

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BRENDAN JAMES NASBY,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 70626

**FILED**

JUL 12 2017

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

*ORDER OF AFFIRMANCE*

Brendan James Nasby appeals from a district court order denying his postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; William D. Kephart, Judge.

Nasby asserts the district court erred by denying his petition as procedurally barred. Nasby filed his petition on January 5, 2016, nearly 15 years after issuance of the remittitur on direct appeal on March 6, 2001. *See Nasby v. State*, Docket No. 35319 (Order of Affirmance, February 7, 2001). Thus, Nasby's petition was untimely filed. *See* NRS 34.726(1). Moreover, Nasby's petition was successive because he had previously filed three postconviction petitions for a writ of habeas corpus.<sup>1</sup> *See* NRS 34.810(1)(b)(2); NRS 34.810(2). Nasby's petition was procedurally barred absent a demonstration of good cause and actual

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<sup>1</sup>*Nasby v. State*, Docket No. 67580 (Order of Affirmance, September 11, 2015); *Nasby v. State*, Docket No. 58579 (Order of Affirmance, February 8, 2012); *Nasby v. State*, Docket No. 47130 (Order of Affirmance, June 18, 2007).

prejudice. See NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3). Moreover, because the State specifically pleaded laches, Nasby was required to overcome the rebuttable presumption of prejudice. NRS 34.800(2).

Nasby claimed he had good cause to excuse the procedural bars as a result of inadequate access to legal materials and because he is actually innocent. He asserted he received a flawed jury instruction on the elements of first-degree murder because the jury was given the *Kazalyn* instruction on premeditation and therefore, the State was not required to prove all three elements of first-degree murder. 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). He argued that because the State was not required to prove willfulness, deliberation, and premeditation, the State did not actually prove he committed first-degree murder. He further asserted there was no testimony or argument presented regarding deliberation and without the State proving deliberation he is actually innocent of first-degree murder.

Nasby pointed out he raised the jury instruction issue on direct appeal and in his first postconviction petition for a writ of habeas corpus, but his claims were denied on the basis the holding in *Byford* did not apply to him. Nasby also asserted he was unable to adequately argue good cause and prejudice to consider his jury instruction claim in his second postconviction petition for a writ of habeas corpus due to inadequate access to legal materials. He further asserted that due to inadequate access to legal materials, he only recently found out about the Nevada Supreme Court's decision in *Nika v. State*, 124 Nev. 1272, 198

P.3d 839 (2008), which held *Byford* announced a new rule that must be applied to convictions, such as his, that were not final at the time *Byford* was announced. Finally, Nasby argued his jury instruction claim should not be barred by laches because he exercised due diligence by raising the jury instruction claim on direct appeal and in his first two postconviction petitions and the error in rejecting his prior claims is good cause for re-raising the claim in the instant petition.<sup>2</sup>

Judicial review of Nasby's claims would be required if he could demonstrate failure to consider them would result in a fundamental miscarriage of justice. *See Mazzan v. Warden*, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996). In order to demonstrate a fundamental miscarriage of justice, a petitioner must make a colorable showing of actual innocence—factual innocence, not legal innocence. *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001); *see also Calderon v. Thompson*, 523 U.S. 538, 559 (1998). To establish actual innocence, Nasby would have had to demonstrate that had the jury not received the *Kazalyn* instruction and been properly instructed regarding the meaning of premeditation and the meaning of deliberation, "it is more likely than not that no reasonable juror would have convicted him." *Calderon*, 523 U.S. at 559 (quotation marks omitted).

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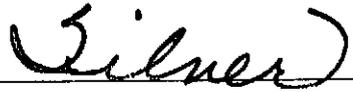
<sup>2</sup>We note the order affirming the denial of Nasby's second postconviction petition for a writ of habeas corpus incorrectly implies Nasby did not raise his jury instruction claim on direct appeal or in his first postconviction petition. *Nasby v. State*, Docket No. 58579 (Order of Affirmance, February 8, 2012) at 2.

The jury heard testimony that approximately one month before the victim was killed Nasby questioned others regarding whether they thought the victim should be killed. On the night the victim was killed, Nasby and his co-defendants were at Nasby's residence and Nasby was giving orders. Nasby's co-defendants left Nasby's residence, picked up the victim from the victim's home, and returned with the victim to Nasby's residence to pick up Nasby and head out to the desert. Although the victim was informed they were going to the desert to shoot guns and smoke some weed, one of the co-defendants testified it was understood by all except the victim that they were taking the victim to the desert to shoot him. Nasby was the only person to bring a gun with them that evening. Once in the desert and while the victim was looking for something they could use as target practice, Nasby moved up from behind the victim and shot the victim from behind. The victim fell down to one knee, Nasby moved closer to the victim, and shot the victim again. Nasby and his codefendants then got back into the car, but as the car was starting to turn around, Nasby exited the car, walked over to the victim, stood over the victim's head, and shot the victim a third time, this time in the victim's head.

Even assuming inadequate access to legal materials constituted good cause to re-raise the jury instruction issue in this petition, Nasby cannot demonstrate actual prejudice or a fundamental miscarriage of justice will result from the failure to consider his claims because the evidence presented at trial was sufficient to establish beyond a reasonable doubt that the killing of the victim was premeditated and Nasby acted willfully and with deliberation when killing the victim. See

*Byford*, 116 Nev. at 233-34, 994 P.2d at 712-13 (concluding that giving the *Kazalyn* instruction was not reversible error when the evidence was “clearly sufficient” to establish all elements of first-degree murder). Accordingly, we conclude the district court did not err by denying Nasby’s petition as procedurally barred, and we

ORDER the judgment of the district court AFFIRMED.<sup>3</sup>

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

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

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

cc: Hon. William D. Kephart, District Judge  
Brendan James Nasby  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk

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<sup>3</sup>We further conclude the district court did not abuse its discretion by denying Nasby’s request for the appointment of counsel, see NRS 34.750(1); *Renteria-Novoa v. State*, 133 Nev. \_\_\_, \_\_\_, 391 P.3d 760, 760-61 (2017), or his NRCP 59(e) motion.