

IN THE SUPREME COURT OF THE STATE OF NEVADA

TODD MITCHELL LEAVITT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 69218

FILED

SEP 16 2016

TRACIE KENNEDY
CLERK OF SUPREME COURT
BY *J. M. Leavitt*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a pro se appeal from a district court order denying appellant Todd Mitchell Leavitt's postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Leavitt filed his petition on October 20, 2015, more than 25 years after remittitur issued from his direct appeal in 1989. *Leavitt v. State*, Docket No. 19493 (Order Dismissing Appeal, September 28, 1989).¹ Thus, the petition was untimely filed. See NRS 34.726(1). The petition was also successive pursuant to NRS 34.810(1)(b)(2) because Leavitt had

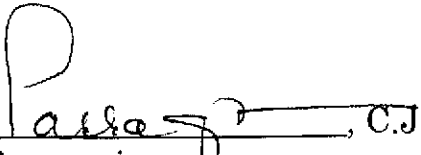
¹The petition was filed more than 22 years after the effective date of NRS 34.726 on January 1, 1993.

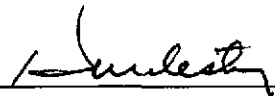
previously sought postconviction relief. *Leavitt v. State*, Docket No. 28987 (Order Dismissing Appeal, February 10, 1999); *Leavitt v. State*, Docket No. 50438 (Order of Affirmance, April 18, 2008). Accordingly, the petition was procedurally barred absent a demonstration of good cause and prejudice. See NRS 34.726(1); NRS 34.810(1)(b), (3). The district court concluded that Leavitt failed to demonstrate good cause and prejudice and denied his petition.

Leavitt contends that the district court erred by failing to consider his good cause argument regarding *Riley v. McDaniel*, 786 F.3d 719, 721 (9th Cir. 2015) (holding that it was error to give the instruction referenced in *Kazalyn v. State*, 108 Nev. 67, 825 P.2d 578 (1992), in trials conducted before *Powell v. State*, 108 Nev. 700, 838 P.2d 921 (1992), or after *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000)). Although Leavitt cited *Riley* in his petition, he did not discuss *Riley's* holding or apply it to his case. Therefore, we conclude that the district court did not err by failing to consider *Riley* and by denying his petition. As a separate and independent ground for denying relief, we also conclude that the district court did not err by denying Leavitt's petition because we do not agree with *Riley* and therefore it would not provide good cause. See *Nika v. State*, 124 Nev. 1272, 1289, 198 P.3d 839, 851 (2008) (discussing the history of Nevada law on the phrase "willful, deliberate, and premeditated," including *Hern v. State*, 97 Nev. 529, 635 P.2d 280 (1981), and explaining that prior to *Byford* this court had not required separate definitions of the terms and had instead viewed them as together conveying a meaning that was sufficiently described by the definition of "premeditation" eventually approved in *Kazalyn* and *Powell*). But even

assuming that *Riley* would provide good cause, Leavitt did not establish prejudice because he did not demonstrate that the result of trial would have been different had a different instruction been given. Accordingly, we

ORDER the judgment of the district court AFFIRMED.²


_____, C.J.
Parraguirre


_____, J.
Hardesty


_____, J.
Pickering

cc: Hon. Michelle Leavitt, District Judge
Todd Mitchell Leavitt
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

²Having considered the pro se brief filed by appellant, we conclude that a response is not necessary. NRAP 46A(c). This appeal therefore has been submitted for decision based on the pro se brief and the record. See NRAP 34(f)(3). We have excluded from our consideration any claims raised for the first time on appeal.