

IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANCISCO LEON ALVAREZ,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 55012

**FILED**

**JUN 09 2010**

TRACIE K LINDEMAN  
CLERK OF SUPREME COURT  
BY: *A. Ingsou*  
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.<sup>1</sup> Eighth Judicial District Court, Clark County; Stefany Miley, Judge.

Appellant filed his petition on July 15, 2009, more than six years after the remittitur from direct appeal issued on March 4, 2003. Alvarez v. State, Docket No. 38995 (Order of Affirmance, February 5, 2003). Thus, appellant's petition was untimely filed. See NRS 34.726(1). Moreover, appellant's petition was successive because he previously

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<sup>1</sup>This 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 Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

litigated two prior habeas corpus petitions.<sup>2</sup> See NRS 34.810(1)(b)(2); NRS 34.810(2). Appellant's petition was procedurally barred absent a demonstration of good cause and actual prejudice. See NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3). Moreover, because the State specifically pleaded laches, appellant was required to overcome the presumption of prejudice. NRS 34.800(2).

Appellant first claimed that the post-conviction procedural bar rules did not apply because he was filing his petition pursuant to NRS 34.360. Appellant's argument was patently without merit. Because appellant challenged the validity of his judgment of conviction and sentence, the post-conviction provisions set forth in NRS chapter 34 apply. NRS 34.720(1).

Appellant did not attempt to demonstrate good cause, but instead argued that he was actually innocent.<sup>3</sup> However, beyond his bald assertion of innocence, appellant failed to set forth a cogent argument of innocence. Thus, appellant failed to demonstrate that a fundamental miscarriage of justice required consideration of his procedurally barred petition. Calderon v. Thompson, 523 U.S. 538, 559 (1998); Pellegrini v.

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<sup>2</sup>Alvarez v. State, Docket No. 53782 (Order of Affirmance, October 21, 2009). No appeal was taken from the denial of his first petition filed on February 12, 2004.

<sup>3</sup>We note that the substance of the petition was a copy of post-conviction counsel's supplement to his 2004 petition. Thus, nothing raised in the petition would constitute new evidence.

State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001); Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996). Having concluded that the district court did not err in denying the petition as procedurally barred, we

ORDER the judgment of the district court AFFIRMED.

Cherry, J.  
Cherry

Saitta, J.  
Saitta

Gibbons, J.  
Gibbons

cc: Hon. Stefany Miley, District Judge  
Francisco Leon Alvarez  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk