

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ESTEBAN HERNANDEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 74843-COA

FILED

NOV 06 2018

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

ORDER OF AFFIRMANCE

Esteban Hernandez appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on September 13, 2017.¹ Eighth Judicial District Court, Clark County; Eric Johnson, Judge.

Hernandez filed his petition nearly 18 years after entry of the judgment of conviction on October 12, 1999. Hernandez did not pursue a direct appeal. Hernandez' petition was untimely filed. *See* NRS 34.726(1). His petition constituted an abuse of the writ as he raised claims new and different from those raised in his previous petitions.² *See* NRS 34.810(2). Hernandez' petition was procedurally barred absent a demonstration of

¹This appeal has been submitted for decision without oral argument and we conclude the record is sufficient for our review and briefing is unwarranted. NRAP 34(f)(3), (g).

²*See Hernandez v. State*, Docket No. 70205 (Order Dismissing Appeal, June 3, 2016); *Hernandez v. State*, Docket No. 60246 (Order of Affirmance, October 8, 2012); *Hernandez v. State*, Docket No. 40117 (Order of Affirmance, June 25, 2003); *Hernandez v. State*, Docket No. 36916 (Order of Affirmance, November 15, 2001); *Hernandez v. State*, Docket No. 35462 (Order of Affirmance, November 21, 2000).


good cause and actual prejudice. See NRS 34.726(1); NRS 34.810(3). Further, because the State specifically pleaded laches, Hernandez was required to overcome the presumption of prejudice to the State. See NRS 34.800(2).


Hernandez claimed the holdings in *Welch v. United States*, ___ U.S. ___, 136 S. Ct. 1257 (2016), and *Montgomery v. Louisiana*, ___ U.S. ___, 136 S. Ct. 718 (2016), provided good cause to overcome the procedural bars. A claim of good cause must be raised within a reasonable time, *Hathaway v. State*, 119 Nev. 248, 251, 71 P.3d 503, 505 (2003), but Hernandez' petition was filed more than one year from when *Welch* and *Montgomery* were decided. Hernandez claimed he was delayed in raising the good-cause argument because prison law-library practices prevented his learning of *Welch* until August 2016. Yet Hernandez still waited more than a year to file his petition, and he offered no explanation for this delay. Hernandez thus failed to demonstrate good cause to excuse his entire delay. See *id.*

Further, *Welch* and *Montgomery* are inapplicable to Hernandez' underlying substantive claim. Hernandez claimed he was entitled to the retroactive application of the 2007 amendments to NRS 193.165. *Welch* and *Montgomery* address situations where a court interpreted a statute or made a constitutional ruling. See *Welch*, ___ U.S. at ___, 136 S. Ct. at 1264-65; *Montgomery v. Louisiana*, ___ U.S. at ___, 136 S. Ct. at 726-27. The changes to NRS 193.165 were not the result of a court decision and were not of constitutional dimension. *State v. Second Judicial Dist. Court (Pullin)*, 124 Nev. 564, 565-66, 571, 188 P.3d 1079, 1080, 1084 (2008). Accordingly, *Welch* and *Montgomery* would not provide good cause to reach Hernandez' underlying claim.

Finally, Hernandez failed to overcome the presumption of prejudice to the State pursuant to NRS 34.800(2). We therefore conclude the district court did not err by denying Hernandez' petition as procedurally barred, and we

ORDER the judgment of the district court AFFIRMED.³


_____, C.J.
Silver


_____, J.
Gibbons

cc: Hon. Eric Johnson, District Judge
Esteban Hernandez
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

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

The Honorable Jerome T. Tao did not participate in the decision in this matter.