

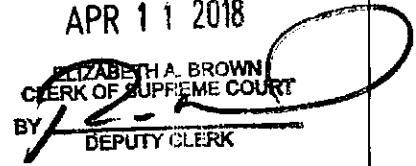
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ROBERT GORDON JOHNSTONE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 73770

FILED

APR 11 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Robert Gordon Johnstone appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus.¹ Eighth Judicial District Court, Clark County; Stefany Miley, Judge.

Johnstone filed his petition on October 3, 2016, more than 39 years after issuance of the remittitur on direct appeal on August 15, 1977.² See *Johnstone v. State*, 93 Nev. 427, 566 P.2d 1130 (1977). Thus, Johnstone's petition was untimely filed.³ See NRS 34.726(1). Johnstone's petition was procedurally barred absent a demonstration of good cause—cause for the delay and undue prejudice. See *id.* Moreover, because the State specifically pleaded laches, Johnstone was required to overcome the rebuttable presumption of prejudice. NRS 34.800(2).

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

²See NRS 34.738(2)(a) (a petition filed in the incorrect county is “deemed to be filed on the date it is received” in the incorrect county).

³Johnstone's petition was also untimely from the January 1, 1993 effective date of NRS 34.726. 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).

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Johnstone claimed he had good cause to overcome the procedural bars because his first petition, filed in 1978, was erroneously denied as procedurally barred; he was denied the right to counsel; the State was not required to respond to the petition; and he was never given an opportunity to present good cause. This is not the proper vehicle to challenge the alleged improper denial of Johnstone's first petition. He should have challenged that finding on appeal or in a petition for rehearing from the Nevada Supreme Court's decision to affirm the denial of his first petition.

Even assuming a postconviction petition for a writ of habeas corpus is the proper vehicle to challenge a previous denial of a petition, Johnstone failed to demonstrate good cause to overcome the procedural bars. The denial of Johnstone's first petition was affirmed on appeal in 1979, and Johnstone failed to demonstrate good cause for the entire length of his delay for raising these good cause claims. *See Hathaway v. State*, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003). Further Johnstone previously filed two postconviction petitions where he could have raised these good cause claims and he has failed to allege why those claims could not have been raised in those prior petitions. *See id.*


Johnstone also claimed the procedural bars have not been consistently applied and, therefore, they do not apply to his petition. This argument is without merit. The procedural bars are applied consistently. *See Pellegrini*, 117 Nev. at 886, 34 P.3d at 536.


On appeal, Johnstone also claims he has good cause to overcome the procedural bars because of the recent United States Supreme Court decisions in *Martinez v. Ryan*, 566 U.S. 1 (2012); *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718 (2016), and *Welch v. United States*, 578 U.S.

___, 136 S. Ct. 1257 (2016), and because he is actually innocent. Johnstone raised these claims in a pleading filed after the district court announced its decision to deny Johnstone's petition as procedurally barred. Because these claims were not considered by the district court below, we decline to consider them on appeal in the first instance. *See McNelton v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999); *see also* NRS 34.750(5) ("No further pleadings may be filed except as ordered by the court.").

Finally, we conclude Johnstone failed to overcome the presumption of prejudice to the State. Therefore, the district court did not err in denying the petition as procedurally barred, and we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Stefany Miley, District Judge
Robert Gordon Johnstone
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk