

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 56316

FILED

JUN 08 2011

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.¹ Eighth Judicial District Court, Clark County; Stefany Miley, Judge.

Appellant filed his petition on March 29, 2010, more than seven years after issuance of the remittitur on direct appeal 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 had previously filed three post-conviction petitions for a writ of habeas corpus, and it constituted an abuse of the writ as he raised claims new and different from those raised in his previous petitions.² See NRS

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 Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

²Alvarez v. State, Docket No. 53782 (Order of Affirmance, October 21, 2009); Alvarez v. State, Docket No. 55012 (Order of Affirmance, June
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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 rebuttable presumption of prejudice to the State. NRS 34.800(2).

Appellant first claimed he had good cause to overcome the procedural bars because post-conviction counsel for his 2004 petition failed to file an appeal following the denial of that petition. Appellant cannot demonstrate prejudice because he was not entitled to post-conviction counsel and therefore, he was not entitled to the effective assistance of post-conviction counsel. See NRS 34.750(1); McKague v. Warden, 112 Nev. 159, 164-65, 912 P.2d 255, 258 (1996).


Second, appellant claimed he had good cause because he needed to exhaust his State claims to allow federal court review. Raising claims in an untimely and successive petition for purposes of exhaustion is not good cause. Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994) (holding that good cause must be an impediment external to the defense); see also Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989). Appellant failed to demonstrate that his claims were not reasonably available to be raised in a timely petition. See Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). Further, appellant failed to overcome the presumption of prejudice to the State. Therefore,

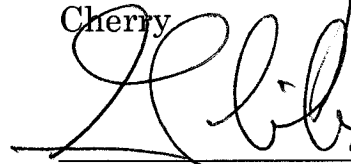
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9, 2010). No appeal was taken from the denial of his first petition filed on February 12, 2004.

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.
Gibbons


_____, J.
Pickering

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