


IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JULIO HERRERA,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 73650-COA

FILED

MAR 20 2019

ELIZABETH L. BROWN  
CLERK OF APPEALS COURT  
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Julio Herrera appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on April 13, 2017.<sup>1</sup> Eighth Judicial District Court, Clark County; William D. Kephart, Judge.

Herrera filed his petition 30 years after issuance of the remittitur on direct appeal on January 13, 1987, *see Castellon v. State*, Docket No. 16103 (Order Dismissing Appeal, December 23, 1986),<sup>2</sup> and 25 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). Herrera's petition was therefore untimely filed. *See* NRS 34.726(1). Herrera's petition was also successive.<sup>3</sup>

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

<sup>2</sup>Herrera filed a joint appeal with his codefendant, Hector Castellon.

<sup>3</sup>*See Herrera v. State*, Docket Nos. 55708 & 55996 (Order of Affirmance, November 8, 2010).

See NRS 34.810(1)(b)(2). Herrera's petition was therefore procedurally barred absent a demonstration of good cause and actual prejudice. See NRS 34.726(1); NRS 34.810(1)(b).

As to his claim that he is entitled to the retroactive application of *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000), Herrera claimed the decisions in *Welch v. United States*, 578 U.S. \_\_\_, 136 S. Ct. 1257 (2016), *Montgomery v. Louisiana*, 577 U.S. \_\_\_, 136 S. Ct. 718 (2016), and *Riley v. McDaniel*, 786 F.3d 719 (9th Cir. 2015), provided good cause to overcome the procedural bars. This court recently held that *Welch* and *Montgomery* do not provide good cause to reach a *Byford* claim. See *Branham v. Warden*, 134 Nev. \_\_\_, \_\_\_, 434 P.3d 313, 316 (Ct. App. 2018). And Herrera's petition is untimely from *Riley* such that it would not overcome his procedural bars. See *Hathaway v. State*, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003) (holding a good-cause claim must not itself be procedurally barred). Moreover, the Nevada Supreme Court has held *Riley* does not provide good cause to overcome procedural bars. *Leavitt v. State*, 132 Nev. 829, 830, 386 P.3d 620, 620 (2016).


As to his claim of error at sentencing, Herrera failed to allege good cause to overcome the procedural bars. For the foregoing reasons, we conclude the district court did not err by denying Herrera's petition as procedurally barred.<sup>4</sup>

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<sup>4</sup>Herrera contends the district court failed to afford him an opportunity to respond to the State's claim of laches. Although the district court erred by denying Herrera's petition without giving him that opportunity, see NRS 34.750(4); NRS 34.800(2), because Herrera failed to overcome the other procedural bars, he failed to demonstrate he was prejudiced.

Finally, 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). Accordingly, we

ORDER the judgment of the district court AFFIRMED.

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

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

  
\_\_\_\_\_, J.  
Bulla

cc: Hon. William D. Kephart, District Judge  
Julio Herrera  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk