

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MICHAEL TODD BOTELHO,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 69046

**FILED**

**MAY 18 2016**

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY S. Young  
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.<sup>1</sup> Second Judicial District Court, Washoe County; Jerome M. Polaha, Judge.

Appellant Michael Todd Botelho filed his petition on January 27, 2010, almost five years after issuance of the remittitur on direct appeal on April 29, 2005. *Botelho v. State*, Docket No. 43247 (Order of Affirmance, April 4, 2005). Thus, Botelho's petition was untimely filed. See NRS 34.726(1). Moreover, Botelho'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>2</sup> See NRS 34.810(2).

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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>*Botelho v. State*, Docket No. 49586 (Order of Affirmance, May 16, 2008).

Botelho's petition was procedurally barred absent a demonstration of good cause and actual prejudice. *See* NRS 34.726(1) NRS 34.810(3).

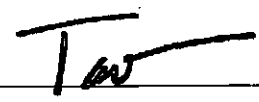
Botelho claimed he had good cause to overcome the procedural bars because his postconviction counsel for his prior petition did not properly exhaust state remedies for all of his claims and he was forced to proceed through counsel in the prior postconviction proceedings. We conclude Botelho did not demonstrate good cause to overcome the procedural bars.


Botelho's failure to exhaust state remedies in his earlier court proceedings did not demonstrate there was an impediment external to the defense that should excuse the procedural bars. *See Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003); *see also Colley v. State*, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989), *abrogated by statute on other grounds as recognized by State v. Huebler*, 128 Nev. 192, 197 n.2, 275 P.3d 91, 95 n.2 (2012). To the extent Botelho claimed his postconviction counsel was ineffective and thus constituted good cause for this petition, that assertion also lacked merit as Botelho had no statutory right to postconviction counsel, and therefore, had no right to the effective assistance of counsel. *See McKague v. Warden*, 112 Nev. 159, 164-65 & n.5, 912 P.2d 255, 258 & n.5 (1996); *Crump v. Warden*, 113 Nev. 293, 303 & n.5, 934 P.2d 247, 253 & n.5 (1997); *see also Brown v. McDaniel*, 130 Nev. \_\_\_, \_\_\_ 331 P.3d 867, 870 (2014) (explaining that postconviction counsel's performance does not constitute good cause to excuse the procedural bars unless the appointment of postconviction counsel was

mandated by statute). Therefore, the district court did not err in dismissing the petition as procedurally barred. Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>3</sup>

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

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

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

cc: Hon. Jerome M. Polaha, District Judge  
Michael Todd Botelho  
Attorney General/Carson City  
Washoe County District Attorney  
Washoe District Court Clerk

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<sup>3</sup>On October 28, 2015, Botelho submitted a motion for the appointment of counsel. However, on December 2, 2015, Botelho submitted a motion requesting to withdraw his earlier motion for the appointment of counsel. In light of our disposition of this appeal, we decline to take action regarding these motions.