**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| WILLIAM JAMES BERRY, SR.,<br>Petitioner,<br>v.<br>BRIAN WILLIAMS, Sr.<br>Respondent. | No. 18-70711<br><br>ORDER* |

Application to File Second or Successive
Petition Under 28 U.S.C. § 2254

Argued and Submitted July 19, 2019
San Francisco, California

Before: MURPHY,** PAEZ, and RAWLINSON, Circuit Judges.

Petitioner Berry has applied for permission to file a second or successive habeas corpus application to present a claim that a jury instruction given during his trial violated his right to due process by eliminating an element of first-degree murder. *See Sandstrom v. Montana*, 442 U.S. 510, 521 (1979).

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Michael R. Murphy, United States Circuit Judge for the U.S. Court of Appeals for the Tenth Circuit, sitting by designation.

APPENDIX A

"The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of [§ 2244(b)]." 28 U.S.C. § 2244(b)(3)(C); *see also* 9th Cir. Rule 22-3(a)(4) (providing that an application to file a second or successive § 2254 petition must "state how the requirements of section[] 2244(b) . . . have been satisfied"). Section 2244(b)(2) provides as follows:

> A claim presented in a second or successive habeas corpus application . . . that was not presented in a prior application shall be dismissed unless —
>
> (A) the applicant shows that the claim relies on a new rule of constitutional law . . . or
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and (ii) the facts underlying the claim . . . would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(2).

Berry has made neither showing. He does not assert that the factual predicate for his claim could not have been discovered previously. Nor has he shown that his claim relies on a new rule of constitutional law. The Supreme Court cases on which he relies, *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016) and *Welch v. United States*, 136 S. Ct. 1257 (2016), do not require retroactive

application of a change in state law, like that adopted by the Nevada Supreme Court in *Byford v. State*, 994 P.2d 700 (Nev. 2000), to cases on collateral review.

The application is DENIED.

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

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

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

[3]Berry'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.



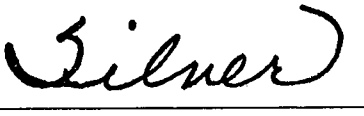
APPENDIX B

17-902661

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).

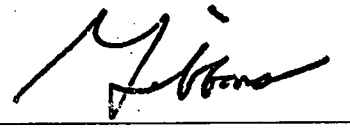
We note Berry failed to overcome the presumption of prejudice to the State. *See* NRS 34.800(2). We conclude the district court properly denied his petition as procedurally barred. *See State v. Eighth Judicial Dist. Court (Riker)*, 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005) (explaining the application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

ORDER the judgment of the district court AFFIRMED.[4]



_____, C.J.
Silver

_____, J.
Tao



_____, J.
Gibbons

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[4]Berry 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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

DEC 5 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

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| WILLIAM JAMES BERRY, SR.,<br><br>Petitioner,<br><br>v.<br><br>BRIAN WILLIAMS, SR.,<br><br>Respondent. | No. 18-70711<br><br><br><br><br>ORDER |

Before: MURPHY,* PAEZ, and RAWLINSON, Circuit Judges.

Petitioner Berry has filed a *pro se* motion seeking *en banc* review of the denial of his motion to file a second or successive habeas corpus application. *Berry v. Williams*, 784 F. App'x 557 (9th Cir. 2019). Because applicable law precludes the filing of a petition for rehearing in this matter, this court denies the motion. 28 U.S.C. § 2244(a)(3)(E) ("The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.").

* The Honorable Michael R. Murphy, United States Circuit Judge for the U.S. Court of Appeals for the Tenth Circuit, sitting by designation.

APPENDIX C