

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 64170

FILED

APR 10 2014

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; Elissa F. Cadish, Judge.

Appellant filed his petition on June 12, 2013, more than 13 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 filed five 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 34.810(1)(b)(2); NRS 34.810(2). Appellant's

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).

²*Moore 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, continued on next page . . .

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. NRS 34.800(2).

First, appellant claimed he had good cause because he recently discovered that there is no statute that specifically makes attempted robbery with the use of a deadly weapon a crime. This claim was reasonably available to be raised in a timely petition and appellant failed to demonstrate that an impediment external to the defense precluded him from raising this claim in a timely manner. *See Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). Appellant also fails to demonstrate actual prejudice for this claim because attempted robbery with the use of a deadly weapon is a crime by application of NRS 193.165, NRS 193.330, and NRS 200.380.

Second, appellant claimed that he was actually innocent of attempted robbery with the use of a deadly weapon because the legislature had not enacted a statute that caused it to be a crime. 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);

... continued

December 9, 2010); *Moore v. State*, Docket No. 57969 (Order of Affirmance July 13, 2011). Appellant also filed a post-conviction petition for a writ of habeas corpus in the district court on February 10, 2012, but he did not appeal the denial of that petition.


Calderon v. Thompson, 523 U.S. 538, 559 (1998). Appellant did not demonstrate actual innocence as his claim involved legal innocence, and therefore, he failed to show 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 P.3d at 537; *Mazzan v. Warden*, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

Finally, appellant failed to overcome the presumption of prejudice to the State. Therefore, the district court did not err in denying the petition. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Pickering


_____, J.
Parraguirre


_____, J.
Saitta

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