

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOE GUTIERREZ-PICENO,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 57391

**FILED**

**JUL 13 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 dismissing two post-conviction petitions for a writ of habeas corpus, or alternatively, a petition for a writ of mandamus or request for declaratory judgment.<sup>1</sup> Eighth Judicial District Court, Clark County; Abbi Silver, Judge.

Appellant filed his petitions on April 7, 2010, and June 10, 2010, more than 13 years after entry of the judgment of conviction on February 7, 1997.<sup>2</sup> Thus, appellant's petitions were untimely filed. See NRS 34.726(1). Moreover, appellant's petitions were successive because he had previously filed a post-conviction petition for a writ of habeas corpus, and they constituted an abuse of the writ as he raised claims new

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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).

<sup>2</sup>No direct appeal was taken.

and different from those raised in his previous petition.<sup>3</sup> See NRS 34.810(2). Appellant's petitions were procedurally barred absent a demonstration of good cause and actual prejudice. See NRS 34.726(1); 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 that the procedural bars did not apply because he was not challenging the validity of the judgment of conviction but rather the constitutionality of the laws, jurisdiction, and this court's interpretation of NRS 193.165. Appellant's claim was without merit. Appellant's claims challenged the validity of the judgment of conviction, and thus, the procedural bars apply in this case.<sup>4</sup> NRS 34.720(1); NRS 34.724(1).

Second, appellant claimed he had good cause because his counsel was ineffective. This did not demonstrate good cause because it did not explain the entire delay and appellant failed to demonstrate that he could not have raised the underlying claims in a timely petition. Hathaway v. State, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003). Further, appellant failed to overcome the presumption of prejudice against the State.

Next, appellant appeared to argue that a fundamental miscarriage of justice should overcome application of the procedural bars. Specifically, he argued that his due process rights had been violated


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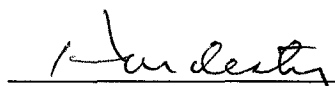
<sup>3</sup>No appeal was taken from the denial of his petition filed on September 9, 2001.

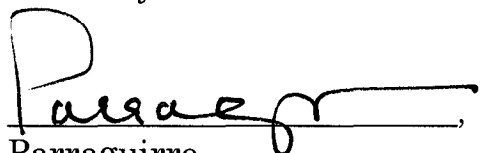
<sup>4</sup>Appellant's claims did not implicate the jurisdiction of the courts. Nev. Const. art. 6, § 6; NRS 171.010.

because the laws reproduced in the Nevada Revised Statutes did not contain an enacting clause as required by the Nevada Constitution. Nev. Const. art. 4, § 23. He further claimed that this court erroneously interpreted NRS 193.165 to require a consecutive sentence. Appellant did not demonstrate a fundamental miscarriage of justice as his arguments fell short of demonstrating actual innocence.<sup>5</sup> Calderon v. Thompson, 523 U.S. 538, 559 (1998); Schlup v. Delo, 513 U.S. 298, 327 (1995); see also Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001); Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996). We therefore conclude that the district court did not err in dismissing appellant's petitions.<sup>6</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Saitta

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

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

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<sup>5</sup>We note that the Statutes of Nevada contain the laws with the enacting clauses required by the constitution. The Nevada Revised Statutes reproduce those laws as classified, codified, and annotated by the Legislative Counsel. NRS 220.120.

<sup>6</sup>We further conclude that the district court did not err in denying the request for a writ of mandamus or declaratory judgment. NRS 34.170.

cc: Hon. Abbi Silver, District Judge  
Joe Gutierrez-Piceno  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk