

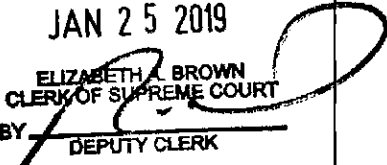
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TERRY L. WEATHERS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 74432-COA

**FILED**

JAN 25 2019

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY  DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Terry L. Weathers appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on July 3, 2017.<sup>1</sup> Eighth Judicial District Court, Clark County; Eric Johnson, Judge.

Weathers filed his petition 28 years after issuance of the remittitur on direct appeal on May 16, 1989, *see Weathers v. State*, 105 Nev. 199, 772 P.2d 1294 (1989), and 24 years after the effective date of NRS 34.726, *see* 1991 Nev. Stat., ch. 44, § 5, at 75-76, § 33, at 92; *Pellegrini v. State*, 117 Nev. 860, 874-75, 34 P.3d 519, 529 (2001), *abrogated on other grounds by Rippo v. State*, 134 Nev. \_\_\_, \_\_\_ n.12, 423 P.3d 1084, 1097 n.12 (2018). Weathers' petition was therefore untimely filed. *See* NRS 34.726(1). Weathers' petition was also successive.<sup>2</sup> *See* NRS 34.810(1)(b)(2); NRS 34.810(2). Weathers' 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). Further, because the State specifically

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

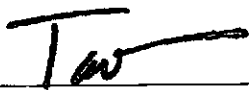
<sup>2</sup>*See Weathers v. State*, Docket No. 21371 (Order Dismissing Appeal, September 14, 1990).


pleaded laches, Weathers was required to overcome the presumption of prejudice to the State. See NRS 34.800(2).

Weathers claimed he had good cause to challenge the mens rea jury instruction given at his trial because “it wasn’t ruled unconstitutional until years prior.” Weathers’ bare claim failed to demonstrate good cause. We therefore conclude the district court did not err by denying his petition as procedurally barred. See *Hathaway v. State*, 119 Nev. 248, 255, 71 P.3d 503, 508 (2003). Further, Weathers failed to overcome the presumption of prejudice to the State pursuant to NRS 34.800(2). Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>3</sup>

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

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

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

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<sup>3</sup>We 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. 75, 76, 391 P.3d 760, 760-61 (2017).

Weathers’ informal brief raises new argument not properly presented to the district court in the first instance. See NRS 34.750(4). Accordingly, we need not consider those arguments on appeal in the first instance. *McNelson v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999). However, we note that, even were Weathers entitled to the retroactive application of *Byford v. State*, the purpose of that opinion was to create a clear distinction between first- and second-degree murder. 116 Nev. 215, 235, 994 P.2d 700, 713 (2000). And as Weathers was convicted of only second-degree murder, he failed to demonstrate that the lack of a *Byford* instruction “worked to [his] actual and substantial disadvantage.” *Pellegrini*, 117 Nev. at 887, 34 P.3d at 537.

cc: Hon. Eric Johnson, District Judge  
Terry L. Weathers  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk