

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

WILLIAM JAMES BERRY, SR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 72277

FILED

DEC 14 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

William James Berry, Sr., appeals from a district court order denying the postconviction petition for a writ of habeas corpus he filed on October 4, 2016.¹ Eighth Judicial District Court, Clark County; Stefany Miley, Judge.

Berry's petition was filed more than 28 years after the remittitur on direct appeal was issued on July 23, 1988;² consequently, it was untimely filed and procedurally barred absent a demonstration of good cause—cause for the delay and undue prejudice.³ See NRS 34.726(1). Moreover, because the State specifically pleaded laches, Berry was required to overcome the rebuttable presumption of prejudice to the State. See NRS 34.800(2).

Berry claimed he had good cause to excuse the procedural default because he was relying upon *Riley v. McDaniel*, 786 F.3d 719 (9th

¹This appeal has been submitted for decision without oral argument. NRAP 34(f)(3).

²See *Berry, Sr. v. State*, Docket No. 18098 (Order Dismissing Appeal, June 23, 1988).

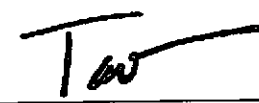
³Berry's petition was also untimely from the January 1, 1993, effective date of NRS 34.726. See 1991 Nev. Stat., ch. 44, § 33, at 92.

Cir. 2015), to challenge the *Kazalyn* instruction that was given to the jury at his trial. See *Kazalyn v. State*, 108 Nev. 67, 75, 825 P.2d 578, 583 (1992), *receded from by Byford v. State*, 116 Nev. 215, 235, 994 P.2d 700, 713-14 (2000). The district court properly rejected this good-cause claim because the Nevada Supreme Court disagreed with *Riley's* interpretation of Nevada law and concluded *Riley* does not establish good cause for filing an untimely petition. See *Leavitt v. State*, 132 Nev. ___, ___, 386 P.3d 620, 620-21 (2016).

We note Berry failed to overcome the presumption of prejudice to the State. See NRS 34.800(2). We conclude the district court properly denied his petition as procedurally barred. See *State v. Eighth Judicial Dist. Court (Riker)*, 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005) (explaining the application of procedural bars is mandatory). And, we

ORDER the judgment of the district court AFFIRMED.⁴


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

⁴Berry also claims recent retroactivity decisions by the United States Supreme Court provide good cause to overcome the procedural default, but he did not raise this good-cause claim in his petition and we decline to consider it for the first time on appeal. See *Davis v. State*, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991), *overruled on other grounds by Means v. State*, 120 Nev. 1001, 1013, 103 P.3d. 25, 33 (2004).

cc: Hon. Stefany Miley, District Judge
William James Berry, Sr.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk