

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DAVID MARISCAL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 72470

FILED

DEC 14 2017

ELIZABETH A. BROWN
CLERK OF SUPERIOR COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

David Mariscal appeals from an order of the district court denying his November 1, 2016, postconviction petition for a writ of habeas corpus, request for an evidentiary hearing to establish a gateway actual-innocence claim, and motion for the appointment of counsel and an evidentiary hearing.¹ Second Judicial District Court, Washoe County; Lynne K. Simons, Judge.

Mariscal filed his petition more than 20 years after the April 23, 1996, issuance of the remittitur on direct appeal. *See Mariscal v. State*, Docket No. 26400 (Order Dismissing Appeal, April 3, 1996). Mariscal's petition was therefore untimely filed. *See* NRS 34.726(1).² Mariscal's petition was also successive and an abuse of the writ insofar as it raised

¹This appeal has been submitted for decision without oral argument. NRAP 34(f)(3).

²The petition was also filed nearly eight years from the December 30, 2008, issuance of remittitur on direct appeal from his second amended judgment of conviction. *See Mariscal v. State*, Docket No. 51205 (Order of Affirmance, December 3, 2008); *see also Sullivan v. State*, 120 Nev. 537, 541, 96 P.3d 761, 764 (2004).

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new claims that could have been raised in earlier proceedings.³ NRS 34.810(1)(b)(2); NRS 34.810(2). Mariscal's petition was therefore 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). Mariscal was entitled to an evidentiary hearing on his procedural defaults only if he pleaded specific facts that, if true and not belied by the record, would have overcome the procedural bars and entitled him to have his claims heard on the merits. See *Berry v. State*, 131 Nev. ___, ___, 363 P.3d 1148, 1154-55 (2015).

Mariscal claimed the Ninth Circuit Court of Appeals' decision in *Riley v. McDaniel*, 786 F.3d 719 (9th Cir. 2015), provided good cause to excuse raising a claim challenging the premeditation-and-deliberation jury instruction. Mariscal's reliance on *Riley* was misplaced. First, the *Riley* court noted there was no issue with the jury instruction where the crime was committed between 1992 and 2000, see 786 F.3d at 723-24, and Mariscal committed his crime in 1993. Second, the Nevada Supreme Court has held *Riley* does not provide good cause. See *Leavitt v. State*, 132 Nev. ___, ___, 386 P.3d 620, 620 (2016). Finally, even if *Riley* could provide good cause, Mariscal filed his petition nearly 18 months after *Riley* was decided. Accordingly, he did not raise it within a reasonable time. See *Hathaway v. State*, 119 Nev. 248, 255, 71 P.3d 503, 508 (2003). We therefore conclude

³See *Mariscal v. Warden*, Docket No. 57494 (Order of Affirmance, April 11, 2012); *Mariscal v. State*, Docket No. 51205 (Order of Affirmance, December 3, 2008); *State v. Mariscal*, Docket No. 41660 (Order of Affirmance, October 10, 2006); *Mariscal v. State*, Docket No. 26400 (Order Dismissing Appeal, April 3, 1996).

this argument could not have overcome the procedural bars and Mariscal was not entitled to an evidentiary hearing on it.⁴

Mariscal also claimed the effective assistance of appellate counsel excused his failure to raise his remaining jury-instruction claims earlier. While the ineffective assistance of counsel can constitute good cause, the claim itself must not be procedurally barred. *See id.* at 252-53, 71 P.3d at 506. Mariscal did not indicate why he could not have raised the claim in a previous petition. We therefore conclude this argument could not have overcome the procedural bars and Mariscal was not entitled to an evidentiary hearing on it.


Mariscal claimed he was actually innocent such that denying consideration of his substantive claims would result in a fundamental miscarriage of justice. Specifically, Mariscal contended his new jury-instruction arguments were new evidence of his actual innocence. However, jury instructions are not “evidence.” *See* NRS 175.161(2); *Evidence, Black’s Law Dictionary* (10th ed. 2014) (“Something (including testimony, documents, and tangible objects) that tends to prove or disprove the existence of an alleged fact.”). We therefore conclude this argument could not have overcome the procedural bars, *see Calderon v. Thompson*, 523 U.S. 538, 559 (1998) (holding a petitioner must demonstrate “it is more likely than not that no reasonable juror would have convicted him in light of . . . new evidence” to overcome a procedural bar) (quoting *Schlup v. Delo*, 513


⁴We decline to consider Mariscal’s arguments regarding *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718 (2016), and *Welch v. United States*, 578 U.S. ___, 136 S. Ct. 1257 (2016), as they were not raised below. *See Rimer v. State*, 131 Nev. ___, ___ n.3, 351 P.3d 697, 713 n.3 (2015).


U.S. 298, 327 (1995))), and Mariscal was not entitled to an evidentiary hearing on it.

Finally, we conclude the district court did not abuse its discretion in declining to appoint postconviction counsel. See NRS 34.750(1); *Renteria-Novoa v. State*, 133 Nev. ___, ___, 391 P.3d 760, 760-61 (2017). Accordingly, we

ORDER the judgment of the district court AFFIRMED.⁵


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Lynne K. Simons, District Judge
David Mariscal
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

⁵Mariscal's request that his case be retained by the Nevada Supreme Court is denied. See NRAP 17(d).