

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARTINEZ SMITH AYTCH,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 65843

**FILED**

SEP 16 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 denying a post-conviction petition for a writ of habeas corpus.<sup>1</sup> Eighth Judicial District Court, Clark County; Jennifer P. Togliatti, Judge.

Appellant filed his petition on March 18, 2014, almost five years after issuance of the remittitur on direct appeal on June 2, 2009. *Aytch v. State*, Docket No. 51386 (Order of Affirmance, May 5, 2009). 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.<sup>2</sup> See NRS

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<sup>1</sup>This 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).

<sup>2</sup>*Aytch v. State*, Docket No. 54832 (Order of Affirmance, September 10, 2010). In his petition, appellant indicated that grounds 2(b), 2(f), 2(g), 2(h)(ii), 3, 4, and 6 had not been previously litigated. The remaining  
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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).

First, appellant claimed that he had good cause because he received ineffective assistance of trial and appellate counsel. We conclude that this argument lacked merit. Claims of ineffective assistance of trial and appellate counsel were reasonably available to be raised in a timely petition and ineffective-assistance-of-counsel claims that are themselves procedurally barred cannot establish good cause. *Hathaway v. State*, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003); see also *Edwards v. Carpenter*, 529 U.S. 446, 453 (2000).

Second, appellant, relying upon *Martinez v. Ryan*, 566 U.S. \_\_\_, 132 S. Ct. 1309 (2012), argued that he had good cause because he was not appointed counsel for the first post-conviction proceedings. We conclude that this argument lacked merit. The appointment of counsel was discretionary in the first post-conviction proceedings, see NRS 34.750(1), and appellant failed to demonstrate an abuse of discretion or provide an explanation for why he could not raise this claim earlier. Further, this court has recently held that *Martinez* does not apply to Nevada's statutory post-conviction procedures. See *Brown v. McDaniel*, \_\_\_ 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.

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claims were previously litigated and appellant provided no cogent argument why he should be permitted to raise them again.

Third, appellant claimed that he had good cause because he had been litigating the validity of his conviction in federal court and was required to exhaust state court remedies. We conclude that this argument lacked merit. Litigating a petition in federal court and exhaustion of claims in order to seek federal court review do not provide good cause. *See Colley v. State*, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989); *see also Edwards*, 529 U.S. at 452-53. Therefore, we conclude that the district court did not err in denying this petition as procedurally barred. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Hardesty, J.  
Hardesty

Douglas, J.  
Douglas

Cherry, J.  
Cherry

cc: Hon. Jennifer P. Togliatti, District Judge  
Martinez Smith Aytch  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk