

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN P. GIBBS A/K/A JHAN GIBBS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent

No. 38112

FILED

JUL 25 2002

ORDER OF AFFIRMANCE

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY J. Richard  
DEPUTY CLERK

This is a proper person appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus and appellant's motion for the appointment of counsel.

On December 15, 1987, the district court convicted appellant, pursuant to a guilty plea, of attempted larceny from a person. The district court sentenced appellant to serve a term of three years in the Nevada State Prison. Appellant did not file a direct appeal.

On April 23, 2001, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court.<sup>1</sup> On that same date, appellant also filed a proper person motion for the appointment of counsel. The State opposed the petition and the motion. Appellant filed a reply. Pursuant to NRS 34.750 and 34.770, the district

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<sup>1</sup>Appellant labeled his petition "motion for writ of error coram nobis." We elect to construe appellant's petition as a post-conviction petition for a writ of habeas corpus because it challenges the validity of his conviction. See NRS 34.724(2)(b) (stating that a post-conviction petition for a writ of habeas corpus "[c]omprehends and takes the place of all other common law, statutory or other remedies which have been available for challenging the validity of the conviction or sentence, and must be used exclusively in place of them.").

court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On June 14, 2001, the district court denied appellant's petition and motion. This appeal followed.

We conclude that the district court did not err in denying appellant's petition and motion. Appellant had completed serving his three-year sentence prior to the time that he filed his petition.<sup>2</sup> Therefore, the district court lacked jurisdiction to grant the writ because appellant was not in custody or otherwise restrained of his liberty at the time he filed his petition.<sup>3</sup>

Furthermore, appellant filed his petition over thirteen years after entry of the judgment of conviction; thus, appellant's petition was procedurally barred absent of demonstration of cause for the delay.<sup>4</sup> In an attempt to demonstrate cause for the delay, appellant claimed that Apprendi v. New Jersey<sup>5</sup> constitutes a substantial intervening change in the law rendering his conviction unconstitutional. Specifically, appellant claimed that district court did not have jurisdiction to sentence him under the statutes for attempt larceny because the value of the stolen property was not alleged in the indictment. Appellant failed to demonstrate good

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<sup>2</sup>In his petition, appellant acknowledges that he was released from custody in April of 1989.

<sup>3</sup>See NRS 34.360; Jackson v. State, 115 Nev. 21, 23, 973 P.2d 241, 242 (1999).

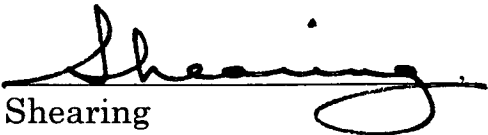
<sup>4</sup>See NRS 34.726(1).

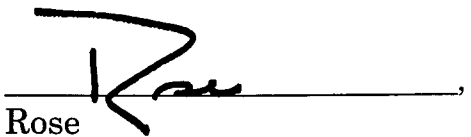
<sup>5</sup>30 U.S. 466 (2000).


cause for the delay because the rule announced in Apprendi does not apply retroactively.<sup>6</sup> Finally, appellant waived any defects by entry of his plea.<sup>7</sup>

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.<sup>8</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 J.  
Shearing

 J.  
Rose

 J.  
Becker

cc: Hon. Valorie Vega, District Judge  
Attorney General/Carson City  
Clark County District Attorney  
John P. Gibbs  
Clark County Clerk

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<sup>6</sup>See State v. Sanchez-Cervantes, 282 F.3d 664 (2002) (holding that the new rule of criminal procedure announced in Apprendi does not apply retroactively on collateral review); see also Jones v. Smith, 231 F.3d 1227 (9th Cir. 2000) (absence of certain language in a criminal indictment did not warrant the retroactive application of Apprendi).

<sup>7</sup>See Webb v. State, 91 Nev. 469, 538 P.2d 164 (1975).

<sup>8</sup>See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).