

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KEVIN RAY HOLMES,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 73913

FILED

JUN 13 2018

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

Kevin Ray Holmes appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on April 21, 2017.<sup>1</sup> Eighth Judicial District Court, Clark County; Michael Villani, Judge.

Holmes filed his petition more than 15 years after issuance of the remittitur on direct appeal on July 12, 2001. *See Holmes v. State*, Docket No. 35367 (Order of Affirmance, May 21, 2001). Holmes' petition was therefore untimely filed. *See* NRS 34.726(1). Holmes' petition was also successive and an abuse of the writ.<sup>2</sup> NRS 34.810(1)(b)(2); NRS 34.810(2). Holmes' petition was therefore procedurally 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,

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

<sup>2</sup>*See Holmes v. State*, Docket No. 68955 (Order of Affirmance, April 14, 2016); *Holmes v. State*, Docket No. 41065 (Order of Affirmance, January 2, 2004).

Holmes was required to overcome the presumption of prejudice to the State. See NRS 34.800(2).

Holmes' underlying claim was that he is entitled to the retroactive application of *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000).<sup>3</sup> He claimed the United States Supreme Court's decisions in *Welch v. United States*, \_\_\_, U.S. \_\_\_, 136 S. Ct. 1257 (2016), and *Montgomery v. Louisiana*, \_\_\_, U.S. \_\_\_, 136 S. Ct. 718 (2016), provided good cause to excuse his procedural bars because they changed the framework under which retroactivity is analyzed. However, Holmes' conviction was not yet final when *Byford* was decided, and *Byford* was thus available to raise on direct appeal<sup>4</sup> or in his first, timely postconviction petition for a writ of habeas corpus. See *Holmes v. State*, Docket No. 41065 (Order of Affirmance, January 2, 2004). Accordingly, retroactivity is not at issue in Holmes' case.

Holmes also claimed he could demonstrate a fundamental miscarriage of justice to overcome the procedural bars because "there is a significant risk that [he] stands convicted of an act that the law does not make criminal." A petitioner may overcome procedural bars by demonstrating he is actually innocent such that the failure to consider his petition would result in a fundamental miscarriage of justice. *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). "It is important to note in this regard that 'actual innocence' means factual innocence, not mere

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<sup>3</sup>Holmes offers a new substantive claim on appeal: the trial court never obtained subject matter jurisdiction over his case because the charging document was faulty. Because this claim was not presented to the district court in the first instance, we decline to consider it on appeal. See *Rimer v. State*, 131 Nev. 307, 328 n.3, 351 P.3d 697, 713 n.3 (2015).

<sup>4</sup>*Byford* was decided on February 28, 2000. Holmes' opening brief on appeal was filed more than four months later on July 10, 2000.

legal insufficiency.” *Bousley v. United States*, 523 U.S. 614, 623 (1998). As Holmes noted in his petition, “[t]he facts in this case established that [he] only committed a second-degree murder.” This is not factual innocence. Accordingly, Holmes failed to demonstrate he is actually innocent such that failing to consider his claims on the merits would result in a fundamental miscarriage of justice. And for this same reason, he failed to overcome the presumption of prejudice to the State. *See* NRS 34.800.

Holmes raises several new arguments in his informal brief on appeal. He acknowledges he did not raise these claims in the district court but claims he has good cause to raise them for the first time on appeal because the district court did not grant his request to file a reply to the State’s response to his petition. *See McNelton v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999) (declining to reach new arguments on appeal because appellant failed to “allege good cause and prejudice for failing to include these issues in his petition”). The State sought dismissal of Holmes’ petition as procedurally barred. *See* NRS 34.726(1)(b) (referring to “dismissing of the petition as untimely”); NRS 34.800 (entitled “Dismissal of petition for delay in filing”); NRS 34.810 (entitled “Additional reasons for dismissal of petition”). Accordingly, Holmes had 15 days to file a reply. *See* NRS 34.750(4). He filed neither a reply nor a request for extension of time to file a reply within that time frame. He has thus failed to demonstrate good cause for raising new claims on appeal.


Moreover, as a separate and independent ground to deny relief, his claims did not demonstrate good cause. To warrant relief, a claim of good cause must not itself be procedurally barred. *See Hathaway v. State*, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003).

First, Holmes argues that at the time of his direct appeal and first postconviction proceedings, the Nevada Supreme Court was holding to its conclusion that *Byford* was purely prospective and did not apply even to cases that were not yet final when *Byford* was decided. Holmes is correct in noting that it was not until *Nika v. State*, 124 Nev. 1272, 1287, 198 P.3d 839, 850 (2008), that the Nevada Supreme Court first held *Byford* applied to convictions that were not yet final when *Byford* was decided. However, Holmes is untimely from that decision and has not demonstrated good cause and prejudice to excuse the delay.

Second, Holmes argues the ineffective assistance of his trial and appellate counsel constitutes good cause. Again, these claims are themselves untimely, and he has not demonstrated good cause and prejudice to excuse the delay.

Having concluded Holmes' petition is procedurally barred, we ORDER the judgment of the district court AFFIRMED.<sup>5</sup>

  
\_\_\_\_\_, C.J.  
Silver

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Gibbons

<sup>5</sup>We conclude the district court did not abuse its discretion by declining to appoint postconviction counsel. See NRS 34.750(1); *Renteria-Novoa v. State*, 133 Nev. \_\_\_, \_\_\_, 391 P.3d 760, 760-61 (2017).

cc: Hon. Michael Villani, District Judge  
Kevin Ray Holmes  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk