

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JUAN GARCIA, A/K/A JACOBO J.  
GARCIA,  
Appellant,  
vs.  
BRIAN E. WILLIAMS, WARDEN,  
Respondent.

No. 70604

**FILED**

FEB 23 2017

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Appellant Juan Garcia appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus.<sup>1</sup> Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Garcia filed his petition on November 4, 2015, more than eight years after issuance of the remittitur from Garcia's direct appeal filed pursuant to *Lozada v. State*, 110 Nev. 349, 871 P.2d 944 (1994) on June 27, 2007.<sup>2</sup> Thus, Garcia's petition was untimely filed. *See* NRS 34.726(1). Moreover, Garcia's petition was successive because he had previously filed several postconviction petitions for a writ of habeas corpus, and it

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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>*Garcia v. State*, Docket No. 47059 (Order Affirming in Part and Reversing in Part and Remanding, May 31, 2007). Following that decision the district court entered an amended judgment of conviction on December 3, 2007. Garcia did not file a direct appeal challenging the amended judgment of conviction.

constituted an abuse of the writ as he raised claims new and different from those raised in his previous petitions.<sup>3</sup> See NRS 34.810(1)(b)(2); NRS 34.810(2). Garcia's petition was 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).

First, Garcia claimed the decisions in *Martinez v. Ryan*, 566 U.S. \_\_\_, 132 S. Ct. 1309 (2012), *Trevino v. Thaler*, 566 U.S. \_\_\_, 133 S. Ct. 1911 (2013), and *Nguyen v. Curry*, 736 F.3d 1287 (9th Cir. 2013), provided good cause because he did not have counsel appointed to assist him with the litigation of his prior postconviction petitions. 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). Thus, the decision in *Martinez* did not provide good cause for filing a late and successive petition. And because *Trevino* and *Nguyen* merely discussed and applied the decision in *Martinez*, those decisions also did not provide good cause to overcome the procedural bars.

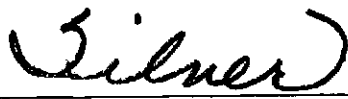
Next, Garcia claimed the procedural bars should not apply because failure to consider his claims on the merits would result in a fundamental miscarriage of justice. Garcia asserts he suffers from a fundamental miscarriage of justice because the kidnapping was incidental to the robbery and he did not receive a proper direct appeal.


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<sup>3</sup>*Garcia v. State*, Docket No. 65158 (Order of Affirmance, July 23, 2014); *Garcia v. State*, Docket No. 62119 (Order of Affirmance, July 23, 2013); *Garcia v. State*, Docket No. 56137 (Order of Affirmance, March 29, 2011).

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)). Garcia’s claims failed to meet that narrow standard. Therefore, the district court did not err in denying Garcia’s petition as procedurally barred.<sup>4</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>5</sup>

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

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

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<sup>4</sup>Garcia also appears to assert the Nevada Revised Statutes are void due to the failure to contain enacting clauses. However, Garcia did not raise this issue in the instant petition before the district court and we decline to consider this issue in the first instance on appeal. See *McNelton v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999).

<sup>5</sup>The Honorable Jerome T. Tao, Judge, did not participate in the decision in this matter.

cc: Hon. Michelle Leavitt, District Judge  
Juan Jacobo Garcia  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk