

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSE ANTONIO CHAVEZ,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 47673

FILED

MAR 02 2007

ORDER OF AFFIRMANCE

JANETTE M BLOOM  
CLERK OF SUPREME COURT  
BY *J. R. [Signature]*  
CHIEF DEPUTY CLERK

This is a proper person appeal from an order of the district court dismissing appellant's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

On May 19, 2005, the district court convicted appellant, pursuant to an Alford plea,<sup>1</sup> of three counts of attempted sexual assault on a minor under the age of fourteen. The district court sentenced appellant to serve two concurrent terms of 96 to 240 months in the Nevada State Prison, followed by a consecutive term of 96 to 240 months. On September 29, 2005, the district court filed a second amended judgment of conviction to include the special sentence of lifetime supervision.<sup>2</sup> Appellant did not file a direct appeal.

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<sup>1</sup>North Carolina v. Alford, 400 U.S. 25 (1970).

<sup>2</sup>The record does not contain a first amended judgment of conviction.

On May 27, 2005, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On August 16, 2005, the district court denied appellant's petition. Appellant did not appeal that denial to this court.

On April 14, 2006, appellant filed a "relation-back amended petition for writ of habeas corpus per [NRC] rule 15(c)" in the district court. The State opposed. Pursuant to NRS 34.750 and 34.770, the district court appointed counsel to represent appellant but declined to conduct an evidentiary hearing. On August 29, 2006, the district court dismissed appellant's petition. This appeal followed.

In his petition, appellant claimed that his counsel was ineffective for failing to investigate and present a defense, that his plea was entered involuntarily, that his attorney and the court failed to inform him of the imposition of lifetime supervision, and that lifetime supervision is unconstitutional because it constitutes a bill of attainder, violates Apprendi v. New Jersey,<sup>3</sup> and is vague and ambiguous. Appellant further claimed that the district court failed to initiate competency hearings.

Appellant claimed that pursuant to NRC Rule 15(c) his petition filed on April 14, 2006, should relate back and supplement his

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<sup>3</sup>530 U.S. 466 (2000).

original petition filed on May 27, 2005. However, NRCP Rule 15 governs amendments and supplements for civil cases. This court has never held that NRCP 15(c) governs amendments or supplements to habeas petitions.<sup>4</sup> Supplemental and amended pleadings in criminal cases are addressed by NRS 34.750, which states

3. After appointment by the court, counsel for the petitioner may file and serve supplemental pleadings, exhibits, transcripts, and documents [within certain time limits].

...

5. No further pleadings may be filed except as ordered by the court.

This court has held that the district court has the discretion to permit a habeas petitioner to assert new claims even as late as the evidentiary hearing on the petition.<sup>5</sup> However, appellant filed his supplemental pleading eight months after the district court issued an order denying his initial petition. There was no pending petition to supplement or amend. Thus, the district court did not err in treating appellant's supplemental petition as a second post-conviction petition for a writ of habeas corpus.

Appellant's petition was successive because he had previously filed a post-conviction petition for a writ of habeas corpus in which there

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<sup>4</sup>See State v. Powell, 122 Nev. \_\_\_, \_\_\_, 138 P.3d 453, 457 (2005).

<sup>5</sup>Barnhart v. State, 122 Nev. \_\_\_, \_\_\_, 130 P.3d 650, 651-52 (2006).

was a prior determination on the merits.<sup>6</sup> To the extent that appellant raised new claims in his petition, these claims constituted an abuse of the writ.<sup>7</sup> Appellant's petition was procedurally barred absent a demonstration of good cause and prejudice.<sup>8</sup> Appellant made no attempt to excuse his procedural defects.

However, good cause to overcome procedural bars "might be shown where the factual or legal basis for a claim was not reasonably available at the time of any default."<sup>9</sup> Appellant filed his first petition for a writ of habeas corpus prior to the district court filing the second amended judgment of conviction to include the special sentence of lifetime supervision. Thus, a claim as to the imposition of lifetime supervision was not reasonably available to appellant at the time of his initial petition and appellant had good cause to raise the claim. However, appellant failed to

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<sup>6</sup>See NRS 34.810(2). Appellant repeated the following claims: ineffective assistance of counsel for failure to investigate and present a defense and that his guilty plea was coerced, and thus, involuntarily entered.

<sup>7</sup>See *id.* Appellant's claim that counsel was ineffective for failing to request a competency hearing was an abuse of the writ. To the extent that appellant claimed that the district court erred in failing to conduct a competency hearing, this claim fell outside the scope of claims permissible in a petition for a writ of habeas corpus based on a guilty plea. NRS 34.810(1)(a).

<sup>8</sup>See NRS 34.810(3).

<sup>9</sup>See *Clem v. State*, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003).

demonstrate actual prejudice for the reasons discussed below, and thus appellant's petition was properly procedurally barred.<sup>10</sup>

First, appellant claimed that counsel and the district court failed to inform him of the imposition of lifetime supervision. This claim is belied by the record.<sup>11</sup> Appellant's guilty plea agreement, which appellant said he had read, understood and signed, specifically stated that the district court would sentence him to lifetime supervision. The district court specifically questioned appellant regarding his understanding of the district court's obligation to sentence him to lifetime supervision. A defendant need not be informed of the specific conditions of lifetime supervision at entry of a guilty plea because these conditions are not determined until after a hearing just prior to expiration of a sex offender's term of imprisonment, parole, or probation.<sup>12</sup> Thus, the district court did not err in dismissing this claim.

Second, appellant claimed lifetime supervision is unconstitutional because it constitutes a bill of attainder, is vague and ambiguous, and violates Apprendi. These claims were not properly brought in a post-conviction petition for a writ of habeas corpus where the

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<sup>10</sup>Hogan v. Warden, 109 Nev. 952, 959-960, 860 P.2d 710, 716 (1993).


<sup>11</sup>Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

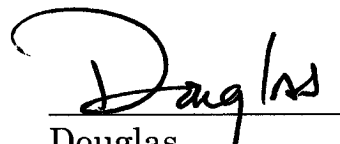
<sup>12</sup>See NRS 213.1243(1); NAC 213.290; see also Palmer v. State, 118 Nev. 823, 827, 59 P.3d 1192, 1194-95 (2002).

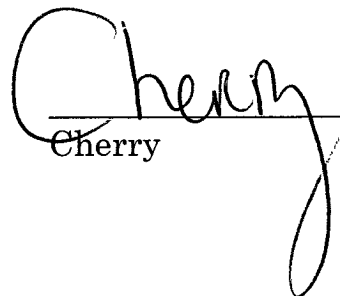
conviction is based upon a guilty plea.<sup>13</sup> Accordingly, we conclude that the district court did not err in dismissing these claims. Therefore, we conclude that the district court did not err in dismissing the petition as procedurally barred.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.<sup>14</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>15</sup>

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

  
\_\_\_\_\_, J.  
Douglas

  
\_\_\_\_\_, J.  
Cherry

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<sup>13</sup>See NRS 34.810(1)(a).

<sup>14</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

<sup>15</sup>We have reviewed all documents that appellant has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that appellant has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.

cc: Hon. Michelle Leavitt, District Judge  
Jose Antonio Chavez  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk