

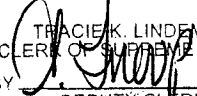
IN THE SUPREME COURT OF THE STATE OF NEVADA

JIMMY TODD KIRKSEY,
Appellant,
vs.
WARDEN, ELY STATE PRISON, E.K.
MCDANIEL, AND THE STATE OF
NEVADA, OFFICE OF THE ATTORNEY
GENERAL, CATHERINE CORTEZ
MASTO,
Respondents.

No. 49140

FILED

AUG 21 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Lee A. Gates, Judge.

On January 12, 1990, the district court, pursuant to a guilty plea, convicted appellant of first-degree murder. A three-judge panel recommended the death penalty, and the district court imposed the death penalty. On appeal, this court concluded that two of the aggravating circumstances found by the three-judge panel should not have been considered but affirmed the conviction and sentence. Kirksey v. State, 107 Nev. 499, 814 P.2d 1008 (1991). The remittitur issued on December 18, 1991.

On February 28, 1992, appellant, with the aid of counsel, filed a petition for post-conviction relief pursuant to former NRS chapter 177 in the district court. The State opposed the petition. An evidentiary hearing was conducted on February 1, 1993. On April 14, 1993, the district court

denied the petition. This court affirmed the order of the district court on appeal. Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

After seeking relief in federal court, on March 6, 2003, appellant, with the aid of counsel, filed a post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition as procedurally barred and specifically pleaded laches. The district court ordered the State to respond to the claims on the merits and set the matter for an evidentiary hearing.

The State sought extraordinary relief with this court by way of a petition for a writ of prohibition or mandamus challenging the order of the district court granting the evidentiary hearing. This court granted the petition in part and denied the petition in part. State v. District Court (Kirksey), Docket No. 43559 (Order Granting Petition in Part and Denying in Part, December 2, 2004). In granting the petition in part, this court determined that a full hearing on appellant's numerous claims was not warranted due to the procedural bars. In denying the petition in part, this court determined that an evidentiary hearing was necessary to consider a good cause claim relating to a competency report filed in the trial proceedings in 1989. In his petition, appellant alleged that the trial judge had drafted a second report concerning appellant's competency for Dr. Franklin Master's signature and that he had only learned of the trial judge's participation in August of 2000. This court concluded a limited evidentiary hearing was warranted to determine "(1) whether the new information was discovered and presented in a reasonably timely manner; (2) if it was, whether the judge did in fact draft the report; and (3) if he did, whether Kirksey can establish any resulting prejudice." The order stated that "[t]he most relevant question appears to be whether an

impediment external to the defense prevented the information from being discovered and presented earlier.” This court further concluded that an evidentiary hearing was warranted concerning appellant’s claim that he was mentally retarded, which would require that the death sentence be vacated. See Atkins v. Virginia, 536 U.S. 304, 321 (2002). Accordingly, a limited evidentiary hearing was to be conducted to ascertain whether appellant could establish good cause and prejudice sufficient to overcome the procedural bars concerning the drafting of the second report and on the issue of appellant’s mental retardation.

On February 6, 2006 through February 8, 2006, a limited evidentiary hearing was conducted concerning those claims. The district court determined that appellant was mentally retarded and ordered a new sentencing hearing. The district court also concluded that appellant failed to demonstrate good cause and prejudice to overcome the procedural bars. Thus, on March 2, 2007, the district court granted the petition as to the claim of mental retardation, but denied the remainder of the claims in the petition as procedurally barred. This appeal follows.

In his petition below, appellant claimed: (1) the trial court erred in failing to hold a competency hearing; (2) trial counsel was ineffective¹; (3) he was incompetent to enter his guilty plea; (4) his plea

¹Appellant claimed his trial counsel was ineffective for the following reasons: (1) trial counsel was ineffective for unreasonably ceding control to a client of unsound mind; (2) trial counsel was ineffective for failing to explore the extent of appellant’s mental illness and other cognitive and neurological impairments; (3) trial counsel was ineffective for failing to conduct an adequate investigation to prevent appellant from making false statements to the district court; (4) trial counsel was ineffective for failing to present evidence that appellant’s statements were untrue; (5) trial

continued on next page . . .

was unknowing and unintelligent; (5) he was incompetent to be sentenced; (6) he was not before an impartial tribunal due to judicial bias; (7) the State was required to protect individuals from harming themselves, including those who would commit suicide by abandoning defenses to charges of capital murder; (8) his appellate counsel had a conflict of interest; (9) his appellate counsel was ineffective; (10) the Nevada Supreme Court did not provide a fair and adequate appellate review; (11) imposition of the death penalty by a three-judge panel was unconstitutional; (12) unreliable evidence was improperly admitted at appellant's sentencing hearing; (13) admission at the sentencing hearing of facts from previous charges without a certified copy of a judgment of conviction constituted a relitigation of those charges and violated double jeopardy; (14) appellant's death sentence was the result of purposeful discrimination based on race; (15) the grand jury indictment was invalid because members of appellant's race were systematically excluded from the grand jury; (16) the State failed to prove the sole aggravating circumstance beyond a reasonable doubt; (17) the State failed to disclose exculpatory and impeachment evidence; (18) the State committed

... continued

counsel was ineffective for failing to advise appellant of a critical weakness in the State's case; (6) trial counsel was ineffective for unreasonably relying on the State to provide all relevant discovery and to provide advice on litigation of the case; (7) trial counsel was ineffective for failing to object to egregious errors in the district court proceedings; (9) trial counsel was ineffective for failing to investigate appellant's innocence of the aggravating circumstance; and (9) trial counsel was ineffective for failing to obtain a guardian or necessary mental health treatment.

prosecutorial misconduct; (19) the statutorily mandated reasonable doubt standard improperly minimized the State's burden of proof and improperly infected appellant's guilty plea; (20) Nevada's definitions of "premeditation and deliberation," "implied malice," and "reasonable doubt" are unconstitutional; (21) the charging document failed to inform appellant of the acts he was alleged to have committed and the district court failed to advise appellant of those acts in the plea canvass; (22) there was an absence of sufficient evidence to support a factual basis for the necessary element of criminal agency for culpability for the offense; (23) critical stages of the proceedings were conducted outside of appellant's presence; (24) the district court erred by failing to record critical proceedings; (25) the district court erred by closing critical proceedings from public scrutiny; (26) the district court unfairly limited the issues to be raised in the 1992 post-conviction proceedings and the ability of counsel in 1992 to litigate issues in post-conviction; (27) his conviction and sentence were invalid due to cumulative errors in the admission of evidence and instructions, gross misconduct by state officials and witnesses, and the systematic deprivation of appellant's right to effective assistance of counsel; (28) execution of the mentally retarded constitutes cruel and unusual punishment; (29) the death penalty is cruel and unusual punishment; (30) Nevada's capital punishment system operates in an arbitrary and capricious manner; (31) execution by lethal injection is cruel and unusual punishment; (32) appellant was not competent to be executed; (33) appellant's sentence violates the International Covenant on Civil and Political Rights; (34) appellant's conviction and sentence were invalid because the trial and appeal were presided over by judicial officers whose tenure in office was dependent on popular elections; (35) appellant's death

sentence is invalid because of the risk that innocent persons will be executed; (36) law enforcement officials conducted an interrogation of appellant without obtaining a voluntary, knowing, and intelligent waiver of his rights; (37) the reduced standard of reliability for admission of evidence at the penalty phase of a capital trial violates guarantees of a fair trial, due process, and equal protection; (38) the jury instructions for the weighing of factors for death eligibility did not require proof beyond a reasonable doubt; and (39) he received ineffective assistance of his first post-conviction counsel.² In his petition, appellant stated that claims 1, 4-5, 27 and 36 were raised under ineffective assistance of counsel, but appellant did not specify if the claims were raised as ineffective assistance of trial, appellate, or post-conviction counsel.

In his briefs before this court, appellant argues that the district court erred in denying claims 1-9, 17-18, 20, 23-24, 26-27, and 36 as procedurally barred. In his briefs before this court, appellant does not discuss, argue or provide good cause to excuse the procedural defects for raising claims 10, 15, 19, 21-22, 25, 34, and 39 in the procedurally defective petition. Therefore we conclude that appellant has abandoned those claims and we will not consider them further in this appeal.³

²In his petition below, appellant did not raise any specific claims of ineffective assistance of post-conviction counsel, but only generally claimed that his post-conviction counsel was ineffective.

³Claims 11-14, 16, 28-33, 35, and 37-38 were rendered moot as the death penalty has been vacated and a new sentencing hearing has been ordered. Therefore, we decline to consider these claims further in this appeal.

Appellant filed his petition more than 12 years after this court issued the remittitur from his direct appeal. Thus, appellant's petition was untimely filed. See NRS 34.726(1). Moreover, appellant's petition was successive because he had previously filed a petition for post-conviction relief in which he raised claims 2, 6, 9, 17, 23, and 26. See NRS 34.810(1)(b); NRS 34.810(2). Further, appellant's petition constituted an abuse of the writ as claims 1, 3-5, 7-8, 18, 20, 24, 27, and 36 were new and different from those claims raised in his previous post-conviction petition. See 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(3). Further, because the State specifically pleaded laches, appellant was required to overcome the presumption of prejudice to the State. See NRS 34.800(2). "Application of the statutory procedural default rules to post-conviction habeas petitions is mandatory." See State v. Dist. Ct. (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005).

"In order to demonstrate good cause, a petitioner must show that an impediment external to the defense prevented him or her from complying with the state procedural default rules." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (citing Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994)). "An impediment external to the defense may be demonstrated by a showing 'that the factual or legal basis for a claim was not reasonably available to counsel, or that some interference by officials, made compliance impracticable.'" Id. (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986) (citations omitted)). Prejudice can be shown by demonstrating that the errors worked to a petitioner's actual and substantial disadvantage. Hogan v. Warden, 109 Nev. 952, 959-60, 860 P.2d 710, 716 (1993). "Appellate courts will not disturb a trial

court's discretion in determining the existence of good cause except for clear cases of abuse." Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989) (citing State v. Estencion, 625 P.2d 1040, 1042 (Haw. 1981)).

GOOD CAUSE AND ACTUAL PREJUDICE

Appellant appears to raise several good cause and prejudice arguments to overcome procedural defects for specific claims for relief raised in his petition below. Specifically, he argues he has good cause and prejudice to raise: (1) claims relating to competency based on newly discovered evidence of the creation of the second report; (2) claims relating to judicial bias based on newly discovered evidence of the creation of the second report; (3) claims relating to competency and the validity of his guilty plea based on a finding of mental retardation; and (4) claims that could have been raised in his direct appeal based on appellate counsel's conflict of interest.⁴ Appellant also appears to argue the authorship of a letter written to the trial judge provides good cause and prejudice to overcome the procedural bars for the entire petition.⁵ The remainder of this discussion addresses these arguments.

⁴To the extent that appellant argues these arguments would provide good cause and prejudice for the entire petition, we reject that argument. These arguments do not provide good cause for the entire petition as they do not provide good cause for each claim raised in the petition. Therefore, the district court did not err in rejecting this argument.

⁵In his petition below appellant claimed the following provided good cause to excuse the procedural defects: (1) constitutional claims are not subject to procedural bars; (2) NRS 34.726 does not apply because appellant did not know it would apply to successive petitions; (3) any delay was the fault of appointed counsel and not appellant's fault; and (4) equal protection requires his claims to be considered on the merits because Nevada does not apply the procedural bars in a consistent manner.

continued on next page . . .

New Evidence of Judicial Bias as Good Cause and Actual Prejudice

First, appellant argues that the district court erred in denying his claim that newly discovered evidence of judicial bias established good cause and prejudice to excuse the procedural defects to raise claims relating to competency. Prior to his guilty plea, appellant was evaluated for competency by Dr. Master and by Dr. Jurasky. Dr. Jurasky concluded that appellant was competent, but Dr. Master concluded that appellant was incompetent because he was suicidal and depressed. The trial judge, believing that Dr. Master did not discuss the legal standard for competency in his first report, contacted Dr. Master to ask him to clarify his report. A second report, which Dr. Master signed, was filed on June 22, 1989. The second report concluded that appellant was competent to aid his counsel, could understand the nature of the charges against him, and knew the difference between right and wrong. The district court concluded that appellant was competent and subsequently, appellant pleaded guilty.

In August of 2000, more than 9 years after the issuance of the remittitur on direct appeal and more than 11 years after the issuance of the second report, counsel for appellant in federal habeas proceedings noticed that the font of the second report did not match the font from the first report. However, the font of the second report appeared to match documents produced by the trial judge. In September of 2000, an expert

... continued

Appellant did not discuss or argue these good cause claims on appeal and we therefore conclude that he has abandoned these good cause claims and we will not consider them.

document examiner looked at the documents and concluded that the second report was not produced by Dr. Master but was likely produced by the trial judge. In 2003, appellant filed the instant petition in state court claiming that newly discovered evidence that the trial judge produced the second report indicates that the trial judge was biased. Appellant argues he has good cause to raise claims concerning appellant's competency to enter a guilty plea because the evidence regarding the creation of the report is newly discovered.⁶

The proper framework to analyze this claim was established in our prior order regarding the State's original petition, and we will consider this good cause and actual prejudice argument within that framework. State v. District Court (Kirksey), Docket No. 43559 (Order Granting Petition in Part and Denying in Part, December 2, 2004).

1. Whether the new information was discovered and presented in a reasonably timely manner.

Appellant argues that the district court improperly rejected his assertion that evidence that the trial judge prepared the second report was newly discovered because it was only discovered in 2000 in federal habeas proceedings. We disagree. Appellant fails to demonstrate that his claim that the trial judge produced the second report was not reasonably available prior to the filing of the 2003 state habeas petition. "[T]he mere fact that counsel failed to recognize the factual or legal basis for a claim, or

⁶Appellant's claims relating to competency were claim 3 (he was incompetent to enter his guilty plea) and claim 5 (he was incompetent to be sentenced). However, as noted earlier, claim 5 was rendered moot when the death penalty sentence was vacated and a new sentencing hearing was ordered.

failed to raise the claim despite recognizing it, does not constitute cause for a procedural default.” Murray, 477 U.S. at 486. Appellant had access to the second report since the district court forwarded the report to both the State and defense counsel in 1989. As appellant had access to the second report in 1989, any challenge to the origin or authenticity of the second report was reasonably available for approximately 14 years prior to the filing of the 2003 state habeas petition. That appellant only noticed that there may be a claim involving the second report in 2000 does not demonstrate that an impediment external to the defense prevented this claim from being raised in a timely manner or that this claim was not reasonably available prior to the instant filing.⁷ The district court determined that the claim arising from the second report was reasonably available prior to the filing of the 2003 state habeas petition and substantial evidence supports that conclusion. We conclude that the district court did not abuse its discretion in determining that appellant failed to demonstrate good cause to raise his claim relating to competency to enter a guilty plea in an untimely and successive petition.

As stated earlier, in order to overcome his procedural defects, appellant must demonstrate good cause and prejudice. Even though we conclude that appellant failed to demonstrate good cause because his

⁷In addition, appellant began the litigation of this claim in federal court in 2000. Notwithstanding any statements made during the federal litigation by the Attorney General’s Office, appellant does not demonstrate any impediment external to the defense prevented him from litigating this claim in state court from when he became aware of it in 2000. Thus, appellant failed to excuse the delay in filing the instant petition in 2003, three years after the alleged discovery of the factual basis for this good cause argument. See Colley, 105 Nev. 235, 773 P.2d 1229.

claim was reasonably available to raise in the first timely petition, and this conclusion alone is sufficient to support the district court's determination that the claim was procedurally defaulted, we will address the additional two questions raised by this court in the 2004 order under the lens of actual prejudice—whether any errors worked to appellant's actual and substantial disadvantage. Hogan v. Warden, 109 Nev. 952, 959-60, 860 P.2d 710, 716 (1993) (quoting United States v. Frady, 456 U.S. 152, 170 (1982)).

2. Whether the judge did in fact draft the report.

At the evidentiary hearing, both the trial judge and Dr. Master testified that they did not remember who actually wrote the second report. However, Dr. Master testified that the signature on the second report was his signature. This evidence was inconclusive. Regardless, for the reasons discussed below, appellant cannot demonstrate actual prejudice.

3. Whether Kirksey can establish any resulting prejudice from the production of the report.

At the evidentiary hearing, Dr. Master testified that the second report reflected his findings, that the signature on the report was his, and that the trial judge did not pressure or coerce him to change his conclusions about appellant's competency. Dr. Master further testified that, even if he had been pressured to change his conclusions, he would never have done so.⁸ The district court determined any errors in the

⁸Dr. Master also testified that he believed appellant was incompetent due to a suicidal ideation. However, we note that suicidal
continued on next page . . .

creation of the second report did not amount to prejudice pursuant to NRS 34.810 and NRS 34.726. After reviewing the documents before this court, we conclude that the district court did not abuse its discretion in rejecting this good cause and actual prejudice argument.

Other Claims of Judicial Bias as Good Cause and Actual Prejudice

Appellant also argues that the district court erred in rejecting his good cause and prejudice arguments to raise two additional claims of judicial bias based on newly discovered evidence relating to the creation of the second report, specifically the cumulative effect of the creation of the second report and that this court applied the incorrect standard to judicial bias claims in the 2004 order.

Cumulative effect of report on judicial bias

Appellant argues that the creation of the second report also provides good cause and actual prejudice to overcome the procedural bars relating to the merits of his judicial bias claims. Appellant argues that the creation of the second report, taken together with a letter from appellant to the trial judge,⁹ the denial of the appointment of co-counsel for trial, ex-parte communication with Dr. Master regarding the competency report, the allegedly poorly run competency proceedings, the denial of investigative funds for post-conviction counsel, and the allegedly poorly run post-conviction proceedings established bias.

... continued

ideation does not itself meet the legal standard of incompetency. Melchor-Gloria v. State, 99 Nev. 174, 179-80, 660 P.2d 109, 113 (1983).

⁹The letter from appellant to the trial judge was a confession and also contained demeaning comments about the trial judge.

As discussed previously, appellant failed to demonstrate he could not have raised claims relating to the second report in a timely petition, and thus, the creation of the second report would not provide good cause to raise a claim of judicial bias.

Moreover, appellant fails to demonstrate actual prejudice. Adverse rulings “during the course of official judicial proceedings do not establish cognizable grounds for disqualification.” In re Petition to Recall Dunleavy, 104 Nev. 784, 789-90, 796 P.2d 1271, 1275 (1988). However, “a deep-seated favoritism or antagonism that would make fair judgment impossible” is improper. Liteky v. United States, 510 U.S. 540, 555 (1994).

At the evidentiary hearing, the trial judge testified that he did not coerce Dr. Master. Dr. Master also stated he was not pressured into changing his conclusions. Further, Dr. Master testified that the conclusions in the second report were his own. Under these facts, appellant fails to demonstrate that the creation of the second report indicates that the trial judge had a “deep-seated favoritism or antagonism” against appellant. Liteky, 510 U.S. at 555. Therefore, we conclude that the district court did not err in rejecting this good cause and prejudice argument.

In addition, appellant previously argued in his first petition for post-conviction relief and/or the appeal of the denial of that petition that the failure to appoint co-counsel for trial, the ex-parte communication with Dr. Master, the denial of investigative funds, and allegedly poorly run post-conviction proceedings indicated that the trial judge was biased. This court considered and rejected these arguments. Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996). The doctrine of law of the case prevents further litigation of these issues and cannot be avoided by a more detailed

and precisely focused argument. See Hall v State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975). Further, appellant's argument that the trial judge was biased due to a letter that was sent to him by appellant was reasonably available prior to the instant petition because the letter available at the time of trial and because appellant had personal knowledge of the letter. Hathaway, 119 Nev. at 252, 71 P.3d at 506 (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986)). Therefore, we conclude that the district court did not err in rejecting this good cause and prejudice argument.

Standard to demonstrate judicial bias

Appellant also argues that this court applied an incorrect standard to claims of judicial bias in issuing its 2004 disposition of the writ of prohibition or mandamus. Appellant claimed that the order required a showing of specific prejudice rather than the appropriate standard of actual bias. Appellant should have argued this court misapplied controlling authority in a petition for rehearing and arguing that this court misapplied controlling authority in a previous order would be inappropriate in this instance. See NRAP 40(c)(2); NRS 34.810(1)(a). Even assuming there was an error regarding the standard, we conclude that any error was harmless because appellant failed to show actual bias on the part of the trial judge as previously discussed. See Liteky, 510 U.S. at 555; see also NRS 178.598 (stating that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded"). Therefore, appellant fails to demonstrate that this would overcome his procedural defects and the district court did not err in rejecting this argument.

Mental Retardation as Good Cause and Actual Prejudice

Next, appellant argues that the district court erred in rejecting his argument that the district court's determination he is mentally retarded established good cause and prejudice to excuse the procedural defects to raise claims relating to competency. Appellant argues that his mental retardation indicates that he was not competent at the time of his guilty plea. Appellant fails to demonstrate that claims concerning mental retardation were not reasonably available prior to the instant petition. Hathaway, 119 Nev. at 252-53, 71 P.3d at 506 (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986)). Appellant was in special education in school and was examined in prison in 1998 for evidence of mental retardation. Accordingly, appellant fails to demonstrate good cause excuse the procedural defects.

Even assuming appellant's mental retardation is newly discovered evidence, appellant fails to demonstrate actual prejudice. This court has held that the test for determining competency is "whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." Melchor-Gloria v. State, 99 Nev. 174, 180, 660 P.2d 109, 113 (1983) (quoting Dusky v. United States, 362 U.S. 402, 402 (1960)) (alteration in original). In regards to mental retardation, "[c]linical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills." Atkins v. Virginia, 536 U.S. 304, 318 (2002). However, "[m]entally retarded persons frequently know the difference between right and wrong and are competent to stand trial ... [t]heir deficiencies do not warrant an exemption from criminal

sanctions.” Id. As there are different standards for competency and mental retardation and because mentally retarded persons are not exempt from criminal punishment, appellant fails to demonstrate that his mental retardation indicates he was incompetent at the time of his plea. As noted earlier, appellant’s competency was already litigated in the trial proceedings and he was found to be competent. Therefore, we conclude that the district court did not err in rejecting this good cause and prejudice argument.

Conflicted Appellate Counsel as Good Cause and Actual Prejudice

Appellant argues that the district court erred in rejecting his argument that he had good cause to raise claims that could have been raised in his direct appeal because his appellate counsel had a conflict of interest. The public defender represented a codefendant in a separate trial, who was acquitted of manslaughter. While outside counsel was appointed to represent appellant at the trial stage, the public defender’s office was appointed for appellant’s direct appeal. Appellant argues that the public defender’s office was conflicted due to the representation of the codefendant and that the conflict of interest provides good cause to raise any claims that could have been raised in his direct appeal. Even assuming the public defender’s office had a conflict of interest, appellant provided no cogent argument to excuse the more than 11-year delay between the issuance of the remittitur for his direct appeal and the filing of the 2003 state habeas petition. See Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). Therefore, appellant fails to demonstrate that this argument provides good cause to excuse the procedural defects, and the district court did not err in rejecting this argument.

Further, appellant fails to demonstrate an actual conflict of interest, and thus, appellant fails to demonstrate actual prejudice. In the context of an ineffective assistance of counsel claim based on an alleged conflict of interest, “[p]rejudice is presumed only if the defendant demonstrates that counsel ‘actively represented conflicting interests’ and that ‘an actual conflict of interest adversely affected his lawyer’s performance.’” Strickland v. Washington, 466 U.S. 668, 692 (1984) (quoting Cuyler v. Sullivan, 446 U.S. 335, 350, 348 (1980)); see Clark v. State, 108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992); but see Cuyler, 446 U.S. at 348 (holding that prejudice is presumed if the district court fails to provide a defendant the opportunity to show that a potential conflict of interest, that the defendant has timely objected to, impermissibly imperils his right to a fair trial). The existence of an actual conflict of interest must be established on the specific facts of each case, but “[i]n general, a conflict exists when an attorney is placed in a situation conducive to divided loyalties.” Clark, 108 Nev. at 326, 831 P.2d at 1376 (quoting Smith v. Lockhart, 923 F.2d 1314, 1320 (8th Cir. 1991)). At the time of appellant’s direct appeal, the public defender’s office no longer was actively representing the codefendant. Further, appellant fails to demonstrate that the public defender’s office performance was adversely affected by a conflict or that the facts establish a situation conducive to divided loyalties. Therefore, appellant fails to demonstrate that this would overcome his procedural defects and the district court did not err in rejecting this argument.

Authorship of a Letter as Good Cause

Appellant next argues that newly discovered evidence that appellant had another person write a letter should provide good cause to

consider claims relating to the validity of his plea and that the district court erred in rejecting this argument. Appellant argues that he asked a fellow jail inmate to write a letter for him to the district court admitting to the facts of the murder and asking the district court to impose the death penalty. Appellant argues that this indicates that appellant's guilty plea was invalid and that he did not actually admit to the facts contained in the letter. Appellant's argument that the above is newly discovered and was not reasonably available is patently without merit. Information from conversations that appellant was a party to was reasonably available to raise in the first, timely petition. Hathaway, 119 Nev. at 252, 71 P.3d at 506 (quoting Murray, 477 U.S. at 488 (1986)). Therefore, appellant fails to demonstrate that this claim should provide good cause to excuse the procedural defects, and the district court did not err in rejecting this argument.

LACHES

As appellant's petition was filed more than five years after the filing of the judgment of conviction and the State specifically pleaded laches, appellant was required to overcome the presumption of prejudice to the State. See NRS 34.800(2). If a petitioner cannot overcome the presumption of prejudice to the State, a petition may be summarily dismissed. NRS 34.800(1). This alone is sufficient to deny the petition as procedurally barred. Appellant provided no argument to rebut the presumption of prejudice to the State, and we conclude that the district court did not err in denying appellant's petition as procedurally barred by laches.

ACTUAL INNOCENCE

Next, appellant argues that a fundamental miscarriage of justice will result if his claims are not reviewed on the merits because he is actually innocent due to the cumulative effect of the above errors. This court has recognized that even if a petitioner has procedurally defaulted claims and cannot demonstrate good cause and prejudice, judicial review of the petitioner's claims would nevertheless be required if the petitioner demonstrates that failure to consider them would result in a "fundamental miscarriage of justice." Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996). A "fundamental miscarriage of justice" typically involves a claim that a constitutional error has resulted in the conviction of someone who is actually innocent. See Coleman v. Thompson, 501 U.S. 722, 748-50 (1991); Murray, 477 U.S. at 496. However, appellant has not introduced any facts indicating that he is actually innocent. Appellant merely claims that the cumulative effect of the errors discussed above indicate that he is innocent. Appellant fails to demonstrate any errors discussed previously amounted to actual innocence. Accordingly, appellant has not shown that the failure to consider his petition on the merits would result in a fundamental miscarriage of justice. See Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001); Mazzan, 112 Nev. at 842, 921 P.2d at 922; see also Bousley v. United States, 523 U.S. 614, 623 (1998); Murray, 477 U.S. at 496. Therefore, appellant fails to demonstrate that this claim should excuse the procedural defects, and the district court did not err in applying the procedural bars in this case.

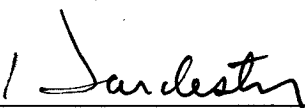
CONCLUSION

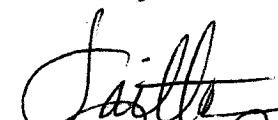
Based upon our review of the documents before this court, we conclude that the district court did not err in denying appellant's petition

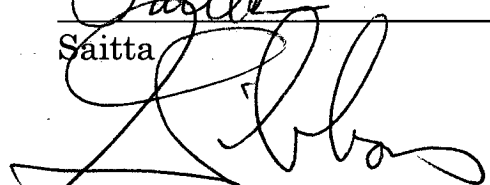
as procedurally barred. Appellant's petition is subject to the procedural bars in NRS 34.726(1), NRS 34.810(2) and NRS 34.800(2). As discussed earlier, appellant failed to demonstrate good cause to excuse the procedural defects or that an impediment external to the defense excused the procedural defects. See Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003); Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994). Appellant also failed to demonstrate actual prejudice. Hogan, 109 Nev. at 959-60, 860 P.2d at 716. In addition, appellant failed to overcome the presumption of prejudice to the State. Finally, appellant failed to demonstrate that he is actually innocent. Therefore, we affirm the order of the district court denying the petition as procedurally barred.

Accordingly, having considered appellant's contentions and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Hardesty


_____, J.
Saitta


_____, J.
Gibbons

cc: Eighth Judicial District Court Dept. 8, District Judge
Federal Public Defender/Las Vegas
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk