

IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANK J. MATYLINSKY, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 38746

FILED

SEP 12 2002

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

This is an appeal from a district court order denying appellant Frank J. Matylinsky's post-conviction petition for a writ of habeas corpus.

On September 25, 1984, Matylinsky was convicted, pursuant to a jury verdict, of one count each of first-degree murder and manslaughter. The district court sentenced Matylinsky to serve a life prison term without the possibility of parole for the murder count and a concurrent ten-year prison term for the manslaughter count. Matylinsky filed a direct appeal. While his direct appeal was pending, Matylinsky filed a post-conviction petition for a writ of habeas corpus in the district court. The district court denied the petition, and Matylinsky appealed. This court consolidated Matylinsky's appeals from the judgment of conviction and affirmed the order denying the post-conviction petition, and affirmed the judgment of conviction.¹

On June 1, 1989, Matylinsky filed a second post-conviction petition in the district court. The district court denied the petition, finding that Matylinsky had failed to show prejudice to excuse his procedural

¹Matylinsky, Jr. v. State, Docket Nos. 16222 and 18547 (Order Dismissing Appeals, November 22, 1988).

default. Matylinsky appealed, and this court affirmed the district court's order.²

On July 29, 1994, Matylinsky, with the assistance of counsel, filed a third post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Approximately five years later, on August 10, 1999, the State filed a motion to dismiss the petition, alleging it was successive and failed for lack of prosecution. Matylinsky opposed the motion to dismiss. The district court appointed new counsel, who supplemented the petition on August 4, 2000. After hearing argument from counsel, the district court denied the petition, finding that it was procedurally barred. Matylinsky filed the instant appeal.


Although Matylinsky acknowledges his petition is successive, he contends that the district court erred in ruling that he failed to prove good cause and prejudice to overcome his procedural default. In particular, Matylinsky argues that his procedural default should be excused because: (1) his trial and post-conviction counsel were ineffective; (2) his trial counsel had an actual conflict of interest; (3) in 1992, Matylinsky discovered new evidence about several trial witnesses, which the State failed to disclose; and (4) Matylinsky learned that trial counsel had unilaterally rejected a plea offer that he would have "considered." Alternatively, Matylinsky contends that his procedural default should be excused because numerous instances of error occurred during the guilt and penalty phase of his trial. Matylinsky contends that cumulatively those errors deprived him of his right to a fair trial, thereby constituting a fundamental miscarriage of justice.


²Matylinsky, Jr. v. Warden, Docket No. 20228 (Order Dismissing Appeal, November 2, 1989).

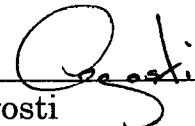
Based upon our review of the record on appeal, we conclude that the district court did not err in determining that Matylinsky failed to demonstrate adequate cause to overcome the procedural bar.³ Matylinsky has not demonstrated that the claims he raised in the petition could not have been raised earlier in the proceedings or in the prior petition.⁴ Matylinsky also has not demonstrated that failure to consider his petition would result in a fundamental miscarriage of justice.⁵

Having considered Matylinsky's contentions and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Rose


_____, J.
Young


_____, J.
Agosti

³Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994) (holding that good cause must be an impediment external to the defense); Phelps v. Director, Prisons, 104 Nev. 656, 764 P.2d 1303 (1988) (holding that a petitioner's limited intelligence or inability to obtain proper assistance from an inmate law clerk did not constitute good cause).

⁴See NRS 34.810(1)(b).

⁵Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996) (stating that a petitioner may be entitled to review of defaulted claims if failure to review the claims would result in a fundamental miscarriage of justice).

cc: Hon. Peter I. Breen, District Judge
Karla K. Butko
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk