

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

FRANK J. MATYLINSKY, JR.,
Appellant,
vs.
ISIDRO BACA, WARDEN,
Respondent.

No. 72235

FILED

DEC 13 2017

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

ORDER OF AFFIRMANCE

Frank J. Matylinsky, Jr., appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on May 12, 2016, and supplemental petition filed on August 31, 2016. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge.

Matylinsky filed his petition more than 27 years after issuance of the remittitur on direct appeal on December 13, 1988,¹ and more than 23 years after the effective date of NRS 34.726, *see* 1991 Nev. Stat., ch. 44, § 5, at 74, §33, at 92. Matylinsky's petition was therefore untimely filed. *See* NRS 34.726(1). Moreover, his petition was successive insofar as he reraised claims already decided on the merits and abusive insofar as he raised claims new and different from those raised in his previous petitions.² *See* NRS 34.810(1)(b)(2); NRS 34.810(2). Appellant's petition was procedurally

¹*See Matylinsky v. State*, Docket Nos. 16222, 18547 (Order Dismissing Appeals, November 22, 1988).

²*See Matylinsky v. State*, Docket Nos. 16222, 18547 (Order Dismissing Appeals, November 22, 1988); *Matylinsky v. Warden*, Docket No. 20228 (Order Dismissing Appeal, November 2, 1989); *Matylinsky v. State*, Docket No. 38746 (Order of Affirmance, September 12, 2002).

barred absent a demonstration of good cause and actual prejudice. See NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3). Further, because the State specifically pleaded laches, Matylinsky was required to overcome the presumption of prejudice to the State. See NRS 34.800(2).


Matylinsky argues *Riley v. McDaniel*, 786 F.3d 719 (9th Cir. 2015), provides good cause to overcome the procedural bars. In his pleadings below, Matylinsky sought postconviction relief based on his having received the *Kazalyn*³ jury instruction, which was at issue in *Riley*. However, the Nevada Supreme Court has held *Riley* does not provide good cause to overcome procedural bars. *Leavitt v. State*, 132 Nev. ___, ___, 386 P.3d 620, 620 (2016). Further, even if *Riley* could provide good cause, it is inapposite to Matylinsky's case because he did not receive the *Kazalyn* instruction. We decline to consider on appeal in the first instance his arguments related to the jury instructions he actually received. See *Rimer v. State*, 131 Nev. ___, ___ n.3, 351 P.3d 697, 713 n.3 (2015).


Matylinsky also argues he is actually innocent such that failure to consider his underlying claim on the merits would result in a fundamental miscarriage of justice. Relying on testimony at trial that he used cocaine before the homicide, Matylinsky contends he was unable to form the necessary intent for first-degree murder. Because Matylinsky's claim is one of legal, not actual, innocence and is based entirely on evidence presented at trial, he has failed to demonstrate he is actually innocent and is thus subject to the procedural bars. See *Calderon v. Thompson*, 523 U.S. 538, 559 (1998). Further, because Matylinsky failed to allege facts that, if true and not belied by the record, would have entitled him to relief, we

³*Kazalyn v. State*, 108 Nev. 67, 825 P.2d 578 (1992).

conclude the district court did not err in denying this claim without first conducting an evidentiary hearing. *See Berry v. State*, 131 Nev. ___, ___, 363 P.3d 1148, 1154-55 (2015). Finally, Matylinsky failed to overcome the presumption of prejudice to the State. *See* NRS 34.800. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Chief Judge, Second Judicial District Court
Second Judicial District, Dept. 7
Troy Curtis Jordan
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk