

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BRIAN KERRY O'KEEFE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 73527

FILED

APR 11 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Brian Kerry O'Keefe appeals from a district court order denying the postconviction petition for a writ of habeas corpus he filed on December 14, 2016.¹ Eighth Judicial District Court, Clark County; Michael Villani, Judge.

O'Keefe was convicted, pursuant to a jury verdict, of second-degree murder with the use of a deadly weapon and he was sentenced to a total of 18 to 45 years in prison. The Nevada Supreme Court affirmed the judgment of conviction on appeal and issued the remittitur on July 23, 2013. *See O'Keefe v. State*, Docket No. 61631 (Order of Affirmance, April 10, 2013).

On December 14, 2016, O'Keefe filed a document entitled "Petition for [a Writ of] Habeas Corpus Pursuant [to] NRS 34.360 under NRS 34.500 . . ." in the Eleventh Judicial District Court, the district court for the county where he is incarcerated. The Eleventh Judicial District Court concluded O'Keefe's petition challenged the validity of his judgment of conviction and transferred it to the Eighth Judicial District Court, the

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

district court for the county where O'Keefe was convicted. Thereafter, the Eighth Judicial District Court determined O'Keefe's petition was procedurally barred and denied it as such.

O'Keefe claims the Eleventh Judicial District Court erred in recharacterizing his petition and transferring it to another district court without notice.² He relies primarily on *Castro v. United States*, 540 U.S. 375 (2003), for the proposition a district court may not recharacterize a pro se litigant's action without notice.

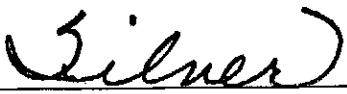
We conclude the Eleventh Judicial District Court properly determined O'Keefe's challenge to the legality of his imprisonment was necessarily a challenge to the validity of his judgment of conviction. Therefore, the Eleventh Judicial District Court properly treated O'Keefe's petition as a postconviction petition for a writ of habeas corpus and transferred it to the Eighth Judicial District Court. See NRS 34.724(2)(b); NRS 34.738(1), (2)(b). And the district court was not bound by the notice requirements prescribed in *Castro* because *Castro* addresses motions filed in federal court under federal habeas law and does not address petitions filed in state court under state habeas law. See *Castro*, 540 U.S. at 383 (limiting a federal court's power to recharacterize a pro se motion filed under the Antiterrorism and Effective Death Penalty Act).

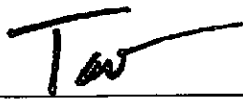
O'Keefe appears to further claim the Eighth Judicial District Court erred in denying his petition as procedurally barred. However, O'Keefe's petition was untimely because it was filed more than three years after the remittitur on direct appeal was issued and he failed to


²The record demonstrates O'Keefe was served with a copy of the Eleventh Judicial District Court order transferring his case to the Eighth Judicial District Court.

demonstrate good cause—cause for the delay and undue prejudice—to overcome his procedural default. See NRS 34.726(1). Therefore, we conclude the Eighth Judicial District Court did not err in denying O’Keefe’s petition as procedurally barred.³

Having concluded O’Keefe is not entitled to relief, we
ORDER the judgment of the district court AFFIRMED.⁴


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

³Although the district court reached the correct result, it erred in finding this petition was successive because O’Keefe’s previous postconviction habeas petition was not decided on the merits. See NRS 34.810(2); *O’Keefe v. State*, Docket No. 69036 (Order of Affirmance, June 22, 2016); *Wyatt v. State*, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970).

⁴We have reviewed all documents O’Keefe has filed in this matter, and we conclude no relief based upon those submissions is warranted. To the extent O’Keefe has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we decline to consider them in the first instance.

cc: Hon. Michael Villani, District Judge
Hon. Jim C. Shirley, District Judge
Brian Kerry O'Keefe
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk
Eleventh District Court Clerk