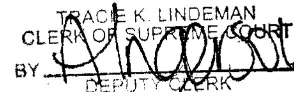
IN THE SUPREME COURT OF THE STATE OF NEVADA

ROCKY NEIL BOICE, JR.,
Appellant,
vs.
GREGORY SMITH, WARDEN,
Respondent.

No. 62307

FILED

NOV 14 2013



ORDER OF AFFIRMANCE

This is an appeal from a district court order denying appellant Rocky Neil Boice, Jr.'s untimely and successive post-conviction petition for a writ of habeas corpus. First Judicial District Court, Carson City; James Todd Russell, Judge.

Boice contends that the district court erred by denying his habeas petition after determining that it was procedurally barred.[1] Boice argues that the claim he raised is not untimely because it is "based on a new rule of constitutional law that was not available to [him] during his prior post-conviction proceedings," specifically, this court's holding in *Rose v. State*, 127 Nev. ___, ___, 255 P.3d 291, 293 (2011), where we stated that "assaultive-type felonies that involve a threat of immediate violent injury merge with a charged homicide for purposes of second-degree felony

[1]Boice filed the instant habeas petition on July 19, 2012, nearly eight years after this court issued its remittitur after resolving his direct appeal. *See Boice v. State*, Docket No. 40799 (Order of Affirmance, July 1, 2004). Boice previously filed a timely, proper person habeas petition on December 3, 2004; we affirmed the district court's denial of his habeas petition in *Boice v. State*, Docket No. 48672 (Order of Affirmance, September 21, 2007).

13-34150

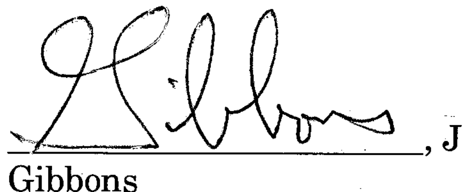
murder and therefore cannot be used as the basis for a second-degree felony-murder conviction," and that "[w]hether the felony is assaultive must be determined by the jury."

The district court determined that Boice's habeas petition was untimely and successive, *see* NRS 34.726(1); NRS 34.810(2), and that he failed to demonstrate good cause sufficient to excuse the procedural bars to a consideration of his petition on the merits, *see* NRS 34.726(1)(a)-(b); NRS 34.810(3). Even assuming, without deciding, that our holding in *Rose* provided Boice with adequate cause for the failure to raise the merger issue at an earlier proceeding, *see Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003), he nevertheless fails to demonstrate prejudice because, based on his actions alone, the jury could have found that Boice possessed the requisite implied malice during the commission of the crime and found him guilty of second-degree murder, *see* NRS 200.020(2); *Rose*, 127 Nev. at ___, 255 P.3d at 298. Therefore, we conclude that Boice is not entitled to relief on this basis.

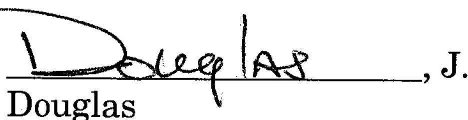
Boice also contends that *Martinez v. Ryan*, 566 U.S. ___, ___, 132 S. Ct. 1309, 1315 (2012) ("Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial."), provides good cause for the untimely filing of his habeas petition, and that based on our holding in *Rose*, prior post-conviction counsel was ineffective for failing to argue that trial and appellate counsel were ineffective for not raising the claim that the underlying battery merged with his second-degree

felony murder conviction.[2] Even if we agreed with Boice's proposition that *Martinez* should apply to state court proceedings, *but see McKague v. Warden*, 112 Nev. 159, 912 P.2d 255 (1996); *Crump v. Warden*, 113 Nev. 293, 934 P.2d 247 (1997), his claim is without merit because, as we stated in *Nika v. State*, 124 Nev. 1272, 1289, 198 P.3d 839, 851 (2008), "counsel's failure to anticipate a change in the law does not constitute ineffective assistance of counsel." Therefore, Boice cannot demonstrate that trial and appellate counsels' performances were deficient. *See Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Kirksey v. State*, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996). Accordingly, we

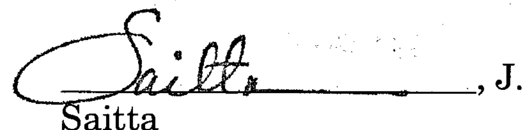
ORDER the judgment of the district court AFFIRMED.[3]



_______________, J.
Gibbons



_______________, J.
Douglas



_______________, J.
Saitta

---

[2]After a lengthy jury trial, Boice was convicted of principal to second-degree (felony) murder with the use of a deadly weapon, principal to battery with the use of a deadly weapon, and conspiracy to commit battery with the use of a deadly weapon.

[3]The fast track statement, part of the response, and reply do not comply with NRAP 3C(h)(1) and NRAP 32(a)(4) because the text in the body of the briefs is not double-spaced. The fast track response does not comply with NRAP 3C(h)(1) and NRAP 32(a)(4) because it does not contain 1-inch margins on all four sides. Counsel for the parties are cautioned that the failure to comply with the briefing requirements in the future may result in the imposition of sanctions. *See* NRAP 3C(n).

cc: Hon. James Todd Russell, District Judge
Federal Public Defender/Las Vegas
Attorney General/Carson City
Carson City District Attorney
Carson City Clerk