

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAYOMASHELL DAVID AGUILAR
A/K/A DAVID DAYOMASSHE
AGUILAR,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 64560

FILED

OCT 16 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY D. 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; Kathleen E. Delaney, Judge.

Appellant filed his petition on July 31, 2013, more than thirteen years after this court issued the remittitur from his direct appeal on January 18, 2000. *Aguilar v. State*, Docket Nos. 31595, 31811 (Order Dismissing Appeals, December 20, 1999). 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,¹ and it constituted an abuse of the writ to the extent he raised claims new and different from those in his first 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). Moreover, because

¹*Aguilar v. State*, Docket Nos. 57356, 57357 (Order of Affirmance, May 9, 2012).

the State specifically pleaded laches, appellant was required to overcome the rebuttable presumption of prejudice. NRS 34.800(2).

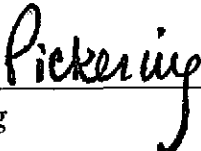
Appellant, relying in part on *Martinez v. Ryan*, 566 U.S. ___, 132 S. Ct. 1309 (2012), argues that ineffective assistance of post-conviction counsel excused his procedural defects. Ineffective assistance of post-conviction counsel would not be good cause in the instant case because the appointment of 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. ___, 331 P.3d 867 (2014), and thus, *Martinez* does not provide good cause for this late and successive petition.

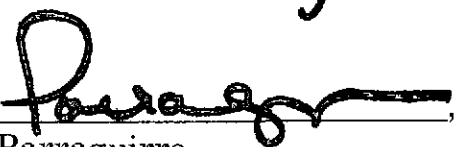
Next, appellant argues that the Ninth Circuit Court of Appeals' decision in *Babb v. Lozowsky*, 719 F.3d 1019 (2013), provided good cause to raise his claim that he was deprived of due process when the jury was not instructed pursuant to *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000). The *Babb* decision, which this court is not obligated to follow, did not announce any new proposition but merely discussed this court's holding in *Nika v. State*, 124 Nev. 1272, 1286-89, 198 P.3d 839, 849-51 (2008), that the *Byford* rule only applies prospectively. And appellant's petition was filed more than one year after *Nika* was decided. Thus, appellant fails to demonstrate that *Babb* constitutes good cause.

Finally, appellant argues that the district court erred in finding that the doctrine of laches barred his petition because the State did not demonstrate prejudice and most of the delay in filing the instant petition was attributable to the district court's error in taking the first

post-conviction petition off the calendar. We conclude that appellant has failed to demonstrate that the district court abused its discretion in finding that the petition was barred by the doctrine of laches because he did not overcome the presumption of prejudice to the State. See NRS 34.800(2). Thus, because the petition was untimely and successive and appellant failed to demonstrate good cause or overcome the presumption of prejudice, the district court did not err in denying the petition. Accordingly, we


ORDER the judgment of the district court AFFIRMED.


_____, J.
Pickering


_____, J.
Parraguirre

SAITTA, J., concurring:

Although 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), I concur in the judgment on appeal in this case because the State pleaded laches under NRS 34.800(2) and appellant failed to rebut the presumption of prejudice to the State.


_____, J.
Saitta

cc: Hon. Kathleen E. Delaney, District Judge
Federal Public Defender/Las Vegas
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk