

IN THE SUPREME COURT OF THE STATE OF NEVADA

JULIO HERRERA,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 55708

HECTOR CASTELLON,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 55996

**FILED**

NOV 08 2010

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

ORDER OF AFFIRMANCE

Docket No. 55708 is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus.<sup>1</sup> Docket No. 55996 is a proper person appeal from an order of the district court denying a motion to modify or correct an illegal sentence. Eighth Judicial District Court, Clark County; David B. Barker, Judge. We elect to consolidate these appeals for disposition. NRAP 3(b).

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<sup>1</sup>This appeal has been submitted for decision without oral argument, NRAP 34(f)(3), and we conclude that the record is sufficient for our review and briefing is unwarranted. See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

Docket No. 55708

Appellant, Julio Herrera, filed his petition on December 7, 2009, twenty-two years after issuance of the remittitur on direct appeal on January 13, 1987.<sup>2</sup> See Castellon v. State, Docket No. 16103 (Order Dismissing Appeal, December 23, 1986). Thus, appellant's petition was untimely filed, and was procedurally barred absent a demonstration of cause for the delay and undue prejudice. See NRS 34.726(1); Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998). Moreover, because the State specifically pleaded laches, appellant was required to overcome the rebuttable presumption of prejudice. NRS 34.800(2).

First, appellant claimed that he had good cause because he does not speak, read or write English very well, did not have access to the law library because of his inadequate English, and believed that the prison law clerk who helped him with his prior federal petition was admitted to practice law in the State of Nevada. Appellant failed to demonstrate good cause to overcome the procedural bars because he failed to demonstrate an impediment external to the defense. Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). Further, appellant previously filed a motion to correct or modify a sentence in English and failed to demonstrate why he was unable to timely file the instant petition.<sup>3</sup> See Cobas v. Burgess, 306 F.3d 441, 444 (6th Cir. 2002) (finding

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<sup>2</sup>Appellant's petition was also filed almost seventeen years after the effective date of NRS 34.726. See 1991 Nev. Stat., ch. 44, § 5, at 75-76; Pellegrini v. State, 117 Nev. 860, 874-75, 34 P.3d 519, 529 (2001).

<sup>3</sup>Also, as stated previously, it appears that appellant pursued a petition for a writ of habeas corpus in federal court.

that petitioner's alleged inability to speak English was no excuse for delay when the petitioner had previously filed several post-conviction petitions in state court, even if the petitioner had received assistance in drafting those petitions). Therefore, the district court did not err in denying this claim.

Second, appellant claimed that the Ninth Circuit Court of Appeals decisions in Polk v. Sandoval, 503 F.3d 903 (9th Cir. 2007), and Chambers v. McDaniel, 549 F.3d 1191 (9th Cir. 2008), provided good cause to excuse his raising a claim challenging the premeditation and deliberation jury instruction.

Appellant's reliance upon the Chambers decision was misplaced as Chambers did not announce any new proposition, but rather discussed and applied decisions entered previously. Specifically, the Chambers court discussed and applied the decision in Polk, which itself discussed this court's decision in Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000). Because it is the substantive holdings in Polk and Byford that appellant sought to apply in this case, it is those cases that provide the marker for filing timely claims and not a later case, Chambers, which merely discussed and applied those cases. Appellant's 2009 petition was filed almost two years after entry of Polk and more than nine years after this court's decision in Byford. Under these circumstances, appellant failed to demonstrate good cause for the entire length of his delay.

Appellant's reliance upon Byford is further misplaced in this case. Byford only affected convictions that were not final at the time that Byford was decided as a matter of due process. See Garner v. State, 116 Nev. 770, 788, 6 P.3d 1013, 1025 (2000), overruled on other grounds by Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002); see also Nika v. State,

124 Nev. 1272, 1284-85, 198 P.3d 839, 848 (2008), cert. denied, 558 U.S. \_\_\_, 130 S. Ct. 414 (2009). In Nika, this court rejected Polk's determination that the Kazalyn instruction was constitutional error. Nika, 124 Nev. at 1286, 198 P.3d at 849. Instead, this court reaffirmed its holding in Garner that Byford announced a change in state law rather than clarified existing state law. Id. at 1287, 198 P.3d at 849-50. When state law is changed, rather than clarified, the change only applies prospectively and to cases that were not final at the time of the change. Id. at 1287, 198 P.3d at 850. Because appellant's conviction was final long before Byford was decided, the premeditation and deliberation instruction was not error in this case. Therefore, he failed to demonstrate actual prejudice.

Appellant also claimed that this court's decisions in Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002), and Mitchell v. State, 122 Nev. 1269, 149 P.3d 33 (2006), provided good cause to excuse his raising a claim challenging the premeditation and deliberation jury instruction. Appellant filed this petition approximately seven years after this court issued its decision in Sharma and approximately 3 years after this court issued its decision in Mitchell. Thus, even if these cases established good cause for a part of appellant's delay, appellant failed to establish good cause for the entire length of his delay. See NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3).

Further, we note that because the jury found appellant guilty of robbery with the use of a deadly weapon and kidnapping with the use of a deadly weapon, appellant was clearly guilty of first-degree murder pursuant to NRS 200.030(1)(b). In addition, appellant's claim that a fundamental miscarriage of justice excused the procedural defects was

without merit as he failed to demonstrate that he was actually innocent. Calderon v. Thompson, 523 U.S. 538, 559 (1998); Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001); Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

Next, appellant claimed that this court's decision in Brooks v. State, 124 Nev. 203, 209-10, 180 P.3d 657, 661 (2008) provided good cause to excuse his raising a claim challenging the deadly weapon enhancement jury instructions. Appellant filed this petition over one year after this court issued its decision in Brooks. Thus, even if Brooks established good cause for a part of appellant's delay, appellant failed to establish good cause for the entire length of his delay. See NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3).

We further conclude that appellant failed to overcome the presumption of prejudice to the State pursuant to NRS 34.800(2). Therefore, the district court did not err in applying the procedural bars under NRS 34.726(1), NRS 34.800(2), and NRS 34.810(1)(b)(2).

Docket No. 55996

In his motion, filed on March 9, 2010, appellant, Hector Castellon, claimed that his sentence should be modified or found to be illegal because while he was sentenced to serve four consecutive terms of life in prison without the possibility of parole, it was the unwritten policy of the pardons board in the 1980s and 1990s to commute sentences to fifteen to twenty years and appellant's sentence was not commuted during this time period. Appellant failed to demonstrate that the district court relied on mistaken assumptions regarding his criminal record that worked to his extreme detriment. See Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996). Appellant failed to demonstrate that his sentence

was facially illegal and that the district court lacked jurisdiction. See id.  
We therefore conclude that the district court did not err in denying  
appellant's motion. Accordingly, we

ORDER the judgments of the district court AFFIRMED.

Hardesty, J.  
Hardesty

Douglas, J.  
Douglas

Pickering, J.  
Pickering

cc: Hon. David B. Barker, District Judge  
Julio Herrera  
Hector Castellon  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk