

No. 18-7547

IN THE SUPREME COURT OF THE UNITED STATES

February 19, 2019

MICHAEL JOSEPH MULDER, *Petitioner*,

v.

THE STATE OF NEVADA, *Respondent*

*ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF NEVADA*

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

CAPITAL CASE

Whether this Court in Hall v. Florida, 572 U.S. ___, 134 S.Ct. 1986 (2014), eliminated the age of onset requirement for establishing intellectual disability in order to exclude one from imposition of the death penalty under the Eighth Amendment?

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STATEMENT OF THE CASE

Michael Mulder was convicted by a jury in 1998 of First-Degree Murder, Robbery of a Victim over Age 65, and Burglary While in Possession of a Firearm and was sentenced to death for severely beating to death an elderly man, John Ahart, in 1996. On direct appeal, the Nevada Supreme Court affirmed the convictions as well as the sentence of death. Mulder v. State, 116 Nev, 1, 992 P.2d 845 (2000). Remittitur issued on October 17, 2000.

Mulder filed a timely first post-conviction petition for writ of habeas corpus in state court on May 15, 2001, through appointed counsel. Meanwhile, Mulder suffered a stroke in prison on March 15, 2001, from his illegal drug usage, giving rise to a claim of mental retardation which was denied. After psychological testing and an evidentiary hearing, Mulder was found competent to proceed with habeas despite the stroke and the court then

denied all claims of ineffective assistance of counsel as to the convictions, but vacated the death sentence and ordered a new penalty hearing due to McConnell error¹ involving two felony aggravators. Findings of fact and conclusions of law were filed on February 6, 2006.

Both sides appealed. In an unpublished order filed on June 17, 2009, the Nevada Supreme Court *en banc* unanimously granted the State's appeal by reversing the district court's order to the extent that it vacated Mulder's death sentence, and denied Mulder's appeal by affirming the denial of habeas relief in all other respects. (SC# 46800). Remittitur issued on December 30, 2009. Even before the appeal was fully concluded, Mulder filed a habeas petition in federal court on October 15, 2009, and the federal public defender was appointed. After several years of litigation in federal court, Mulder sought and received an Order filed on September 8, 2014, for stay and abeyance of federal habeas proceedings so that Mulder could exhaust his new claims in state court.

Finally, after more than five years in federal court, Mulder filed his second state habeas petition in state court on December 9, 2014, which was denied as untimely and successive without a sufficient allegation of good cause to account for the entire length of delay. On appeal, the Nevada Supreme Court affirmed and Mulder now seeks certiorari relief.

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¹ In McConnell v. State, 120 Nev. ___, 102 P.3d 606, 624 (2004), the Nevada Supreme Court held that "it is impermissible under the United States and Nevada Constitutions to base an aggravating circumstance in a capital prosecution on the felony upon which a felony murder is predicated."

REASONS FOR DENYING THE PETITION

I.

HALL v. FLORIDA DID NOT ELIMINATE THE AGE OF ONSET REQUIREMENT FOR INTELLECTUAL DISABILITY

Mulder invites this Court to decide whether the Eighth Amendment categorically excludes from the death penalty those who suffer from dementia even though they do not meet the age of onset requirement for intellectual disability. But this is not the issue that the Nevada Supreme Court decided. Nevada rendered no opinion on the scope of Eighth Amendment protection available to those with mental illness short of intellectual disability. Rather, Nevada simply considered whether this Court's pre-existing authority, namely Hall v. Florida, had already decided such an issue. 4 App 0761-0763; *See Hall v. Florida*, 572 U.S. ___, 134 S.Ct. 1986 (2014). The question is not whether those with dementia are exempt from the death penalty under the Eighth Amendment, but whether this Court's precedent has already recognized and established such a right so that Mulder had good cause to overcome state procedural default.

Mulder's state habeas petition below was untimely and successive and subject to procedural default absent a showing a good cause and prejudice. NRS 34.726; NRS 34.810. Nevada recognizes that good cause for failing to file a timely petition or raise a claim in a previous proceeding may be established where the legal basis for the claim was not reasonably available. Bejarano v. State, 122 Nev. 1066, 1072, 146 P.3d 265, 270 (2006); Rogers v. State, 127 Nev. ___, 267 P.3d 802, 8034 (2011). To this end, Mulder claimed that intervening case authority explains his lengthy delay in returning to state court in a successive petition. Specifically, Mulder argued that Hall v. Florida created a new

claim previously unavailable to him, namely, categorical exemption from the death penalty based on mental infirmities alone. *See Hall v. Florida*, 572 U.S. ___, 134 S.Ct. 1986 (2014). The lower habeas court found that it was *Atkins* in 2002, not *Hall v. Florida*, which created an exemption from the death penalty for intellectual disability and that Mulder “fails to cite any case authority creating a categorical exclusion from the death penalty for mere dementia or aphasia absent onset before age 18.”

The legal basis for a claim of categorical exclusion from the death penalty due to intellectual disability (previously referred to as mental retardation) began with *Atkins v. Virginia* in 2002 which was codified in Nevada in 2003. *See Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242 (2002); NRS 174.098; NRS 174.554. By definition, a post-trial stroke, brought on by one’s own drug abuse in prison at the age of forty, cannot result in intellectual disability which must manifest during the developmental period (onset prior to 18 years of age). Specifically, NRS 174.098(7) defines intellectual disability as “significant subaverage general intellectual functioning which exists concurrently with deficits in adaptive behavior and manifested during the developmental period.” This is consistent with the United States Supreme Court’s opinion in *Atkins* wherein it noted that “clinical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and direction that become manifest before age 18.”

Such a claim of intellectual disability has been available to Mulder for the past fifteen years under *Atkins*. All that *Hall v. Florida* did was hold that a Florida statute unconstitutionally set a threshold IQ score of 70 or below before permitting additional

evidence of intellectual disability. Hall v. Florida, *supra*. This Court recognized that Florida's rigid rule was a minority position and that most states, specifically mentioning Nevada by name, had no such IQ cutoff in their laws and allowed a defendant to present additional evidence of intellectual disability even when an IQ test score is above 70. Hall v. Florida, 134 S.Ct. at 1997-98. Notably, Nevada's statute establishes no minimum IQ score, but instead speaks only of "significant subaverage general intellectual functioning." NRS 174.098(7). Thus, Hall v. Florida did not create any new law or precedent in Nevada.

On appeal, the Nevada Supreme Court correctly reasoned that in Hall v. Florida, age of onset was not an issue, but that the onset of the deficits while still a minor is a core element of the generally accepted, uncontroversial intellectual-disability diagnostic definition. Moore v. Texas, 581 U.S. ___, 137 S.Ct. 1039, 1045 & n.3 (2017). 4 App 0761. Accordingly, Mulder failed to demonstrate that Hall v. Florida was intervening authority that provides good cause to argue that the requirement for age of onset to manifest during the developmental period has been invalidated. Id. Nor was Hall v. Florida's consensus analysis anything new that would constitute good cause as intervening authority. Id. Discussion of "trends" in the law and arguments of what the law should or may be in the future, do not constitute intervening case authority.

It is undisputed that Mulder's mental deficiencies are "a result of his illegal amphetamine usage in prison" which occurred *after* being convicted and sentenced to death in the present case. Even then, Mulder was still found to be competent to proceed with his initial state habeas remedies. At the 2005 evidentiary hearing, a psychologist, Dr. Carol Milner and a psychiatrist, Dr. Terrell Bishop, both opined that Mulder was competent to

assist and communicate with counsel in pursuing post-conviction relief. In fact, Dr. Bishop concluded that Mulder was feigning his lack of memory which was selective and inconsistent with the brain damage of a stroke victim. Mulder's ability to comprehend the court proceeding was later confirmed when he blurted out, "That's a lie," in response to Dr. Bishop's testimony that Mulder functioned normally as an inmate. The transporting corrections officer even observed a marked change in Mulder's fluency and ability to communicate when he was out-of-court versus how he appeared dumbfounded and slow in front of the judge and with his attorney. After hearing the testimony and observing Mulder in person, the judge found Mulder was "competent to assist counsel and proceed with his post-conviction remedies." On appeal, the Nevada Supreme Court concluded that "substantial evidence exists to support the district court's competency determination."

Mulder's self-inflicted mental deficiencies resulting from his illegal drug usage as an adult in prison, are of a fundamentally different nature than the lack of moral culpability attributable to an individual who never attains mental maturity during childhood. *See Ybarra v. State*, 127 Nev. ___, 247 P.3d 269, 275-76 (2011) (upholding age-of-onset requirement for exclusion from death penalty). In *Atkins*, the rationale for exempting the intellectually disabled from the death penalty was due to diminished moral culpability for their criminal conduct. Unlike those who suffer from intellectual disability and lack mental maturity, Mulder was fully responsible and culpable as an adult for his criminal conduct and only developed dementia and aphasia after conviction as a result of a stroke due to "his illegal amphetamine usage in prison." *Hall v. Florida* does not address mental disabilities that arise after conviction and fails to establish new grounds for relief which were

previously unavailable to Mulder. A mere argument for extension of existing precedent does not excuse the procedural bars the same as intervening authority which actually creates a new ground for relief. Because there is no existing case law creating a categorical exclusion from the death penalty for mere dementia or aphasia absent onset before age 18, Mulder's claim of good cause was appropriately denied.

Mulder's attempt to analogize his case to that of Vernon Madison, No. 17-7505 is misplaced and disingenuous. The issue in Madison concerns competency to be executed due to insanity under Ford v. Wainwright, 477 U.S. 399, 106 S.Ct. 2595 (1986) and Panetti v. Quarterman, 551 U.S. 930, 127 S.Ct. 2842 (2007). In Ford, this Court recognized that the Eighth Amendment prohibits inflicting the penalty of death upon a prisoner who is insane. A condemned person is sane if "aware of his impending execution and of the reason for it." Demosthenes v. Baal, 495 U.S. 731, 733, 110 S.Ct. 2223 (1990). Incompetence to be executed is not the same thing as intellectual disability. Unlike the petitioners in Atkins and Hall who never attained mental maturity, there was no suggestion that Ford was incompetent at the time of his offense, at trial, or at sentencing. Ford, *supra*. Likewise, Paneti reasoned that prior findings of competency to be held responsible for committing a crime and to be tried for it, do not foreclose a prisoner from proving he is incompetent to be executed because of his present mental condition. Paneti, *supra*.

Whether Mulder was morally less culpable at the time he committed his murder due to intellectual disability, is an entirely different question than whether he presently is aware of his impending execution and of the reason for it. Calambro v. District Court, 114 Nev. 961, 971, 964 P.2d 794, 800 (1998), quoting Demosthenes v. Baal, 495 U.S. 731, 733, 110

S.Ct. 2223, 109 L.Ed.2d 762 (1990). Mulder made no such argument below regarding incompetence to be executed nor did the Nevada Supreme Court opine upon any such an issue in the decision under review. 4 App 0752-0768. It has become the settled practice of this Court that, in the exercise of its §1257(a) appellate jurisdiction over state courts, it will not consider federal questions not pressed or passed upon in the state courts. This requirement stems from “the appropriate relationship of this Court to state courts,” a relationship of “peculiar force which should lead us to refrain from deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to review.” McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430, 434, 60 S.Ct. 670, 672 (1940). While a Ford-based claim may be available to Mulder in the future, he has yet to raise such a claim in state court.

II. **APPLICATION OF STATE HABEAS PROCEDURAL BARS CONSTITUTES AN** **ADEQUATE AND INDEPENDENT STATE GROUND**

Application of state procedural bars is an adequate and independent state ground which will bar this Court’s review. As set forth in the Statement of the Case section above, Mulder is seeking certiorari review of the Nevada Supreme Court’s affirmance of the denial of his untimely and successive state post-conviction habeas petition which was procedurally barred under state law. The Nevada Supreme Court provided the framework for its reasoning and analysis thusly:

Mulder's petition is subject to several procedural bars. First, the petition was untimely as it was filed more than 14 years after remittitur issued from his direct appeal. See NRS 34.726(1). Additionally, the petition was successive because Mulder had previously filed a postconviction petition, and it constituted an abuse of the writ because he raised claims new and different from those raised in his previous petition. See NRS 34.810(1)(b), (2).

Petitions that are untimely, successive, or that constitute an abuse of the writ are subject to dismissal absent a showing of good cause and actual prejudice. NRS 34.726(1); NRS 34.810(1)(b), (3). To establish good cause, a petitioner must "show that an impediment external to the defense prevented him or her from complying with the state procedural default rules." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). "An impediment external to the defense may be demonstrated by a showing that the factual or legal basis for a claim was not reasonably available to counsel, or that some interference by officials, made compliance impracticable." *Id.* (internal quotation marks omitted).

4 App 0754. The remainder of the Order sets forth why Mulder failed to demonstrate good cause and prejudice under state law sufficient to overcome the procedural default. *Id.* It is well established that the Supreme Court will not review judgments of state courts that rest on adequate and independent state grounds. Michigan v. Long, 463 U.S. 1032, 1040-42, 103 S. Ct. 3469, 3476-77 (1983). Such a rule arises out of respect for the independence of state courts as well as a desire to avoid the rendering of advisory opinions. *Id.* A jurisdictional concern is that this Court not "render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." *Id.*, citing Herb v. Pitcairn, 324 U.S. 117, 125 (1945). The standard for determining whether a state court decision rests upon adequate and independent state grounds is as follows:

When 'a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.'

Michigan v. Long, 463 U.S. 1032, 103 S. Ct. 3469 (1983).

In the present case, the statutory procedural bars found in NRS 34.726(1) and NRS 34.810(1)(b) are not “interwoven” with federal law because it is clear from the Order in this case itself that no federal question was even decided. This is not a situation where the state court has decided a federal question on the merits while ambiguously referencing state grounds as a possible alternative basis for denying relief. The analysis for denying relief is purely a state law issue.

In Nevada, “unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within one year after entry of the judgment of conviction or, if an appeal has been taken from the judgment, within one year after the supreme court issues its remittitur.” NRS 34.726; *see also* Pellegrini v. State, 117 Nev. 860, 869-70, 34 P.3d 519, 525-26 (2001) (holding that the time bar in NRS 34.726 applies to successive petitions); *see generally* Hathaway v. State, 119 Nev. 248, 252-53, 71 P.3d 503, 506-07 (2003) (stating that a claim reasonably available to the petitioner during the statutory time period did not constitute good cause to excuse a delay in filing).

A second or successive petition must be dismissed if the judge or justice determines that it fails to allege new or different grounds for relief and that the prior determination was on the merits or, if new and different grounds are alleged, the judge or justice finds that the failure of the Petitioner to assert those grounds in a prior petition constituted an abuse of the writ. NRS 34.810(2). The Petitioner has the burden of pleading and proving specific facts that demonstrate good cause for the petitioner’s failure to present the claim or for presenting the claim again and actual prejudice to the petitioner. NRS 34.810(3). Even the Ninth Circuit recognizes that “the Nevada Supreme Court has consistently applied its

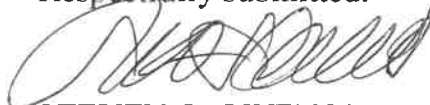
procedural rules prohibiting the review of an untimely post-conviction petition absent a petitioner's showing of cause and prejudice.” Loveland v. Hatcher, 231 F.3d 640, 642-43 (9th Cir. 2000); Moran v. McDaniel, 80 F.3d 1261, 1268-70 (9th Cir. 1996). Accordingly, the Nevada Supreme Court’s decision rests squarely upon the application of state procedural bars which are independent of any federal question and adequate to support the judgment.

CONCLUSION

In the unpublished Order of Affirmance at issue in this petition, the Nevada Supreme Court did not rule upon the merits of any federal question regarding competency to be executed under Ford v. Wainright. Rather, the Nevada Supreme Court found that Mulder’s successive and untimely state post-conviction habeas petition was procedurally barred and that Hall v. Florida did not constitute good cause as intervening authority to overcome the procedural default because it did not eliminate the age of onset requirement for intellectual disability. The Order of Affirmance in this case rests upon issues of state law regarding habeas procedural default and does not warrant certiorari review.

WHEREFORE, the State respectfully requests that certiorari be denied.

Respectfully submitted.



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