

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID A. BOLLINGER,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 50620

**FILED**

SEP 20 2011

TRAGIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *A. Anderson*  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant David A. Bollinger's second post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Janet J. Berry, Judge.

A jury convicted Bollinger of two counts of first-degree murder, two counts of first-degree kidnapping, two counts of robbery, and one count of burglary for his involvement in the deaths of James and Rose Vertrees and theft of their motor home. The jury sentenced Bollinger to death for Rose's murder. This court affirmed the convictions and sentence. Bollinger v. State, 111 Nev. 1110, 901 P.2d 671 (1995). After the appeal from the denial of his first post-conviction petition was dismissed in 1998, Bollinger v. State, Docket No. 30580 (Order Dismissing Appeal, July 28, 1998), Bollinger filed the instant petition in the district court on November 14, 2005. The district court denied the petition as procedurally barred, and this appeal followed.

Bollinger argues that the district court erred by dismissing his post-conviction petition as untimely and successive. He further contends that even if he cannot demonstrate good cause to overcome the applicable procedural bars, the district court erred by dismissing his petition because



the failure to consider his petition on the merits resulted in a fundamental miscarriage of justice.

### Procedural bars

Because Bollinger filed his petition over 10 years after the remittitur issued in his direct appeal, the petition was untimely under NRS 34.726(1). The petition also was successive pursuant to NRS 34.810(2). The petition therefore was procedurally barred absent a demonstration of good cause and prejudice. NRS 34.726(1); NRS 34.810(3).

As cause to overcome the procedural default rules, Bollinger advances several arguments: (1) his post-conviction counsel rendered ineffective assistance, (2) the Ninth Circuit's decision in Polk v. Sandoval, 503 F.3d 903 (9th Cir. 2007), provided him good cause to raise a claim regarding the premeditation and deliberation instruction, (3) the procedural bars should not apply to his claim regarding the weighing instruction, and (4) this court's inconsistent application of procedural default rules precludes application of those rules to his petition. He also argues that the district court erred in concluding that he failed to demonstrate prejudice to overcome the procedural bars concerning his claim challenging the felony aggravator under McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004).

### Ineffective assistance of post-conviction counsel

Bollinger argues that the district court erred in rejecting his claim of ineffective assistance of post-conviction counsel as good cause to overcome the procedural default rules. We disagree. While the ineffective assistance of post-conviction counsel may provide good cause for filing a successive petition, Crump v. Warden, 113 Nev. 293, 304-05, 934 P.2d 247, 254 (1997); see also McKague v. Warden, 112 Nev. 159, 164-65, 912 P.2d

255, 258 (1996), those claims are still subject to other procedural bars, including timeliness under NRS 34.726, State v. Dist. Ct. (Riker), 121 Nev. 225, 235, 112 P.3d 1070, 1077 (2005); see also Hathaway v. State, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003) (explaining that “to constitute adequate cause, the ineffective assistance of counsel claim itself must not be procedurally defaulted”); Edward v. Carpenter, 529 U.S. 446, 452-53 (2000) (concluding that claim of ineffective assistance of counsel cannot serve as cause for another procedurally defaulted claim). In other words, a petitioner must demonstrate cause for raising an ineffective-assistance-of-counsel claim in an untimely fashion. Bollinger failed to explain how any of his counsel’s alleged deficiencies precluded him from filing his second post-conviction petition until ten years after the resolution of his direct appeal and more than seven years after the dismissal of his appeal from the denial of his first post-conviction petition. And while his post-conviction-counsel claims were not available until this court resolved his first post-conviction appeal in July 1998, he was represented by his current counsel as early as February 2, 2000, and Bollinger failed to explain the additional delay of over seven years from the denial of his first post-conviction petition. While his petition appears to assert that he could not raise the claims sooner because he was litigating his federal petition, that explanation does not amount to good cause. See Colley v. State, 105 Nev. 235, 773 P.2d 1229 (1989). Therefore, the district court did not err in rejecting Bollinger’s claim of good cause based on the ineffective assistance of post-conviction counsel.

### Premeditation and deliberation instruction

Bollinger argues that the district court erred in denying his claim regarding the Kazalyn instruction<sup>1</sup> and that the Ninth Circuit Court of Appeals decision in Polk v. Sandoval, 503 F.3d 903 (9th Cir. 2007), provided good cause for his failure to raise the claim in a prior petition. We disagree. In Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000), this court disapproved of the Kazalyn instruction and provided the district courts with new instructions to use in the future. Byford, 116 Nev. at 233-37, 994 P.2d at 712-15. However, we concluded in Nika v. State, 124 Nev. 1272, 198 P.3d 839 (2008), that Byford does not apply to cases that were final when it was decided. Bollinger's conviction was final almost two years before Byford was decided and therefore Byford does not apply. Therefore, the district court did not err in concluding that Bollinger could not demonstrate good cause and prejudice to overcome the applicable procedural bars with respect to this claim.

### Weighing equation

Bollinger argues that the district court erred by applying procedural bars to his claim that the jury was not instructed to find that the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt. We conclude that this argument lacks merit. The premise behind Bollinger's argument is that the jury's weighing function in determining death eligibility is a factual determination that must be found beyond a reasonable doubt, as explained in Johnson v. State, 118 Nev. 787, 59 P.3d 450 (2002), and appears to be based on Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (holding that "[o]ther

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<sup>1</sup>Kazalyn v. State, 108 Nev. 67, 825 P.2d 578 (1992).

than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt”), Ring v. Arizona, 536 U.S. 584, 609 (2002) (holding that capital sentencing scheme which places determination of aggravating circumstances in hands of judge violates the Sixth Amendment right to jury trial), and Blakely v. Washington, 542 U.S. 296, 303 (2004) (providing that “the ‘statutory maximum’ for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant”). Apprendi and Ring were decided several years before Bollinger filed the instant post-conviction petition in 2005, and he wholly fails to explain his delay in raising this claim. Further, this court held in Colwell v. State, 118 Nev. 807, 821, 59 P.3d 463, 473 (2002), that Ring has no retroactive application. Therefore, the district court did not err in denying this claim as procedurally barred.

Alleged inconsistent application of procedural bars

Bollinger argues that the district court erred by dismissing his post-conviction petition as procedurally barred because the default rules are discretionary and this court inconsistently applies them. We disagree. This court has established that procedural default rules are mandatory, see Clem v. State, 119 Nev. 615, 623 n.43, 81 P.3d 521, 527 n.43 (2003); Pellegrini v. State, 117 Nev. 860, 886, 34 P.3d 519, 536 (2001), and this court has rejected claims that this court has the discretion to ignore procedural bars, State v. Dist. Ct. (Riker), 121 Nev. 225, 236, 239, 112 P.3d 1070, 1077, 1079 (2005). Further, we have previously rejected similar claims that this court inconsistently applies procedural default rules. Id. at 236, 112 P.3d at 1077. Even assuming any inconsistent

application, this court has rejected claims that any prior inconsistency excuses procedural default. Id.

### Felony aggravator

Bollinger argues that the district court erred in denying his claim challenging the felony aggravator under McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004), as procedurally barred because he failed to demonstrate prejudice.

Although Bollinger demonstrated good cause, see McConnell, 120 Nev. at 1069, 102 P.3d at 624 (providing that a felony cannot be used to both establish first-degree murder and to aggravate the same murder to capital status); see also Bejarano v. State, 122 Nev. 1066, 1078, 146 P.3d 265, 274 (2006) (providing that McConnell is retroactive), we conclude that the district court did not err in determining that he failed to demonstrate prejudice. The remaining aggravators, that the murder was committed while Bollinger was under a sentence of imprisonment for grand larceny and was committed to avoid or prevent a lawful arrest, and the underlying circumstances of the murders are compelling. The murders were committed while Bollinger was on probation, just over a month after being released from jail. His actions suggest he was a danger to others and was escalating in violence. Further, the evidence suggested that the decision to murder Rose was a calculated one. Considering the evidence supporting the remaining aggravators juxtaposed to the lack of mitigation evidence presented at the penalty hearing, see Rippo v. State, 122 Nev. 1086, 1093-94, 146 P.3d 279, 284 (2006) (striking three McConnell aggravators and reweighing, looking only to the record for mitigating evidence); State v. Haberstroh, 119 Nev. 173, 184 n.23, 69 P.3d 676, 683 n.23 (2003) (reweighing does not involve factual findings “other than those of the jury at the original penalty hearing”); Bridges v. State, 116 Nev.

