

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES LAMONT MOORE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 57969

FILED

JUL 13 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY H. Ingersoll
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; Elissa F. Cadish, Judge.

Appellant filed his petition on November 1, 2010, more than ten years after issuance of the remittitur on direct appeal on April 5, 2000. Moore v. State, 116 Nev. 302, 997 P.2d 793 (2000). Thus, appellant's petition was untimely filed. See NRS 34.726(1). Moreover, appellant's petition was successive because he had previously litigated three post-conviction petitions for a writ of habeas corpus.² See NRS 34.810(1)(b)(2); NRS 34.810(2). Appellant's petition was procedurally barred absent a

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).

²Moore v. State, Docket No. 39387 (Order of Affirmance, November 20, 2002); Moore v. State, Docket No. 52856 (Order of Affirmance, February 4, 2010); Moore v. State, Docket No. 56259 (Order of Affirmance, December 9, 2010).

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. NRS 34.800(2).


Appellant claimed that he was relitigating his claim challenging the Kazalyn³ jury instruction in order to exhaust the claim for federal purposes. Good cause must be an impediment external to the defense. Hathaway v. State, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003). Raising claims in a procedurally barred petition for the purpose of exhaustion is not good cause.

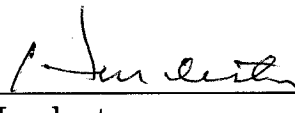
Next, appellant claimed that decisions in Chambers v. McDaniel, 549 F.3d 1191 (9th Cir. 2008), Polk v. Sandoval, 503 F.3d 903 (9th Cir. 2007), and Nika v. State, 124 Nev. 1272, 198 P.3d 839 (2008), provided good cause to relitigate his claim challenging the Kazalyn jury instruction. Although appellant was correct that the holding in Byford was applicable to his case because his conviction was not final when Byford was decided, see Nika, 124 Nev. at 1287, 198 P.3d at 850, the aforementioned decisions did not provide good cause to excuse the procedural defects in the instant case. Appellant's November 1, 2010 petition was filed more than one year from each of these decisions, and appellant did not provide a reasonable explanation for why he could not litigate his claim within one year from these decisions. Hathaway, 119 Nev. at 252-53, 71 P.3d at 506. Moreover, appellant previously challenged the Kazalyn jury instruction in his second post-conviction petition for a

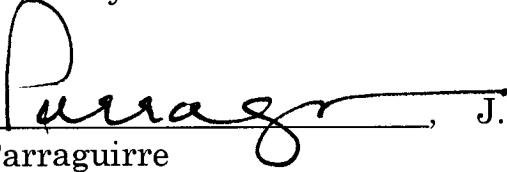
³Kazalyn v. State, 108 Nev. 67, 825 P.2d 578 (1992), receded from by Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000).

writ of habeas corpus. In determining that the district court did not err in denying the second petition as procedurally barred, this court determined that he failed to demonstrate prejudice resulted as the murder occurred during the commission of a robbery. Moore v. State, Docket No. 52856 (Order of Affirmance, February 4, 2010). Nothing in Nika undermines the prior determination that he was not prejudiced by the Kazalyn instruction in the instant case. Appellant's attempt to reframe the claim as one implicating due process and equal protection runs afoul of the doctrine of the law of the case. Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975). Finally, appellant failed to overcome the presumption of prejudice pursuant to NRS 34.800(2). Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 _____, J.
Saitta

 _____, J.
Hardesty

 _____, J.
Parraguirre

cc: Hon. Elissa F. Cadish, District Judge
James Lamont Moore
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk