

IN THE SUPREME COURT OF THE STATE OF NEVADA

CURTIS LUNDY DOWNING,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 65065

CURTIS LUNDY DOWNING,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 65180 ✓

FILED

OCT 15 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

These are proper person appeals from orders of the district court denying post-conviction petitions for a writ of habeas corpus.¹ Eighth Judicial District Court, Clark County; Michael Villani, Judge (Docket No. 65065), Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge (Docket No. 65180).

Docket No. 65065

Appellant filed his petition in district court case number C119521 on October 17, 2013, more than 13 years after issuance of the

¹These appeals have been submitted for decision without oral argument, NRAP 34(f)(3), and we conclude that the records are sufficient for our review and briefing is unwarranted. *See Lockett v. Warden*, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975). We elect to consolidate these appeals for disposition. *See NRAP 3(b)(2)*.

remittitur on direct appeal on March 28, 2000. *Downing v. State*, Docket No. 32394 (Order Dismissing Appeal, March 2, 2000). Thus, appellant's petition was untimely filed. See NRS 34.726(1). Moreover, appellant's petition was successive because he had previously filed several 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 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 that the procedural bars did not apply because he filed his petition within one year of the filing of an amended judgment of conviction on August 15, 2012.³ Appellant's claim was without merit. Appellant did not challenge any changes made in the amended judgment of conviction; rather his claims challenged the original judgment of conviction. Therefore, the amended judgment of conviction did not provide good cause to overcome the procedural bars. See *Sullivan v. State*, 120 Nev. 537, 541, 96 P.3d 761, 764 (2004).

²*Downing v. State*, Docket No. 37473 (Order of Affirmance, April 11, 2002); *Downing v. State*, Docket Nos. 55892 and 56050 (Order of Affirmance, December 20, 2010). Appellant did not appeal the district court's denial of his May 6, 2006, petition for a writ of habeas corpus.

³The district court entered an amended judgment of conviction to clarify that appellant's three consecutive terms of life imprisonment included the possibility of parole.

Second, relying in part on *Martinez v. Ryan*, 566 U.S. ___, 132 S. Ct. 1309 (2012), appellant claimed that he had good cause because he was not appointed counsel in the prior post-conviction proceedings. We conclude that this argument lacked merit. The appointment of counsel was discretionary in the prior post-conviction proceedings, *see* NRS 34.750(1), and appellant failed to demonstrate an abuse of discretion. Further, this court has recently held that *Martinez* does not apply to Nevada's statutory post-conviction procedures. *See Brown v. McDaniel*, 130 Nev. ___, ___, ___ P.3d ___, ___ (Adv. Op. No. 60, August 7, 2014). Thus, the failure to appoint post-conviction counsel and the decision in *Martinez* would not provide good cause for this late and successive petition.

Third, appellant asserted that he had good cause because he needed to exhaust state remedies prior to proceeding in federal court. That appellant wished to exhaust state remedies did not demonstrate that there was an impediment external to the defense that should excuse the procedural bars. *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003); *see also Colley v. State*, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989).

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

Docket No. 65180

Appellant filed his petition in district court case number C114390 on October 17, 2013, more than 16 years after issuance of the remittitur on direct appeal on June 10, 1997. *Downing v. State*, Docket No. 27734 (Order Dismissing Appeal, May 22, 1997). Thus, appellant's

petition was untimely filed. *See* NRS 34.726(1). Moreover, appellant's petition was successive because he had previously filed several 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.⁴ *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 pleaded laches, appellant was required to overcome the rebuttable presumption of prejudice. NRS 34.800(2).

First, appellant claimed that the procedural bars did not apply because he filed his petition within one year of the filing of an amended judgment of conviction on May 17, 2013.⁵ Appellant's claim was without merit. Appellant did not challenge any changes made in the amended judgment of conviction; rather his claims challenged the original judgment of conviction. Therefore, the amended judgment of conviction did not provide good cause to overcome the procedural bars. *See Sullivan*, 120 Nev. at 541, 96 P.3d at 764.

⁴*Downing v. State*, Docket No. 28466 (Order Dismissing Appeal, December 24, 1997); *Downing v. State*, Docket No. 33167 (Order of Affirmance, October 2, 2000); *Downing v. State*, Docket No. 42905 (Order of Affirmance, August 23, 2004); *Downing v. State*, Docket Nos. 55892 and 56050 (Order of Affirmance, December 20, 2010).

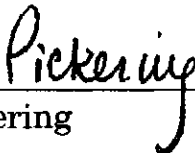
⁵The district court entered an amended judgment of conviction to correct a clerical error as directed by this court. *Downing v. State*, Docket No. 61310 (Order of Affirmance and Directing District Court to Correct Judgment of Conviction, April 9, 2013).

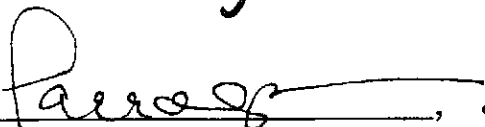
Second, relying in part on *Martinez*, 566 U.S. ___, 132 S. Ct. 1309, appellant claimed that he had good cause because he was not appointed counsel in the prior post-conviction proceedings. We conclude that this argument lacked merit. The appointment of counsel was discretionary in the prior post-conviction proceedings, see NRS 34.750(1), and appellant failed to demonstrate an abuse of discretion. Further, this court has recently held that *Martinez* does not apply to Nevada's statutory post-conviction procedures. See *Brown*, 130 Nev. at ___, ___ P.3d at ___. Thus, the failure to appoint post-conviction counsel and the decision in *Martinez* would not provide good cause for this late and successive petition.


Third, appellant claimed that he was actually innocent because the legislature did not comply with the Nevada Constitution when it adopted and enacted the statute that created the Nevada Revised Statutes, and thus his convictions for crimes contained in the Nevada Revised Statutes were not valid. 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 did not demonstrate actual innocence as his claims involved alleged legal errors and appellant failed to demonstrate that they were based upon newly discovered evidence. Therefore, appellant 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 judgments of the district court AFFIRMED.


_____, J.
Pickering


_____, J.
Parraguirre


_____, J.
Saitta

cc: Hon. Michael Villani, District Judge
Hon. Elissa F. Cadish, District Judge
Curtis Lundy Downing
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk