

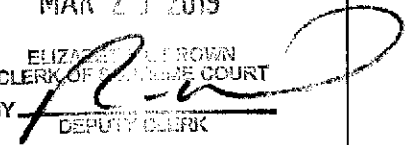
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

FERNANDO PADRON RODRIGUEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 74195-COA

FILED

MAR 21 2019

ELIZABETH BROWN
CLERK OF APPEALS COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Fernando Padron Rodriguez appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on April 22, 2017.¹ Eighth Judicial District Court, Clark County; Stefany Miley, Judge.

Rodriguez filed his petition nearly 18 years after issuance of the remittitur on direct appeal on July 7, 1999. *See Rodriguez v. State*, Docket No. 29730 (Order Dismissing Appeal, June 8, 1999). Rodriguez' petition was therefore untimely filed. *See* NRS 34.726(1). Rodriguez' petition was also successive.² *See* NRS 34.810(1)(b)(2); NRS 34.810(2). Rodriguez' 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 pleaded laches, Rodriguez

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

²*See Rodriguez v. State*, Docket No. 68040 (Order of Affirmance, November 13, 2015); *Rodriguez v. State*, Docket No. 45634 (Order of Affirmance, February 10, 2006); *Rodriguez v. State*, Docket No. 36657 (Order of Affirmance, February 27, 2002).

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


Rodriguez claimed the decisions in *Welch v. United States*, 578 U.S. ___, 136 S. Ct. 1257 (2016), and *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718 (2016), provided good cause to excuse the procedural bars to his claim that he is entitled to the retroactive application of *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000). We conclude the district court did not err by concluding the cases did not provide good cause to overcome the procedural bars. See *Branham v. Warden*, 134 Nev. ___, ___, 434 P.3d 313, 316 (Ct. App. 2018).

Rodriguez also claimed he could overcome the procedural bars because he is actually innocent such that the failure to consider his petition on the merits would result in a fundamental miscarriage of justice. While demonstrating a fundamental miscarriage of justice may excuse procedural bars, Rodriguez did not demonstrate actual innocence because he failed to show that “it is more likely than not that no reasonable juror would have convicted him in light of . . . new evidence.” *Calderon v. Thompson*, 523 U.S. 538, 559 (1998) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)); see *Mazzan v. Warden*, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996). And because he failed to demonstrate a fundamental miscarriage of justice, Rodriguez failed to overcome the presumption of prejudice to the State. See NRS 34.800.


Rodriguez’ claim that the district court failed to afford him the opportunity to respond to the State’s assertion of laches, see NRS 34.800(2), lacks merit. Rodriguez did not submit his reply within the statutory time limit, see NRS 34.750(4), and although the district court’s order did not reference Rodriguez’ untimely reply, it nevertheless addressed all

substantive issues raised therein. 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. Stefany Miley, District Judge
Fernando Padron Rodriguez
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk