance (that counsel's performance fell below an objective standard of reasonableness) and that counsel's performance prejudiced him in the prior habeas proceeding (that the outcome of that proceeding would have been different but for counsel's deficient performance). *See id.* (adopting the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 697 (1984)). This court gives deference to the district court's factual findings if supported by substantial evidence and not clearly erroneous but reviews the court's application of the law to those facts de novo. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

*Composition of the jury*

Byford argues that postconviction counsel failed to adequately challenge the trial court's use of the wrong standard to exclude jurors, that is, whether the jurors could give equal consideration of the punishment options. We rejected this claim in the first postconviction proceeding on the grounds that the "equal consideration" inquiry was not considered improper until after Byford's trial and the record indicated that trial counsel had a strategic reason for not raising an objection. *Byford*, Docket No. 50074 (Order of Affirmance, September 22, 2010). He now argues that postconviction appellate counsel was ineffective for not identifying specific veniremembers who were affected by the "equal consideration" standard. Considering the bases for our rejection of the claim in the prior

proceeding, he was not prejudiced by postconviction appellate counsel's alleged omission as there is no reasonable probability of a different outcome in the prior appeal had this additional argument been made.

Byford next argues that postconviction counsel was ineffective for not challenging the district court's seating of a biased juror based on the juror's comment regarding the meaning of the phrase "an eye for an eye." He contends that although the juror indicated that she took a practical approach to the eye-for-an-eye phrase, she answered the question in a manner that "masked her true beliefs," as evidenced by a declaration from a defense investigator in which the juror explained that the phrase meant that "Byford's life should be taken for the life he took of the victim in this case." The declaration also notes that an investigator working for Byford's first postconviction counsel had contacted the juror in 2003, but the juror had refused to speak to him. Postconviction counsel cannot be considered ineffective for not challenging the juror when the juror refused to make a statement. Moreover, the juror's indication that sentencing Byford to death was appropriate does not establish bias in itself sufficient to justify a new trial where the juror indicated during voir dire that she would follow the court's instructions and consider all punishment options. Accordingly, we conclude that Byford has not demonstrated that postconviction counsel was ineffective for this reason.

*Failure to challenge witness testimony*

Byford argues that postconviction counsel was ineffective for not challenging trial counsel's failure to effectively impeach Smith's testimony by presenting certain evidence. First, Byford argues that trial counsel should have presented medical evidence to show that Smith lied in testifying that Byford shot Wilkins twice in the head. While he presented evidence from a medical expert during postconviction proceedings that

tended to support his allegation, the expert noted that she could not definitively substantiate his theory. Second, Byford claims that trial counsel should have presented evidence that Wilkins was constantly in need of money, which would have supported his contention that Smith had motive to kill Wilkins because she owed Smith money. Third, Byford complains that trial counsel failed to introduce evidence showing that Smith lied in testifying that there was a full moon on the night of the murder. Finally, Byford argues that trial counsel failed to elicit evidence that Smith could have received probation for his involvement as an accessory in the murder in exchange for his testimony. Considering the testimony from other witnesses that Byford admitted to shooting Wilkins, we conclude that none of this new evidence would have altered the outcome of the trial had it been presented. Accordingly, he failed to show that postconviction counsel was ineffective in this regard.[3]

*Mitigation case*

Byford complains that postconviction counsel was ineffective for not adequately investigating potential mitigation evidence to support a claim that trial counsel were ineffective for not conducting an adequate investigation and presenting a compelling mitigation case.

*Strickland* acknowledges counsel's obligation to "make reasonable investigations or to make a reasonable decision that makes

---

[3]Byford argues that postconviction counsel was ineffective for not challenging trial counsel's failure to call a firearms expert, a crime-scene reconstructionist, and cross-examine the medical examiner with his preliminary hearing testimony. However, first postconviction counsel raised those claims in the previous postconviction proceeding and we rejected them. *Byford v. State*, Docket No. 50074 (Order of Affirmance, September 22, 2010).

particular investigations unnecessary." 466 U.S. at 691; *see also Wiggins v. Smith*, 539 U.S. 510, 521-23 (2003). In the context of a capital penalty hearing, "reasonable" does not mean that an investigation must be so exhaustive as to uncover all conceivable mitigating evidence, *see Waldrop v. Thigpen*, 857 F. Supp. 872, 915 (D. Ala. 1994). Instead, "[t]he lawyer must make a 'significant effort, based on reasonable investigation and logical argument,' to mitigate his client's punishment." *Steward v. Gramley*, 74 F.3d 132, 135 (7th Cir. 1996) (quoting *Kubat v. Thieret*, 867 F.2d 351, 369 (7th Cir. 1989)); *see Lambix v. Singletary*, 72 F.3d 1500, 1504 (11th Cir. 1996).

It is evident from the record that trial counsel investigated and prepared for the penalty hearing, as several family members testified about Byford's childhood and a mental health expert related information about Byford's upbringing, personality, and mental health. The mere discovery of additional evidence concerning his background does not in itself establish that trial counsel's level of investigation was objectively unreasonable. *See In re Reno*, 283 P.3d 1181, 1211 (Cal. 2012) (observing that "the mere fact that new counsel has discovered some background information concerning a defendant's family, educational or medical history that was not presented to the jury at trial in mitigation of penalty is insufficient, standing alone, to demonstrate prior counsel's actions fell below the standard of professional competence").

But even if postconviction counsel could have established that trial counsel's investigation was deficient under *Strickland*, we conclude that Byford has not demonstrated prejudice. The jurors were aware of Byford's substance abuse problem, the devastating impact of his grandfather's death, his hyperactivity and dyslexia, his juvenile criminal history, and his conflicts and troubled relationship with his father. They

were told that the results of his psychological tests were largely unremarkable and that he was not psychopathic. The jurors were also shown the gentler side of Byford's character, with family members describing him as an active, kind, caring, and respectful child who loved animals and liked soccer and horseback riding and as a good father who enjoyed a close relationship with his sister and mother. And he apologized for his part in Wilkin's death. Considering that evidence, the aggravating circumstances, and the circumstances of the offense—young Wilkins was driven to the desert where Byford shot her twice in the head after Williams had shot her multiple times and then set her body on fire—the jury returned a death sentence.

There is not a reasonable probability that the jury would have reached a different decision based on the new mitigation evidence. Some of the "new" evidence duplicated the mitigation evidence presented at trial and therefore would not have altered the outcome of the penalty hearing. The evidence that is new provides a more detailed view of Byford's childhood and background—particularly with respect to his father's physical and emotional abuse of him and other family members, his mother's gambling addiction, a brain disorder that interfered with impulse control, and a brain injury he suffered as a child. But that evidence is not necessarily mitigating. Highlighting his pervasive substance abuse, his brain injury, and the family violence—all of which apparently contributed to his lack of impulse control—is a double-edged sword. Instead of viewing the new evidence as mitigating, the jurors could have just as easily considered it to be aggravating, showing that he was unredeemable or a continuing danger. *See Cullen v. Pinholster*, 563 U.S. 170, 201 (2011) (observing that evidence of defendant's family's substance abuse problems, mental illness, and criminal history was "by no means clearly mitigating,

as the jury might have concluded that [defendant] was simply beyond rehabilitation"); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (recognizing that mitigating evidence can be a "two-edged sword" that juries might find to show future dangerousness). The new mitigation evidence would have done little to alter the outcome of the penalty hearing. Because Byford has not shown that postconviction counsel was ineffective for not challenging trial counsel's performance with respect to investigating and presenting additional mitigation evidence, *see Crump v. Warden*, 113 Nev. 293, 304 & n.6, 934 P.2d 247, 254 & n.6, the district court did not err by denying this claim.

*Matters related to appellate review*

Byford argues that postconviction counsel was ineffective for not challenging the constitutionality of this court's review of death sentences under NRS 177.055(2) on the ground that this court has not articulated standards for that review, which, he contends, renders our review unconstitutional under federal due process standards. We disagree. In our mandatory review of a death sentence, we are required to determine (1) whether the aggravating circumstances are supported by sufficient evidence, (2) whether the death sentence was imposed under the influence of passion, prejudice or any arbitrary factor, and (3) whether the death sentence is excessive. NRS 177.055(2). Those statutory requirements are clear and need no further explanation to ensure appellate review of a death sentence. As to Byford's contention that the constitutional inadequacy of our mandatory review is compounded by the fact that Nevada Supreme Court justices are popularly elected, he makes no specific claim that any particular justice is biased against him. We have rejected similar general allegations of partiality. *See e.g., McConnell v. State*, 125 Nev. 243, 256, 212 P.3d 307, 316 (2009); *State v. Haberstroh*,

119 Nev. 173, 186, 69 P.3d 676, 685 (2003). We therefore conclude that Byford has failed to show that postconviction counsel was ineffective for omitting these challenges to appellate review.[4]

*Brady violation*

Byford argues that the district court erred by denying his claim that the State's withholding of impeachment evidence concerning Wayne Porretti provided good cause to excuse the procedural bars. Specifically, he contends that the State withheld evidence showing that, contrary to his trial testimony, Porretti received a benefit in exchange for his trial testimony and had provided information to authorities about unrelated criminal activity. Byford asserts that he was prejudiced by the State's actions because Porretti's testimony was "crucial to corroborating Todd Smith's testimony" and because the withheld evidence would have undermined the reliability of the State's case.

*Brady v. Maryland*, 373 U.S. 83 (1963), obliges a prosecutor to reveal evidence favorable to the defense when that evidence is material to guilt, punishment, or impeachment. *Mazzan v. Warden*, 116 Nev. 48, 66, 993 P.2d 25, 36 (2000). There are three components to a successful *Brady* claim: "the evidence at issue is favorable to the accused; the evidence was withheld by the state, either intentionally or inadvertently; and prejudice ensued, i.e., the evidence was material." *Id.* at 67, 993 P.2d at 37. When a *Brady* claim is raised in the context of a procedurally barred

---

[4]Byford's claim that appellate counsel during first postconviction proceedings was ineffective for not challenging trial and appellate counsel's representation is nothing more than a bare allegation and therefore we need not consider it. *Maresca v. State*, 103 Nev. 669, 748 P.2d 3 (1987).

postconviction petition, the petitioner has the burden of demonstrating good cause for his failure to present the claim earlier and actual prejudice. *State v. Bennett*, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003); *Mazzan*, 116 Nev. at 67, 993 P.2d at 37. As a general rule, "[g]ood cause and prejudice parallel the second and third *Brady* components; in other words, proving that the State withheld the evidence generally establishes cause, and proving that the withheld evidence was material establishes prejudice." *Bennett*, 119 Nev. at 599, 81 P.3d at 8. But a *Brady* claim still must be raised within a reasonable time after discovery of the withheld evidence. *See State v. Huebler*, 128 Nev. 192, 198 n.3, 275 P.3d 91, 95 n.3 (2012).

The evidence alleged to have been withheld concerns two matters—Porretti received a benefit for his testimony and he assisted law enforcement in an unrelated matter. To support his contention that Porretti received a benefit in exchange for his testimony, Byford produced the district court minutes, dated December 2004, related to Porretti's postconviction proceedings reflecting that Porretti informed the district court that "he was supposed to get ninety days meritorious time for testifying for the State." As to Byford's contention that the State withheld evidence that Porretti had assisted law enforcement contrary to his trial testimony, Byford produced a letter Porretti submitted to a district court judge in June 1984 in connection with Porretti's probation revocation hearing in which he indicated that he had been working with a police officer to clean up the drug activity at a local park. There is no indication that the State had any knowledge of this information or Porretti's letter. Even assuming that the State withheld the credit information and Porretti's letter, Byford cannot demonstrate prejudice. While Porretti's testimony corroborated aspects of Smith's testimony, other witnesses testified that Byford and Williams admitted to killing Wilkins.

Impeaching Porretti's credibility with this evidence would not have altered the outcome of the trial. Accordingly, we conclude that the district court did not err by rejecting Byford's claim that the alleged *Brady* violation excuses the procedural bars to his petition.

*Statutory laches*

In addition to the procedural bars in NRS 34.726 and NRS 34.810, the statutory laches bar under NRS 34.800 applies because the State pleaded it below. *See* NRS 34.800(2). Under that statute, a petition may be dismissed if delay in the filing of the petition prejudices the State. A rebuttable presumption of prejudice arises when there is a period exceeding five years between the judgment of conviction or a decision on direct appeal and the filing of the petition. NRS 34.800(2). Relying on *State v. Powell*, 122 Nev. 751, 138 P.3d 453 (2006), Byford contends that the district court erred by applying laches because the delay in filing his postconviction petition was not attributable to him considering the lengthy delays in appellate review and postconviction proceedings. While we are not convinced that *Powell* supports Byford's argument given that the procedural posture in that case is different than his case, *Powell* is not helpful because he has not overcome the procedural bars in NRS 34.726 and NRS 34.810.

*Actual innocence*

Byford argues that he is actually innocent of the death penalty because both aggravating circumstances found are invalid. When a petitioner cannot show good cause, the district court may nevertheless excuse a procedural bar if the petitioner demonstrates that failing to consider the petition would result in a fundamental miscarriage of justice. When claiming a fundamental miscarriage of justice based on ineligibility for the death penalty, the petitioner "must show by clear and convincing

evidence that, but for a constitutional error, no reasonable juror would have found him death eligible." *Pellegrini v. State*, 117 Nev. at 887, 34 P.3d at 537. Although the Supreme Court has opined that the actual innocence exception requires a petitioner to present new evidence demonstrating his innocence, *House v. Bell*, 547 U.S. 518, 536-37 (2006); *Schlup v. Delo*, 513 U.S. 298, 316 (1995), and the actual innocence exception is grounded in factual rather than legal innocence, *see Bousely v United States*, 523 U.S. 614, 623-24 (1998) (citing *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992)); *Mazzan*, 112 Nev. at 842, 921 P.2d at 922, this court has taken a broader approach to claims that are based on actual innocence of the death penalty, effectively extending the actual innocence gateway to include legal challenges to the aggravating circumstances, *see, e.g., Bennett*, 119 Nev. at 597-98, 81 P.3d at 7; *Leslie v. Warden*, 118 Nev. 773, 779-80, 59 P.3d 440, 445 (2002).

*Torture/mutilation aggravating circumstance*

Byford argues that the torture/mutilation aggravating circumstance is invalid on four grounds, all of which were rejected by this court either on direct appeal (that mutilation must be of a live victim and the torture theory was improperly based on imputed intent) or in the first postconviction appeal (that the aggravating circumstance does not narrow the class of defendants eligible for the death penalty and is invalid because the verdict form did not require a unanimous verdict on the theory supporting it). Those decisions are the law of the case on these challenges to this aggravating circumstance, *see Hall v. State*, 91 Nev. 314, 535 P.2d 797 (1975), and therefore these challenges do not demonstrate actual innocence of the death penalty.

*Under-sentence-of-imprisonment aggravating circumstance*

Byford challenges the validity of the under-sentence-of-imprisonment aggravating circumstance on two grounds, neither of which warrants relief. Like the challenges to the torture/mutilation aggravating circumstance, one of the challenges to the under-sentence-of-imprisonment aggravating circumstance (whether it narrows the class of defendants eligible for the death penalty when applied to probationers) was rejected by this court in the prior postconviction appeal. The other challenge to this aggravating circumstance—that neither the plain language of NRS 200.033(1) nor the intent of the Legislature contemplates applying it to a person who is on probation—lacks merit. The statute provides that first-degree murder may be aggravated when the murder was committed by a person who is "under sentence of imprisonment." Interpreting the same language in other statutes, we have observed that "a person who is on probation is under a sentence of imprisonment" because the person has sustained a sentence of incarceration but the term of incarceration has simply been suspended while the person is on probation. *Coleman v. State*, 130 Nev., Adv. Op. 22, 321 P.3d 863, 866 (2014) (discussing "under sentence of imprisonment" requirement in NRS 34.724); *see also Grant v. State*, 99 Nev. 149, 150, 659 P.2d 878, 879 (1983) (observing that "a grant of probation is a suspension of execution of a state prison sentence" (emphasis omitted)). That interpretation is consistent with the statute's plain language.[5] *See State v. White*, 130 Nev., Adv. Op. 56, 330 P.3d 482,

---

[5]Because the statutory language is not ambiguous, we cannot go beyond it in determining legislative intent, *see State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011), and need not turn to the rule of lenity, *see id.* at 99, 249 P.3d at 1230. Nonetheless, we note that nothing in the

*continued on next page . . .*

484 (2014) ("To determine legislative intent of a statute, this court will first look at its plain language.").

Having considered Byford's claims and concluded that no relief is warranted,[6] we

ORDER the judgment of the district court AFFIRMED.[7]

Parraguirre, C.J.

Hardesty, J.

Douglas, J.

Gibbons, J.

Pickering, J.

---

. . . *continued*
legislative history shows that the Legislature intended the aggravating circumstance to apply only to defendants who are incarcerated.

[6]We note that Byford's challenge to the lethal injection protocol is not cognizable in a postconviction habeas petition. *McConnell v. State*, 125 Nev. 243, 248-49, 212 P.3d 307, 311 (2009). Contrary to his assertions, *McConnell* does not suspend the writ of habeas corpus; it merely concludes that the writ of habeas corpus is not the appropriate vehicle to challenge the lethal injection protocol.

[7]The Honorable Michael Cherry, Justice, voluntarily recused himself from participation in the decision of this matter. The Honorable Nancy M. Saitta, Justice, having retired, did not participate in the decision of this matter.

cc: Hon. Valorie J. Vega, District Judge
Federal Public Defender/Las Vegas
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk