

IN THE SUPREME COURT OF THE STATE OF NEVADA

JULIUS BRADFORD,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 61559

**FILED**

OCT 16 2014

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY R. Malone  
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

This is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Appellant filed his petition on May 4, 2012, more than two years after this court issued the remittitur from his direct appeal on December 15, 2009. *Bradford v. State*, Docket No. 50630 (Order of Affirmance, June 30, 2009). Thus, appellant's petition was untimely filed. See NRS 34.726(1). Moreover, appellant's petition was successive because he had previously filed a post-conviction petition for a writ of habeas corpus,<sup>1</sup> and it constituted an abuse of the writ because he raised claims new and different from those raised in his previous petition. See NRS 34.810(1)(b)(2); NRS 34.810(2). Appellant's petition was procedurally barred absent a demonstration of good cause and prejudice. See NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3). Cause for the delay must be

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<sup>1</sup>*Bradford v. State*, Docket No. 58529 (Order of Affirmance, July 23, 2013).

an “impediment external to the defense.” *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003).

On appeal, appellant, relying in part on *Martinez v. Ryan*, 566 U.S. \_\_\_, 132 S. Ct. 1309 (2012), argues that ineffective assistance of post-conviction counsel excused his procedural defects. Ineffective assistance of post-conviction counsel would not be good cause in the instant case because the appointment of counsel in the prior post-conviction proceedings was not statutorily or constitutionally required. *Crump v. Warden*, 113 Nev. 293, 303, 934 P.2d 247, 253 (1997); *McKague v. Warden*, 112 Nev. 159, 164, 912 P.2d 255, 258 (1996). Further, this court has recently held that *Martinez* does not apply to Nevada’s statutory post-conviction procedures, see *Brown v. McDaniel*, \_\_\_ Nev. \_\_\_, \_\_\_ P.3d \_\_\_ (Adv. Op. No. 60, August 7, 2014), and thus, *Martinez* does not provide good cause for this late and successive petition.

Appellant also argues that he demonstrated good cause under *Coleman v. Thompson*, 501 U.S. 722 (1991), because the procedural defects were due to his counsel’s breach of agency principles in the prior post-conviction proceedings. Appellant misreads *Coleman*. *Coleman* held that attorney error may only constitute cause when it violates petitioner’s right to counsel. 501 U.S. at 753-54. Here, because appellant had no statutory or constitutional right to counsel, any error by his counsel did not excuse the procedural defects. To the extent that appellant relies on *Maples v. Thomas*, 565 U.S. \_\_\_, 132 S. Ct. 912 (2012), for the proposition that counsel’s abandonment may constitute good cause, appellant fails to demonstrate that counsel abandoned him. Accordingly, we conclude that

the district court did not err in finding that appellant failed to demonstrate good cause to excuse the procedural defects.<sup>2</sup>

Next, appellant argues that he is actually innocent and that the failure to consider his claims on the merits would result in a fundamental miscarriage of justice. In order to demonstrate a fundamental miscarriage of justice, a petitioner must make a colorable showing of actual innocence—factual innocence, not legal innocence. *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001); *Calderon v. Thompson*, 523 U.S. 538, 559 (1998). Appellant does not identify any new evidence of his innocence; rather, his argument of actual innocence relies on his claim that there was insufficient evidence presented at trial to support his convictions.<sup>3</sup> Appellant has failed to demonstrate that “it is more likely than not that no reasonable juror would have convicted him in light of . . . new evidence.” *Calderon*, 523 U.S. at 559 (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)); see also *Pellegrini*, 117 Nev. at 887, 34

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<sup>2</sup>In his reply brief, appellant contends for the first time that the district court erred in denying his petition as untimely because the State waived the procedural bar by failing to raise it as an affirmative defense. Because this argument was not raised in his opening brief, we need not consider it. See NRAP 28(c) (providing that a reply brief shall “be limited to answering any new matter set forth in the opposing brief”). Furthermore, appellant’s argument is without merit, as application of the procedural bars is mandatory and does not depend on whether the State raised them as a defense. See *State v. Eighth Judicial Dist. Court (Riker)*, 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005).

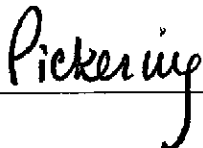
<sup>3</sup>This court previously rejected a challenge to the sufficiency of the evidence presented at trial. *Bradford v. State*, Docket No. 50630 (Order of Affirmance, June 30, 2009).

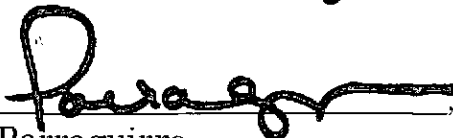
P.3d at 537; *Mazzan v. Warden*, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

Next, appellant argues that the district court's order should be reversed because the district court failed to make specific findings of fact or conclusions of law to support its denial of appellant's petition, as required under NRS 34.830(1). We conclude that appellant has failed to demonstrate that he was prejudiced by any failure of the district court to make specific findings. His petition was untimely and successive and his allegations did not demonstrate good cause or actual innocence. See NRS 34.745(4) (allowing summary dismissal of a successive post-conviction petition).

Appellant also argues that the district court abused its discretion by failing to hold an evidentiary hearing on his claim. We conclude that an evidentiary hearing was not warranted because his petition was procedurally barred and his allegations did not entitle him to relief. See *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984) (holding that a petitioner is entitled to an evidentiary hearing only when his claims are supported by specific factual allegations that are not belied by the record and, if true, would entitle him to relief). Accordingly, we conclude that the district court did not err in denying the petition, and we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Pickering

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

SAITTA, J., dissenting:

I would extend the equitable rule recognized in *Martinez* to this case because appellant was convicted of murder and is facing a severe sentence. See *Brown v. McDaniel*, 130 Nev. \_\_\_, \_\_\_ P.3d \_\_\_ (Adv. Op. No. 60, August 7, 2014) (Cherry, J., dissenting). Accordingly, I would reverse and remand for the district court to determine whether appellant can demonstrate a substantial underlying ineffective-assistance-of-trial-counsel claim that was omitted due to the ineffective assistance of post-conviction counsel. I therefore dissent.

 J.  
Saitta

cc: Hon. Michelle Leavitt, District Judge  
Law Office of Lisa Rasmussen  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk