

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSE GAXIOLA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 54468

FILED

APR 07 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *A. Ingarsou*
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.¹ Eighth Judicial District Court, Clark County; Jennifer Togliatti, Judge.

Appellant filed his petition on May 7, 2009, approximately three and one-half years after this court issued remittitur from his direct appeal on October 18, 2005. Gaxiola v. State, 121 Nev. 638, 119 P.3d 1225 (2005). Thus, appellant's petition was untimely filed. See NRS 34.726(1). Moreover, appellant's petition was successive because he had previously pursued a post-conviction petition for a writ of habeas corpus.² See NRS 34.810(1)(b)(2); NRS 34.810(2). Appellant's petition was procedurally

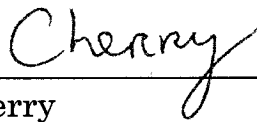
¹This appeal has been submitted for decision without oral argument, NRAP 34(f)(3), and we conclude that the record is sufficient for our review and briefing is unwarranted. See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).


²To the extent appellant raised claims that were new and different from those raised in his previous petitions, those claims were an abuse of the writ. See NRS 34.810(2).


barred absent a demonstration of good cause and actual prejudice. See NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3).

Appellant claimed that he had good cause to relitigate claims in order to federalize the claims for exhaustion purposes. Appellant relied upon a federal court order staying federal proceedings for appellant to return to state court. Appellant failed to demonstrate that an impediment external to the defense excused his procedural defects. Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994). Filing a late, successive petition for exhaustion purposes is not good cause. The claims raised were reasonably available to be raised in a timely petition. Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). Therefore, we conclude that the district court did not err in denying the petition as procedurally barred. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Hon. Jennifer Togliatti, District Judge
Jose Gaxiola
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk