

IN THE SUPREME COURT OF THE STATE OF NEVADA

LAZARO HERNANDEZ,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 50875

**FILED**

JUL 11 2008

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

On September 25, 1997, the district court convicted appellant Lazaro Hernandez, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon. The district court sentenced appellant to serve a term in the Nevada State Prison of life without the possibility of parole, plus an equal and consecutive term for the use of a deadly weapon. This court dismissed appellant's direct appeal.<sup>1</sup> The remittitur issued on November 9, 1999.

On August 9, 2000, appellant filed a timely post-conviction petition for writ of habeas corpus. Without conducting an evidentiary

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<sup>1</sup>Hernandez v. State, Docket No. 31259 (Order Dismissing Appeal, October 12, 1999).

hearing, the district court denied the claim on November 29, 2000. This court affirmed the district court order denying appellant's petition.<sup>2</sup>

On October 2, 2007, appellant filed a second post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition on the grounds that the petition was untimely, successive, and barred by laches. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. The district court denied appellant's petition on December 18, 2007. This appeal followed.

In his petition, appellant claimed that his trial attorney was ineffective for failing to investigate and present evidence that the victim had molested appellant's daughter.

Appellant filed his petition more than seven years after this court issued the remittitur from his direct appeal. Thus, his petition was untimely filed.<sup>3</sup> Moreover, appellant's petition constituted an abuse of the writ as his claim could have been raised in his previous post-conviction petition for a writ of habeas corpus.<sup>4</sup> Therefore, appellant's petition was procedurally barred absent a demonstration of good cause and actual

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<sup>2</sup>Hernandez v. State, Docket No. 37127 (Order of Affirmance, March 7, 2002).

<sup>3</sup>See NRS 34.726(1).

<sup>4</sup>See NRS 34.810(2).

prejudice.<sup>5</sup> Further, because the State specifically pleaded laches, he was required to overcome the presumption of prejudice to the State.<sup>6</sup> “[T]he good cause necessary to overcome a procedural bar must be some impediment external to the defense.”<sup>7</sup>

Appellant argued the procedural defects should be excused because he was unable to obtain an affidavit from his daughter stating that she was abused by the shooting victim earlier because she suffered from psychological trauma. Appellant failed to demonstrate that an impediment external to the defense prevented him from filing a timely petition.<sup>8</sup> Appellant previously pursued a timely post-conviction petition for a writ of habeas corpus, and appellant failed to demonstrate that he could not have raised this claim in that petition.<sup>9</sup> Appellant claimed to have discussed the alleged abuse of his daughter with his trial counsel; therefore, the claim that his trial counsel was ineffective for failing to investigate the abuse was reasonably available prior to the filing of his first post-conviction petition for a writ of habeas corpus. Further,

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<sup>5</sup>See NRS 34.726(1), NRS 34.810(1)(b), NRS 34.810(3).

<sup>6</sup>See NRS 34.800(2).

<sup>7</sup>Harris v. Warden, 114 Nev. 956, 959, 964 P.2d 785, 787 (1998).

<sup>8</sup>See Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003); Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994).

<sup>9</sup>See Hathaway, 119 Nev. at 252-253, 71 P.3d at 506.

appellant failed to overcome the presumption of prejudice against the State.

It appears that appellant further argued that a fundamental miscarriage of justice would result if his claims were not reviewed on the merits because he was actually innocent. This court has recognized that even if a petitioner has procedurally defaulted claims and cannot demonstrate good cause and prejudice, judicial review of the petitioner's claims would nevertheless be required if the petitioner demonstrated that failure to consider them would result in a "fundamental miscarriage of justice."<sup>10</sup> A "fundamental miscarriage of justice" typically involves a claim that a constitutional error has resulted in the conviction of someone who is actually innocent.<sup>11</sup> Appellant's claim that the victim had molested his daughter at some point prior to the shooting is not sufficient to demonstrate that he is actually innocent. Thus, he failed to demonstrate that failure to consider his petition on the merits would result in a fundamental miscarriage of justice.<sup>12</sup> Therefore, we conclude that the district court did not err in determining appellant's petition was procedurally barred.

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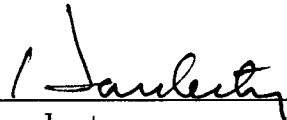
<sup>10</sup>Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).


<sup>11</sup>See Coleman v. Thompson, 501 U.S. 722, 748-50 (1991); Murray v. Carrier, 477 U.S. 478, 496 (1986).


<sup>12</sup>See Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001); Mazzan, 112 Nev. at 842, 921 P.2d at 922; see also Bousley v. United States, 523 U.S. 614, 623 (1998); Murray, 477 U.S. at 496.

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>13</sup>

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Hardesty

  
\_\_\_\_\_, J.  
Parraguirre

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

cc: Hon. Jackie Glass, District Judge  
Lazaro Hernandez  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk

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<sup>13</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).