752, 766, 6 P.3d 1000, 1010 (2000) (this court reweighed based on a “review of the trial record”), we are persuaded that the jury would have found Bollinger death eligible and selected death as the penalty for Rose’s murder absent the invalid aggravator. Therefore, the McConnell error was harmless. See Browning v. State, 120 Nev. 347, 364-65, 91 P.3d 39, 51-52 (2004); Leslie v. Warden, 118 Nev. 773, 784, 59 P.3d 440, 448 (2002).

Fundamental miscarriage of justice

Bollinger argues that even if he cannot demonstrate good cause to overcome the procedural bars, the district court’s failure to consider his post-conviction petition on the merits resulted in a fundamental miscarriage of justice. He argues that he can demonstrate actual innocence of the underlying murder conviction and ineligibility for the death penalty.

Guilt phase

Bollinger contends that not considering his claims that the State presented false and misleading testimony and that his counsel was ineffective for failing to adequately investigate and prepare for trial would result in a fundamental miscarriage of justice. In support of this claim, he submitted statements from two doctors who opined that the medical testimony concerning the cause of Rose’s death may have been mistaken.

When a petitioner cannot demonstrate good cause, the district court may nonetheless excuse a procedural bar if the petitioner demonstrates that failure to consider the petition would result in a fundamental miscarriage of justice. Pellegrini, 117 Nev. at 887, 34 P.3d at 537. A fundamental miscarriage of justice requires “a colorable showing” that the petitioner is “actually innocent of the crime,” meaning “that it is more likely than not that no reasonable juror would have convicted him absent a constitutional violation.” Id. In this context, “actual innocence

means factual innocence, not mere legal insufficiency.” Mitchell v. State, 122 Nev. 1269, 1273-74, 149 P.3d 33, 36 (2006) (internal quotation marks omitted) (alteration omitted).

We conclude that Bollinger failed to demonstrate a fundamental miscarriage of justice as he did not make a “colorable showing” of actual innocence. In addition to the medical evidence presented at trial, the jury also heard other evidence that pointed to Bollinger’s involvement in Rose’s death which included the circumstances under which the victims’ motor home fled from the trailer park, the destruction of the victims’ remains, the presence of the victims’ blood in the motor home and on Bollinger’s clothing seized from the home, and Bollinger’s possession of the victims’ motor home and attempts to fabricate documentation to show his ownership of it. In light of this evidence, Bollinger did not show that it was more likely than not that no reasonable juror would have convicted him had the testimony of the medical examiner and forensic specialists been more strenuously challenged or investigated.

#### Penalty phase claims

Bollinger contends that the failure to consider several claims related to the penalty hearing would result in a miscarriage of justice. He argues that: (1) the preventing-a-lawful-arrest aggravator was invalid; (2) his counsel was ineffective for failing to investigate and introduce mitigating evidence; (3) his trial counsel and the district court failed to ensure that he received the death penalty based on his actual intent to kill the victim; and (4) other procedural errors resulted in a fundamental miscarriage of justice.

When claiming a fundamental miscarriage 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, 117 Nev. at 887, 34 P.3d at 537.

#### Preventing-a-lawful arrest aggravator

Bollinger contends that the failure to consider his claim that the preventing-a-lawful-arrest aggravator is invalid resulted in a fundamental miscarriage of justice because there was no evidence that he murdered the victims in an attempt to avoid a lawful arrest. We disagree. This court already determined in its mandatory review of the death sentence under NRS 177.055(2) that the evidence supported the finding of the aggravating circumstances. Bollinger, 111 Nev. at 1117, 901 P.2d at 676. As it is the law of the case that sufficient evidence was presented at trial for the jury to find that he had murdered Rose to avoid a lawful arrest, see Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975), Bollinger did not show that it was more likely than not that no rational juror would have concluded that Rose’s murder was committed to prevent a lawful arrest.

#### Failure to introduce mitigating evidence

Bollinger argues that trial counsel was ineffective for failing to produce evidence that he had a history of mental illness, an abusive family history, and had previously attempted suicide during which he suffered organic neurological damage. While he concedes that he told his counsel not to present any evidence, he claims that his counsel should not have “abdicated his professional role to his mentally-ill client.”

We conclude that Bollinger failed to demonstrate a fundamental miscarriage of justice for two reasons. First, Bollinger previously waived the underlying ineffective-assistance claim when, during the litigation of his prior post-conviction petition, he personally indicated that he did not wish to raise any claims concerning the

effectiveness of his counsel during the penalty hearing. Second, even if the fundamental-miscarriage exception includes additional mitigation evidence that was not presented at trial as the result of constitutional error, such as alleged ineffective assistance of counsel, see Sawyer v. Whitley, 505 U.S. 333, 347 (1992) (stating that “the ‘actual innocence’ requirement must focus on those elements that render a defendant eligible for the death penalty, and not on additional mitigating evidence that was prevented from being introduced as a result of a claimed constitutional error”), Bollinger failed to “show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found him death eligible,” Pellegrini, 117 Nev. at 887, 34 P.3d at 537.

#### Actual intent

Bollinger next argues that he is actually innocent of the death penalty because neither his trial counsel nor the trial court ensured that he received the death penalty based on his actual intent to kill Rose. Citing Enmund v. Florida, 458 U.S. 782 (1982), and Tison v. Arizona, 481 U.S. 137 (1987), he contends that the State was required to prove that he had the intent to kill Rose or the moral equivalent of such intent. He apparently asserts that the jury instructions regarding the felony aggravator permitted the jurors to find that aggravator if they concluded that Rose died accidentally, from a misplaced gag, or from the application of less than lethal force. We conclude that Bollinger’s argument is moot because the aggravator is invalid under McConnell.


#### Procedural errors

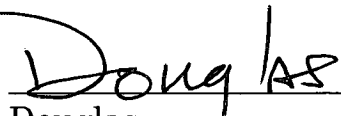
Bollinger argues that other errors amounted to a fundamental miscarriage of justice: (1) his trial counsel proceeded under a conflict of interest, (2) his appellate counsel proceeded under a conflict of interest, (3) the trial judge was biased, (4) the district court lacked jurisdiction, (5) the

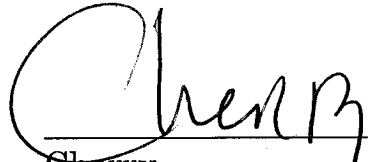
jury failed to designate a degree of murder, and (6) the district court denied him a speedy trial. We conclude that these arguments lack merit. As stated above, a fundamental miscarriage of justice requires a showing of actual, factual innocence or ineligibility for the death penalty. Mitchell v. State, 122 Nev. 1269, 1273-74, 149 P.3d 33, 36 (2006); Pellegrini, 117 Nev. at 887, 34 P.3d at 537. This standard is a factual one that is not met by merely alleging procedural errors at trial.

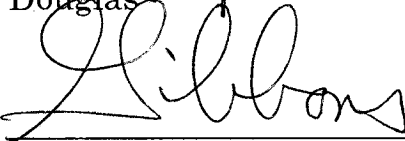
Having considered Bollinger's contentions and concluding that they lack merit, we

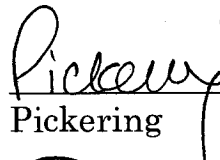
ORDER the judgment of the district court AFFIRMED.

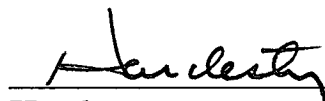
  
Saitta, C.J.

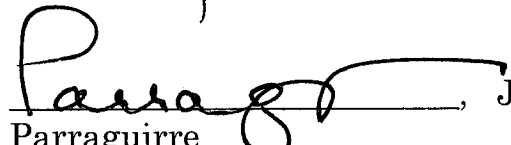
  
Douglas, J.

  
Cherry, J.

  
Gibbons, J.

  
Pickering, J.

  
Hardesty, J.

  
Parraguirre, J.

cc: Hon. Janet J. Berry, District Judge  
Federal Public Defender/Las Vegas  
Attorney General/Carson City  
Washoe County District Attorney  
Washoe District Court Clerk