

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MICHAEL ANGELO DRAKE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 68857

FILED

MAY 17 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court dismissing a postconviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Janet J. Berry, Judge.

Appellant Michael Drake filed his petition on July 29, 2014, more than 14 years after issuance of the remittitur on direct appeal on March 22, 2000.¹ Thus, Drake's petition was untimely filed. See NRS 34.726(1). Moreover, Drake's petition was successive because he had previously filed a postconviction petition for a writ of habeas corpus, and it constituted an abuse of the writ as he raised claims new and different from those raised in his previous petition.² See NRS 34.810(2). Drake's petition was procedurally barred absent a demonstration of good cause and actual prejudice. See NRS 34.726(1); NRS 34.810(3).

Relying on *Martinez v. Ryan*, 566 U.S. ___, 132 S. Ct. 1309 (2012) and *Ha Van Nguyen v. Curry*, 736 F.3d 1287 (9th Cir. 2013), Drake

¹*Drake v. State*, Docket Nos. 34146, 34147, 34148 (Order Dismissing Appeals, February 25, 2000).

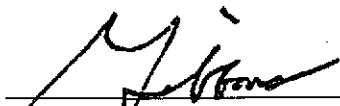
²*Drake v. State*, Docket Nos. 38742, 38743, 38744 (Order of Affirmance, August 28, 2002).


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argued ineffective assistance of postconviction counsel excused his procedural defects. The Nevada Supreme Court has held that *Martinez* does not apply to Nevada's statutory postconviction procedures, see *Brown v. McDaniel*, 130 Nev. ___, ___, 331 P.3d 867, 871-72 (2014), and thus, *Martinez* does not provide good cause for this late and successive petition.³ For similar reasons, *Ha Van Nguyen* would not provide good cause.

Drake also claimed *Ha Van Nguyen* provided good cause because it allows him to amend the petition and have the claim relate back to the first petition. 736 F.3d at 1296. Drake misstated the holding in *Ha Van Nguyen* and its effect on his case. Drake's first petition was resolved in 2002. See *Drake v. State*, Docket Nos. 38742, 38743, 38744 (Order of Affirmance, August 28, 2002). Thus, no amendment was possible in 2015, and his claims cannot relate back to his first petition. Accordingly, the district court did not err in denying the petition as procedurally barred, and we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

³Ineffective assistance of postconviction counsel would not be good cause in the instant case because the appointment of counsel in the prior postconviction proceedings was not statutorily or constitutionally required. *Crump v. Warden*, 113 Nev. 293, 303, 934 P.2d 247, 253 (1997); *McKague v. Warden*, 112 Nev. 159, 164, 912 P.2d 255, 258 (1996).

cc: Hon. Janet J. Berry, District Judge
Law Offices of Lyn E. Beggs, PLLC
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk