

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ROBERT WADE MORSE,  
Appellant,  
vs.  
ISIDRO BACA, WARDEN, N.N.C.C.,  
Respondent.

No. 66025

**FILED**

JAN 21 2015

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY S. Young  
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.<sup>1</sup> Fourth Judicial District Court, Elko County; Nancy L. Porter, Judge.

Appellant filed his petition on March 22, 2013, more than thirteen years after issuance of the remittitur on direct appeal on August 11, 1999. *Morse v. State*, Docket No. 32296 (Order Dismissing Appeal, July 16, 1999). 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.<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 *Luckett v. Warden*, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

<sup>2</sup>*Morse v. Warden*, Docket No. 54897 (Order of Affirmance, May 7, 2010); *Morse v. Warden*, Docket No. 51826 (Order of Affirmance, July 31, 2009); *Morse v. State*, Docket No. 38713 (Order of Affirmance, February 12, 2002).

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, relying in part on *Martinez v. Ryan*, 566 U.S. \_\_\_, 132 S. Ct. 1309 (2012), appellant argued 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. See *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, the Nevada Supreme Court has recently held that *Martinez* does not apply to Nevada's statutory post-conviction procedures, see *Brown v. McDaniel*, 130 Nev. \_\_\_, \_\_\_, 331 P.3d 867, 872-73 (2014), and thus, *Martinez* does not provide good cause for this late and successive petition.

Second, appellant claimed that *Lafler v. Cooper*, 566 U.S. \_\_\_, 132 S. Ct. 1376 (2012), provided good cause to claim that his trial counsel was ineffective for advising appellant to reject a plea offer of voluntary manslaughter. Appellant's claim was without merit. A claim stemming from the State's plea offer was reasonably available to be raised in a timely petition and appellant did not demonstrate that there was an impediment external to the defense that prevented him from timely raising this claim. See *Hathaway v. State*, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003).

Moreover, appellant failed to demonstrate that *Lafler* provided good cause because his case was final when that case was decided, and he failed to demonstrate that that case would apply retroactively to him. See *Clem v. State*, 119 Nev. 615, 627-28, 81 P.3d 521, 530-31 (2003). Even if


*Lafler* announced new rules of constitutional law, appellant failed to demonstrate that he met either exception to the general principle that such rules do not apply retroactively to cases which were already final when the new rules were announced. *See Colwell v. State*, 118 Nev. 807, 820, 59 P.3d 463, 472 (2002) (explaining that new constitutional rules only apply retroactively “(1) if the rule establishes that it is unconstitutional to proscribe certain conduct as criminal or to impose a type of punishment on certain defendants because of their status or offense; or (2) if it establishes a procedure without which the likelihood of an accurate conviction is seriously diminished”).


In addition, appellant failed to demonstrate actual prejudice related to this claim. While appellant was not entirely clear, it appears that appellant asserted counsel believed they would be successful at trial. Appellant did not allege that counsel misadvised him regarding the law pertaining to his charges. *Cf. Lafler*, 566 U.S. at \_\_\_, 132 S. Ct. at 1384 (explaining that counsel’s performance was objectively unreasonable due to misadvice about the charges). Further, he did not demonstrate a reasonable probability that there was a plea offer from the State that appellant would have accepted absent ineffective assistance of counsel, that the State would not have withdrawn it in light of intervening circumstances, and that the district court would have accepted it. *See id.*, 566 U.S. at \_\_\_, 132 S. Ct. at 1385. Therefore, the district court did not err in denying this claim.

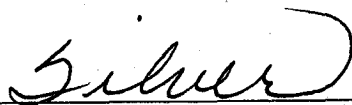
Finally, appellant claimed that the procedural bars did not apply because he is actually innocent as he acted under the influence of alcohol and due to an emotional disturbance caused by his ex-wife’s infidelity. Appellant did not demonstrate actual innocence because his assertions failed to show that “it is more likely than not that no

reasonable juror would have convicted him in light of . . . new evidence.”  
*Calderon v. Thompson*, 523 U.S. 538, 559 (1998) (quoting *Schlup v. Delo*,  
513 U.S. 298, 327 (1995)); see also *Pellegrini v. v. State*, 117 Nev. 860, 887,  
34 P.3d 519, 537 (2001); *Mazzan v. Warden*, 112 Nev. 838, 842, 921 P.2d  
920, 922 (1996). Therefore, the district court did not err in denying the  
petition as procedurally barred. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Silver

cc: Hon. Nancy L. Porter, District Judge  
Robert Wade Morse  
Attorney General/Carson City  
Elko County District Attorney  
Elko County Clerk