

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JACOBY DEONTE FREEMAN,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 70803

FILED

JUN 15 2017

ESTHER A. BROWN  
CLERK OF COURT  
BY *Amorleaf*  
DEPUTY CLERK

ORDER OF AFFIRMANCE

Jacoby Deonte Freeman appeals from an order of the district court dismissing a postconviction petition for a writ of habeas corpus.<sup>1</sup> Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

Freeman filed his petition on March 24, 2016, more than six years after entry of the judgment of conviction on February 26, 2010.<sup>2</sup> Thus, Freeman's petition was untimely filed. See NRS 34.726(1). Moreover, Freeman'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.<sup>3</sup> See NRS 34.810(2). Freeman's petition was procedurally barred absent a demonstration of good cause

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<sup>1</sup>This appeal has been submitted for decision without oral argument and we conclude the record is sufficient for our review and briefing is unwarranted. NRAP 34(f)(3), (g).

<sup>2</sup>Freeman did not pursue a direct appeal.

<sup>3</sup>*Freeman v. State*, Docket No. 61928 (Order of Affirmance, September 18, 2013).

and actual prejudice. See NRS 34.726(1); NRS 34.810(3). Moreover, because the State specifically pleaded laches, Freeman was required to overcome the rebuttable presumption of prejudice. See NRS 34.800(2).

Relying in part on *Martinez v. Ryan*, 566 U.S. \_\_\_, 132 S. Ct. 1309 (2012), Freeman argued ineffective assistance of postconviction counsel excused his procedural defects. Ineffective assistance of postconviction counsel was not good cause in the instant case because the appointment of counsel in the prior postconviction proceeding was not statutorily or constitutionally required. See *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). Further, the Nevada Supreme Court has held *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.

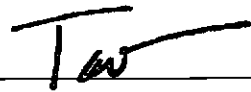
Next, Freeman argued he suffers from a fundamental miscarriage of justice because his counsel failed to present mitigation evidence or request concurrent sentences at the sentencing hearing. Freeman also argued he suffered a fundamental miscarriage of justice due to the ineffective assistance of his postconviction counsel.

In order to demonstrate a fundamental miscarriage of justice, a petitioner must make a colorable showing of actual innocence—factual innocence, not legal innocence. *Calderon v. Thompson*, 523 U.S. 538, 559 (1998); *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). To prove actual innocence as a gateway to reach procedurally-barred constitutional claims of error, a petitioner must show “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)). Freeman’s claims failed to meet that narrow standard because they were not based on new evidence and did not attempt to demonstrate his factual innocence. Therefore, the district court did not err in dismissing Freeman’s petition as procedurally barred. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, C.J.  
Silver

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

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

cc: Hon. Elissa F. Cadish, District Judge.  
Jacobus Deonte Freeman  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk