

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TOMMIE OTIS CLEVELAND,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 75414-COA

**FILED**

JAN 17 2019

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

*ORDER OF AFFIRMANCE*

Tommie Otis Cleveland appeals from a district court order denying a postconviction petition for a writ of habeas corpus filed on December 21, 2017.<sup>1</sup> Eighth Judicial District Court, Clark County; Tierra Danielle Jones, Judge.

Cleveland did not file a direct appeal and his habeas petition was filed more than nine years after the judgment of conviction was entered on August 19, 2008; consequently, his petition was untimely filed and procedurally barred absent a demonstration of good cause—cause for the delay and undue prejudice—or a colorable showing that failure to consider his claims would result in a fundamental miscarriage of justice. *See* NRS 34.726(1); *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001).

Cleveland claimed that ineffective assistance of counsel provided good cause to excuse his procedural default. Cleveland specifically argued that defense counsel misinformed him about his appellate rights and consequently he was deprived of his right to a direct appeal. Although a

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

claim of ineffective assistance of counsel may provide good cause for the delay in filing a petition, the ineffective-assistance-of-counsel claim itself must not be procedurally defaulted. See *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). Cleveland failed to explain why his ineffective-assistance-of-counsel claim could not be raised in a timely-filed habeas petition, and, therefore, we conclude the district court did not err by rejecting this claim without appointing counsel or conducting an evidentiary hearing. See NRS 34.750(1); NRS 34.770(2); *Renteria-Novoa v. State*, 133 Nev. 75, 76, 391 P.3d 760, 760-61 (2017); *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).<sup>2</sup>

Cleveland also claimed that his underlying grounds for relief “advance [a] constitutional violation with a prejudicial impact that seriously diminishes and undermines the confidence in the validity of the guilty plea” and failure to consider these grounds for relief “would amount to a fundamental miscarriage of justice.” Although a colorable showing of actual innocence may overcome procedural bars under the fundamental miscarriage of justice standard, *Pellegrini*, 117 Nev. at 887, 34 P.3d at 537, Cleveland has not made such a showing and we conclude the district court did not err by rejecting his claim without appointing counsel or conducting an evidentiary hearing. See NRS 34.750(1); NRS 34.770(2); *Renteria-Novoa*, 133 Nev. at 76, 391 P.3d at 760-61; *Hargrove*, 100 Nev. at 502-03, 686 P.2d at 225.


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<sup>2</sup>To the extent Cleveland now claims he was entitled to the appointment of postconviction counsel and an evidentiary hearing pursuant to the United States Supreme Court’s decision in *Martinez v. Ryan*, 566 U.S. 1 (2012), he did not raise this claim in the court below and we decline to consider it for the first time on appeal. See *Rimer v. State*, 131 Nev. 307, 328 n.3, 351 P.3d 697, 713 n.3 (2015).

We conclude the district court did not err by denying Cleveland's procedurally-barred habeas petition, and we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, A.C.J.  
Douglas

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Gibbons

cc: Hon. Tierra Danielle Jones, District Judge  
Tommie Otis Cleveland  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk