

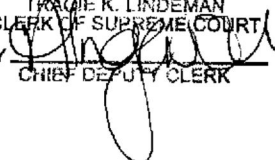
IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH TORRES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 64902

FILED

MAR 11 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY 
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order dismissing a post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Jerome Polaha, Judge.

Appellant filed his petition on February 21, 2013, almost 9 years after entry of the judgment of conviction on April 1, 2004.¹ Thus, appellant's petition was untimely filed. See NRS 34.726(1). Moreover, appellant's petition was successive because he had previously litigated a post-conviction petition for a writ of habeas corpus, and it constituted an abuse of the writ to the extent that he raised claims new and different from those raised in his previous petition.² See NRS 34.810(1)(b)(2); NRS 34.810(2). Appellant's 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

¹This court dismissed appellant's untimely appeal from the judgment of conviction in *Torres, Jr., v. State*, Docket No. 43362 (Order Dismissing Appeal, June 25, 2004).

²*Torres, Jr., v. State*, Docket No. 48568 (Order of Affirmance, October 16, 2007).

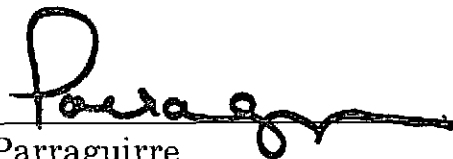
pleaded laches, appellant was required to overcome the rebuttable presumption of prejudice. NRS 34.800(2). The district court dismissed the petition because appellant did not file a response to the State's motion to dismiss based upon grounds that the petition was procedurally barred pursuant to NRS 34.726 and NRS 34.810 and barred by laches pursuant to NRS 34.800(2).

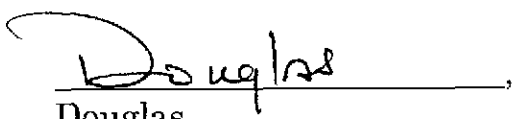
Appellant argues that he has good cause because the clerk of the district court failed to file and treat as a notice of appeal a letter received by the clerk on May 11, 2004, his post-conviction counsel was ineffective for failing to raise this issue in the first post-conviction proceedings, and the State was precluded from raising any procedural bars because the State did not oppose a prior motion to correct clerical error regarding the May 11, 2004, letter. Appellant further argues that the district court erred in applying laches because it was abolished by *Harris v. State*, 130 Nev. ___, 329 P.3d 619 (2014). These arguments were not raised in the district court in the first instance, and this alone provides a sufficient basis for this court to deny review. *See Bejarano v. State*, 122 Nev. 1066, 1071, 146 P.3d 265 (2006).

Even assuming that these arguments could be discerned from the pro se petition filed below and thus are properly reviewed by this court on appeal, appellant fails to demonstrate good cause or overcome the presumption of prejudice to the State. The argument that the clerk failed to file the May 11, 2004, letter as a notice of appeal was reasonably available to be raised in a timely petition, and thus, this argument does not provide good cause for the filing of an untimely and successive petition. *See Hathaway v. State*, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003). Further, a claim of ineffective assistance of counsel would not

provide good cause in the instant case because the appointment of counsel was not statutorily or constitutionally required. See *Brown v. McDaniel*, 130 Nev. ___, ___, 331 P.3d 867, 870 (2014); *Crump v. Warden*, 113 Nev. 293, 303, 934 P.2d 247, 253 (1997); *McKague v. Warden*, 112 Nev. 159, 164-65, 912 P.2d 255, 258 (1996). The State's decision not to oppose a prior motion to correct clerical error would not preclude application of the procedural bars (NRS 34.726 and NRS 34.810) as the application of the procedural bars is mandatory. *State v. Eighth Judicial Dist. Court. (Riker)*, 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). Finally, appellant's argument regarding laches is without merit as *Harris* did not abolish the statutory laches set forth in NRS 34.800.³ 130 Nev. at ___, 329 P.3d at 622-23. Therefore, we conclude that the district court did not err in dismissing the petition as procedurally barred and barred by laches. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

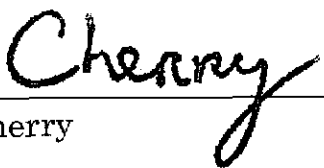

Parraguirre J.


Douglas J.

³Appellant's argument regarding cumulative error was without merit for the reasons discussed above. This court declines to consider any of the arguments raised in the reply brief for the first time.

CHERRY, J., concurring:

Although I would extend the equitable rule recognized in *Martinez v. Ryan*, 566 U.S. ___, 132 S. Ct. 1309 (2012), to appellant's argument that ineffective assistance of post-conviction counsel would provide good cause because appellant was convicted of murder and is facing a severe sentence, *see Brown*, 130 Nev. ___, 331 P.3d at 875-6 (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.
Cherry

cc: Hon. Jerome Polaha, District Judge
Law Office of Thomas L. Qualls, Ltd.
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk