

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHARLES LAMONT ROBINS A/K/A  
HA'IM AL MATIN SHARIF,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 48301

**FILED**

JAN 20 2009

TRACE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from the denial of a post-conviction petition for a writ of habeas corpus in a death penalty case. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

Appellant Charles Robins repeatedly inflicted substantial physical abuse upon 11-month old Brittany Smith, the daughter of his live-in girlfriend, Lovell McDowell. On April 19, 1988, Robins' violent treatment of Brittany resulted in her death. An autopsy revealed a number of significant internal and external injuries, some of which were substantially more recent than others. The autopsy also disclosed that Brittany had suffered a broken back, which resulted from substantial blunt force trauma administered less than 24 hours prior to Brittany's death.

A jury convicted Robins of first-degree murder and sentenced him to death. This court affirmed his conviction and sentence on appeal.<sup>1</sup>

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<sup>1</sup>Robins v. State, 106 Nev. 611, 798 P.2d 558 (1990).

Robins filed his first petition for post-conviction relief in 1991, which the district court denied. This court upheld the district court in all respects but one, remanding for an evidentiary hearing concerning a claim of ineffective assistance of trial counsel.<sup>2</sup> On remand, the district court conducted an evidentiary hearing and denied the petition. This court dismissed Robins' subsequent appeal in 1998.<sup>3</sup> Robins filed a second post-conviction petition in May 2005, which the district court denied as procedurally barred. Robins appeals from the district court's order.

On appeal, Robins contends that the district court erred by denying his petition as procedurally barred without conducting an evidentiary hearing. In particular, he argues that the district court erred by applying procedural bars to four specific claims—trial counsel was ineffective for failing to present expert testimony respecting shaken baby syndrome, the State wrongfully withheld impeachment evidence, the premeditation instruction was erroneous, and the depravity of mind aggravator is unconstitutionally vague.

Robins' overarching claim in this appeal is that the district court erred by denying his petition as procedurally barred without conducting an evidentiary hearing. He was entitled to an evidentiary hearing, however, only if he "assert[ed] claims supported by specific factual allegations not belied by the record that, if true, would entitle him

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<sup>2</sup>Robins v. State, Docket No. 23421 (Order of Remand, May 27, 1993).

<sup>3</sup>Robins v. State, Docket No. 31054 (Order Dismissing Appeal, November 24, 1998).

to relief.”<sup>4</sup> For the reasons discussed below, we conclude that Robins failed to show that he was entitled to an evidentiary hearing concerning whether he overcame applicable procedural bars or demonstrated that failure to consider his petition would result in a miscarriage of justice.

Applicable procedural bars

Robins had a number of procedural bars to overcome before the district court could consider the merits of his habeas petition. First, the petition was untimely filed.<sup>5</sup> Second, the petition was successive because Robins had previously filed a petition for post-conviction relief in the district court.<sup>6</sup> To overcome these procedural bars, Robins had to demonstrate good cause and prejudice.<sup>7</sup> Third, because the State specifically pleaded laches based on the delay, Robins was required to overcome the presumption of prejudice to the State.<sup>8</sup>

Robins asserts that the procedural bars cannot be applied to preclude consideration of the petition because this court has inconsistently applied the procedural bars. We addressed a similar claim in State v.

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<sup>4</sup>Mann v. State, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002) (citing Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984)).

<sup>5</sup>NRS 34.726(1); see also Pellegrini v. State, 117 Nev. 860, 874-75, 34 P.3d 519, 529 (2001) (discussing application of NRS 34.726 time bar when conviction was final before provision’s effective date and petitioner had previously sought post-conviction relief under provisions of former NRS Chapter 177).

<sup>6</sup>NRS 34.810(1)(b), (2).

<sup>7</sup>NRS 34.726(1); NRS 34.810(1)(b), (2).

<sup>8</sup>NRS 34.800(2).

District Court (Riker) and rejected it.<sup>9</sup> Robins has presented nothing in this appeal justifying a departure from the mandatory statutory procedural bars or our discussion in Riker. Therefore, the district court did not err by applying relevant procedural default rules.

Claim of ineffective assistance of trial counsel

Robins argues that the district court erred by denying his claim that trial counsel was ineffective for failing to present evidence of shaken baby syndrome, which would have demonstrated that “Brittany’s death was accidental and occurred during the chaos that ensued after she stopped breathing when [he] attempted to revive her both by shaking her and attempting CPR.”

As good cause to excuse his procedural default on this claim, Robins explains that he tried to raise it at the 1997 evidentiary hearing concerning his first petition, but the district court refused to hear the evidence because he had not raised the claim in the petition and this court denied his motion for a remand. Robins suggests that those decisions are good cause so that the district court could consider his claim in the instant petition. While those decisions may explain why Robins raised the claim in the instant petition, they do not explain his delay or failure to raise the claim in the first petition. And Robins waited nearly eight years after the evidentiary hearing in 1997 to file the instant petition. He has not demonstrated good cause to excuse these delays.

Even if we were to conclude that Robins demonstrated good cause, he must still demonstrate prejudice resulting from the district

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<sup>9</sup>121 Nev. 225, 236, 112 P.3d 1070, 1077 (2005).

court's refusal to consider his ineffective-assistance-of-counsel claim. Whether Robins suffered prejudice requires consideration of the merits of his claim. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, Robins must demonstrate that counsel's performance fell below an objective standard of reasonableness and that counsel's deficient performance prejudiced the defense.<sup>10</sup> Robins must demonstrate prejudice by showing a reasonable probability that but for counsel's errors the result of the trial would have been different.<sup>11</sup>

To support his claim, he offers a letter from Dr. Jacy Showers, who has a doctorate in education and was represented as an expert on shaken baby syndrome, to the effect that in her opinion Brittany died of shaken baby syndrome. According to Dr. Showers' letter, at the time of Brittany's death, there was little public awareness of shaken baby syndrome and Robins' history of physical and sexual abuse, lack of babysitting experience, and lack of CPR and childcare training ill-prepared Robins for assuming a father role. We conclude that Robins cannot demonstrate prejudice as a result of the district court's refusal to consider this claim for four reasons. First, nothing in Robins' submissions explains Dr. Showers' qualifications as an expert in shaken baby syndrome or her ability to diagnose injuries and attribute them to shaken baby syndrome. Second, Robins neglected to include a transcript of the medical examiner's testimony at trial, making it difficult to assess the potential impact of Dr. Showers' proffered testimony in comparison to the

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<sup>10</sup>Strickland v. Washington, 466 U.S. 668, 687-88 (1984).

<sup>11</sup>Thomas v. State, 120 Nev. 37, 43-44, 83 P.3d 818, 823 (2004).

medical evidence adduced at trial.<sup>12</sup> Third, inadequate record aside, the overwhelming medical evidence this court considered in Robins' direct appeal reveals that Brittany sustained persistent and significant physical abuse and that her back was broken within 24 hours of her death as a result of substantial blunt force trauma. Absent from Dr. Showers' letter is any consideration of this pattern of abuse and the blunt force trauma as it related to her opinion that Brittany died as a result of shaken baby syndrome. Finally, the record reveals that trial counsel retained a forensic pathologist, Dr. Allen Jones, to ascertain whether Brittany's injuries could have resulted from Robins' attempt to resuscitate her after she stopped breathing, but Dr. Jones opined, consistent with the medical examiner's conclusion, that Brittany's death was caused by numerous severe blunt force injuries. Thus, at the very least, trial counsel considered the possibility of accidental death. The overwhelming medical evidence to the contrary posed an insurmountable hurdle to such a defense.

Robins presented nothing in his petition or accompanying documentation demonstrating that his counsel was deficient for failing to present evidence of shaken baby syndrome, or that even if counsel had presented such evidence that it would have changed the outcome of the trial. Therefore, the district court did not err by summarily denying this claim.

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<sup>12</sup>See Greene v. State, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980) (stating that "[t]he burden to make a proper appellate record rests on appellant," including providing this court with "portions of the record essential to determination of issues raised in appellant's appeal"); see also NRAP 30(b)(3).

### New claims

Robins argues that the district court erred by denying as procedurally barred his claims that (1) the State wrongfully withheld impeachment evidence under Brady v. Maryland,<sup>13</sup> (2) the premeditated murder instruction allowed the jury to convict him of first-degree murder without finding deliberation, and (3) the depravity of mind aggravator is unconstitutionally vague. As these claims were appropriate for direct appeal, Robins was required to demonstrate good cause for failing to present the claims earlier and actual prejudice.<sup>14</sup> We conclude that Robins failed to do so. Moreover, respecting his challenge to the constitutionality of the depravity of mind aggravator, Robins raised this precise claim on direct appeal and this court rejected it; therefore, it is barred by the doctrine of the law of the case.<sup>15</sup>

### Brady claim

Robins argues that the State withheld material impeachment evidence in violation of Brady respecting three key witnesses—Robert Williams, Charmaine Young, and Sammy Johnston—all of whom testified about physical abuse they observed Robins inflict on Brittany. To establish good cause to excuse his failure to raise this claim previously, Robins must show that the State withheld the challenged evidence and that it was material for Brady purposes.<sup>16</sup>

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<sup>13</sup>373 U.S. 83 (1963).

<sup>14</sup>NRS 34.810(1)(b)(2).

<sup>15</sup>Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975).

<sup>16</sup>Strickler v. Greene, 527 U.S. 263, 282 (1999).

We have carefully reviewed the alleged withheld evidence concerning Williams, Young, and Johnston and reject Robins' claim on two grounds. First, Robins failed to explain when he learned of this alleged impeachment evidence, and absent this information, it is not clear that he demonstrated good cause for his failure to raise this claim at trial, on direct appeal, or in his first petition. Second, Robins failed to adequately explain how the absence of the challenged evidence prejudiced him.

Premeditated murder instruction

Robins argues that the district court erred by rejecting his claim that the premeditation instruction allowed the jury to convict him of first-degree murder without finding deliberation.<sup>17</sup> In particular, Robins

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<sup>17</sup>NRS 200.030(1)(a). The district court instructed the jury as follows regarding first-degree murder:

The court instructs you that while the law requires that the killing, in order to constitute murder in the first degree, shall be willful, premeditated and deliberate, still it does not require that willful intent, premeditation, or deliberation, shall exist for any length of time before the crime was committed; it is sufficient that there was determination and design to kill, distinctly formed in the mind at any moment before or at the time the victim was killed. However, premeditation need not be for a day, an hour, or even a minute. It may be as instantaneous as successive thoughts of the mind.

In this case, if the jury believes from the evidence, beyond a reasonable doubt, that the defendant killed the deceased, as charged, and that at the time or before the killing occurred, the defendant has formed in his mind a willful,

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contends that the jury was given the Kazalyn<sup>18</sup> instruction and that the Ninth Circuit's decision in Polk v. Sandoval<sup>19</sup> requires reversal of his murder conviction. Robins argues that the premeditation instruction, coupled with the second-degree murder instruction,<sup>20</sup> collapsed the three intent elements of first-degree murder into one and permitted him to be convicted of first-degree murder without a finding of all three elements.

To overcome the procedural bars to his claim, Robins must demonstrate good cause and prejudice.<sup>21</sup> He contends that the Polk decision is good cause for his failure to raise this claim previously. However, Polk does not address procedurally defaulted claims based on

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premeditated and deliberate design or purpose to take the life of the deceased and that the defendant acted in furtherance of that design or purpose, and without any justifiable cause or legal excuse therefore, then the jury should find the defendant guilty of murder in the first degree.

<sup>18</sup>Kazalyn v. State, 108 Nev. 67, 825 P.2d 578 (1992).

<sup>19</sup>503 F.3d 903 (9th Cir. 2007).

<sup>20</sup>The district court instructed the jury as follows regarding second-degree murder:

All murder which is not murder of the first degree is murder of the second degree.

Murder of the second degree is the unlawful killing of a human being with malice aforethought, but without the admixture of deliberation and premeditation.

<sup>21</sup>NRS 34.810(1)(b)(1).

the Kazalyn instruction. Nor does Robins adequately explain how he was precluded from challenging the premeditation instruction in a previous proceeding. Thus, he has not shown good cause to excuse his procedural default.<sup>22</sup>

Even assuming Robins satisfied the good cause requirement, he failed to demonstrate prejudice. The first-degree murder instruction given at Robins' trial differed substantially from the Kazalyn instruction and does not raise the same concerns addressed in Byford v. State<sup>23</sup> or Polk. In particular, Robins' instruction did not conflate the elements of willfulness, premeditation, and deliberation. Accordingly, we conclude that the district court did not err by summarily denying this claim.

Depravity of mind aggravator

Robins argues that the depravity of mind aggravator is unconstitutionally vague under Deutscher v. Whitney,<sup>24</sup> in which the Ninth Circuit held that the depravity of mind aspect of NRS 200.033(8) was unconstitutionally vague under Godfrey v. Georgia<sup>25</sup> because the aggravator failed to adequately channel the jury's discretion in imposing death. As noted above, we considered this claim on direct appeal; therefore, it is barred by the doctrine of the law of the case.<sup>26</sup> The

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<sup>22</sup>See Nika v. State, 124 Nev. \_\_\_, \_\_\_ P.3d \_\_\_ (Adv. Op. No. 103, December 31, 2008).

<sup>23</sup>116 Nev. 215, 994 P.2d 700 (2000).

<sup>24</sup>884 F.2d 1152 (9th Cir. 1989), vacated, 500 U.S. 901 (1991).

<sup>25</sup>446 U.S. 420 (1980).

<sup>26</sup>Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975).

doctrine, however, is not absolute, and this court has the discretion to revisit the wisdom of its legal conclusions if warranted.<sup>27</sup>

We specifically considered the decisions in Deutscher and Godfrey in rejecting Robins' constitutional challenge to the depravity of mind aggravator.<sup>28</sup> In an attempt to circumvent the law of the case doctrine, Robins argues that in rejecting his claim on direct appeal, this court misapplied its previous decisions and decisions by the United States Supreme Court. Specifically, Robins suggests that this court improperly upheld the depravity of mind aggravator by applying a narrowed construction of the aggravator on appeal that was not presented to the jury. We disagree. Robins ignores a key aspect of his case underlying this court's decision on direct appeal. In his case, the jury was instructed on torture and found that "[t]he murder involved torture and depravity of mind." This finding is significant and was recognized as critical in Robins' direct appeal when this court explained that Robins' death sentence was "not solely based upon a 'depravity of mind' aspect as it was in Godfrey. This case also involves the torture of an eleven-month-old baby under circumstances plainly covered by the instructions to the jury."<sup>29</sup> This court considered the aggravator as a whole, *i.e.*, the allegation of torture and/or depravity of mind and the attendant instructions defining torture and

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<sup>27</sup>Bejarano v. State, 122 Nev. 1066, 1074, 146 P.3d 265, 271 (2006).

<sup>28</sup>Robins v. State, 106 Nev. 611, 627-30, 798 P.2d 558, 568-70 (1990).

<sup>29</sup>Id. at 629, 798 P.2d at 570.

depravity of mind and concluded that the instructions taken together sufficiently narrowed the aggravator under Godfrey.<sup>30</sup>

Our reasoning in Robins' direct appeal remains sound, and we conclude that Robins has articulated no basis upon which we should abandon the doctrine of the law of the case and revisit the constitutionality of the depravity of mind aggravator or the attendant instructions. Therefore, we conclude that the district court did not err by summarily denying this claim.

Actual innocence

Robins argues that the district court erred by dismissing his petition as procedurally barred because he is actually innocent of first-degree murder and the death penalty. Applicable procedural bars may be excused when "the prejudice from a failure to consider [a] claim amounts to a 'fundamental miscarriage of justice.'"<sup>31</sup> This standard can be satisfied when the petitioner advances a colorable showing that he is actually innocent of the crime or is ineligible for the death penalty.<sup>32</sup> "To avoid application of the procedural bar to claims attacking the validity of the conviction, a petitioner claiming actual innocence must show that it is more likely than not that no reasonable juror would have convicted him absent a constitutional violation."<sup>33</sup> A petitioner asserting that a

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<sup>30</sup>Id. at 627-30, 798 P.2d at 568-70.

<sup>31</sup>Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001) (quoting Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996)).

<sup>32</sup>Id.

<sup>33</sup>Id.

procedural default should be disregarded because he is actually ineligible for the death penalty “must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found him death eligible.”<sup>34</sup>

In particular, Robins argues that trial counsel was ineffective for failing to present shaken baby syndrome and that the “new” evidence of shaken baby syndrome shows that he is innocent of first-degree murder. We disagree. Although Robins holds Dr. Showers out as an expert educator in shaken baby syndrome, he fails to explain her qualifications to assess all of Brittany’s serious injuries—those that occurred in the weeks and months before her death and her fatal injuries—as they related to her opinion that Brittany died as a result of shaken baby syndrome. Additionally, Robins overestimates Dr. Showers’ impact on his case in light of the overwhelming evidence of the persistent and brutal abuse Robins inflicted on Brittany. More significantly, Dr. Showers failed to explain how shaken baby syndrome is consistent with the medical examiner’s finding that Brittany’s back was broken within 24 hours of her death and that this injury resulted from substantial blunt force trauma. The “new evidence” of shaken baby syndrome fails to persuade us that it is more likely than not that no reasonable juror would have convicted Robins absent counsel’s failure to produce this evidence.<sup>35</sup> Therefore, the district court did not err by denying this claim.

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<sup>34</sup>Id.

<sup>35</sup>Id.

Robins also claims that he is actually innocent of the death penalty because but for counsel's failure to produce shaken baby syndrome evidence at the penalty hearing, the State's failure to disclose Brady material, and the unconstitutionality of the depravity-of-mind aggravator, no reasonable juror would have found him eligible for the death penalty. Based on the reasoning explained above, we conclude that these arguments lack merit and Robins failed to demonstrate that he is actually innocent of the death penalty. Consequently, we conclude that the district court did not err by summarily denying this claim.

Having considered Robins' arguments and concluded that the district court did not err by summarily denying his habeas petition, we  
**ORDER** the judgment of the district court **AFFIRMED**.

1 Hardesty, C.J.  
Hardesty

Parraguirre, J.  
Parraguirre

Douglas, J.  
Douglas

Cherry, J.  
Cherry

Saitta, J.  
Saitta

Gibbons, J.  
Gibbons

Pickering, J.  
Pickering

cc: Hon. Donald M. Mosley, District Judge  
Patricia Erickson  
Attorney General Catherine Cortez Masto/Carson City  
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Federal Public Defender/Las Vegas  
Eighth District Court Clerk