

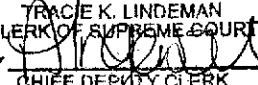
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ANTONIO W. WOOD,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 68978

FILED

JUL 27 2016

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

ORDER OF AFFIRMANCE

This is an appeal from a district court order dismissing a postconviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge.

Appellant Antonio W. Wood claims the district court erred by dismissing his postconviction petition for a writ of habeas corpus as procedurally barred. Wood filed his petition on June 25, 2012, more than 30 years after issuance of the remittitur on direct appeal. *Wood v. State*, 97 Nev. 363, 632 P.2d 339 (1981). Thus, Wood's petition was untimely filed. See NRS 34.726(1).¹ Moreover, Wood's petition constituted an abuse of the writ as he raised claims new and different from those raised in his previous petition.² See NRS 34.810(1)(b); NRS 34.810(2). Wood's petition

¹The deadline for filing a habeas corpus petition pursuant to NRS 34.726 commenced on January 1, 1993, the date of the amendments to NRS chapter 34. See 1991 Nev. Stat., ch. 44, §§ 5, 33, at 75-76, 92; *Pellegrini v. State*, 117 Nev. 860, 874-75, 34 P.3d 519, 529 (2001). Wood's petition was filed 19 years after the effective date of NRS 34.726.

²*Wood v. State*, Docket No. 28625 (Order Dismissing Appeal, August 4, 1998).

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, Wood was required to overcome the rebuttable presumption of prejudice. NRS 34.800(2).

Wood claimed the procedural bars should not apply because he is actually innocent. To prove actual innocence as a gateway to reach procedurally-barred constitutional claims of error, a petitioner must 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. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001); *Mazzan v. Warden*, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996). To be entitled to an evidentiary hearing on a claim of actual innocence, the petitioner must present “specific factual allegations that, if true, and not belied by the record, would show that it is more likely than not that no reasonable juror would have convicted him beyond a reasonable doubt given the *new* evidence.” *Berry v. State*, 131 Nev. ___, ___, 363 P.3d 1148, 1155 (2015) (emphasis added).

Wood asserted medical records regarding the amount of phenobarbital given to the infant were altered and the alteration demonstrates it was medical malpractice, rather than Wood’s actions, that caused the death of the infant. The district court found Wood failed to establish good cause to excuse the untimely filing because he failed to identify any new evidence to support his claim of actual innocence. The record clearly demonstrates that the information regarding any alteration in the medical records is not new evidence because the alteration was

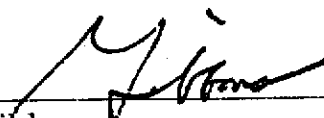
mentioned during trial. Moreover, Wood previously identified the discovery of the alteration of the medical records as good cause to excuse the untimely filing of his first postconviction petition. Because Wood failed to identify any new evidence to support his claim of actual innocence, we conclude the district court did not err by refusing to conduct an evidentiary hearing and finding his claim of actual innocence did not establish good cause to excuse the procedural defect.

Next, relying in part on *Martinez v. Ryan*, 566 U.S. ___, 132 S. Ct. 1309 (2012), Wood argued that ineffective assistance of postconviction counsel excused his procedural defects. Initially, we note it does not appear that Wood was represented by counsel when he filed his first postconviction petition.³ Even if Wood was represented by counsel with regard to his first postconviction petition, ineffective assistance of postconviction counsel would not be good cause in the instant case because the appointment of counsel in the prior postconviction 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, the Nevada Supreme Court has held that *Martinez* does not apply to Nevada's statutory postconviction procedures. See *Brown v. McDaniel*, 130 Nev. ___, ___, 331 P.3d 867, 871-72 (2014). Therefore, *Martinez* does not provide good cause to excuse the procedural bar.


³Wood has not provided this court with the documents relating to his first postconviction petition. The State has provided this court with a copy of a pro se postconviction petition for a writ of habeas corpus that was filed on March 19, 1996.

Finally, Wood failed to overcome the presumption of prejudice to the State to overcome laches. Therefore, we conclude the district court did not err in dismissing Wood's petition as procedurally barred, and we


ORDER the judgment of the district court AFFIRMED.



Gibbons C.J.



Tao J.



Silver J.

cc: Hon. Patrick Flanagan, District Judge
Karla K. Butko
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk