

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN OLIVER SNOW,  
Appellant,  
vs.  
WARDEN, ELY STATE PRISON, E.K.  
MCDANIEL,  
Respondent.

No. 39354

**FILED**

DEC 10 2002

ORDER OF AFFIRMANCE

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

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

In 1984, the district court convicted appellant, pursuant to a jury verdict, of conspiracy to commit murder and murder with the use of a deadly weapon. Appellant was sentenced to death. This court affirmed appellant's sentence and conviction.<sup>1</sup> Subsequently, in 1986 and 1989 appellant filed petitions for post-conviction relief pursuant to former NRS 177.315, and in 1987 a motion for a new trial in the district court. The district court dismissed his petitions and motion, and this court dismissed appellant's subsequent appeals.

On April 16, 1997, appellant filed his third post-conviction petition for a writ of habeas corpus in the district court. The State filed a motion to dismiss the petition because it was untimely filed and successive. The State also specifically pleaded laches. Appellant filed an opposition, and the State filed a reply. The district court conducted two hearings and ultimately denied the motion to dismiss and ordered an

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<sup>1</sup>See Snow v. State, 101 Nev. 439, 705 P.2d 632 (1985).

evidentiary hearing. Before the evidentiary hearing was conducted, the State filed a petition for a writ of prohibition or mandamus in this court seeking to have this court order the district court to apply the procedural bars to appellant's petition. This court granted the State's petition and ordered the district court "to comply with the pertinent law and decide the applicability of the procedural bars asserted by the State before determining to address the merits of any of appellant's substantive claims."<sup>2</sup> The district court then denied appellant's petition as procedurally barred. This appeal followed.

Appellant filed his petition approximately twelve years after this court issued the remittitur from his direct appeal. Thus, appellant's petition was untimely filed.<sup>3</sup> Moreover, appellant's petition was successive because he had previously filed two petitions for post-conviction relief.<sup>4</sup> Appellant's petition was procedurally barred absent a demonstration of good cause and prejudice.<sup>5</sup> Further, because the State specifically pleaded laches, appellant was required to overcome the presumption of prejudice to the State.<sup>6</sup>

In an attempt to excuse his procedural defaults, appellant raises two arguments: (1) that his post-conviction counsel was ineffective

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<sup>2</sup>See State v. Snow, Docket No. 37309 (Order Granting Petition, March 7, 2001)

<sup>3</sup>See NRS 34.726(1).

<sup>4</sup>See NRS 34.810(1)(b),(2).

<sup>5</sup>See NRS 34.726(1); NRS 34.810(1)(b),(3).

<sup>6</sup>See NRS 34.800(2).

in his first post-conviction petition filed in 1986; and (2) that a Brady<sup>7</sup> violation occurred in his case.

We conclude that appellant's first attempt to demonstrate good cause to excuse the procedural defaults fails. Ineffective assistance of counsel can in some cases constitute cause to overcome a procedural default.<sup>8</sup> However, in post-conviction proceedings there is no right to effective assistance of counsel under either the Sixth Amendment or the Nevada Constitution.<sup>9</sup> A post-conviction petitioner has a right to effective assistance of counsel only when a statute requires appointment of counsel for the petitioner.<sup>10</sup> When the appointment of counsel is discretionary, the petitioner has no right to effective assistance by that counsel.<sup>11</sup>

Appellant was entitled to the effective assistance of counsel for his first post-conviction petition filed in 1986 because at that time NRS 177.345(1) required the appointment of counsel for indigent petitioners for post-conviction relief.<sup>12</sup> Therefore, appellant was entitled to claim that his post-conviction counsel in his first petition was ineffective. However,

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<sup>7</sup>See Brady v. Maryland, 373 U.S. 83 (1963).

<sup>8</sup>See Crump v. State, 113 Nev. 293, 304, 934 P.2d 247, 253 (citing Coleman v. Thompson, 501 U.S. 722, 753-54 (1991)).

<sup>9</sup>See McKague v. Warden, 112 Nev. 159, 163, 912 P.2d 255, 257-58 (1996).

<sup>10</sup>See id. at 165 n.5, 912 P.2d at 258 n.5; Crump, 113 Nev. at 303, 934 P.2d at 253.

<sup>11</sup>See Bejarano v. Warden, 112 Nev. 1466, 1470 & n.1, 929 P.2d 922, 925 & n.1 (1996).

<sup>12</sup>In 1986, NRS 177.345(1) provided that an indigent petitioner for post-conviction relief was entitled to appointed counsel.

appellant should have raised this claim in his second post-conviction petition. Because appellant failed to do so, he is required to demonstrate good cause for not raising this claim in his second petition. Appellant has failed to demonstrate good cause and failed to overcome the presumption of prejudice to the State. Thus, appellant was not entitled to relief. Moreover, the district court did not err in failing to conduct an evidentiary hearing.<sup>13</sup>

In appellant's second attempt to demonstrate good cause to excuse the procedural bars, he claims there has been a Brady violation in his case. Specifically, appellant claims that information contained in the "murder book" at the Las Vegas Metropolitan Police Department was not disclosed to him. This information includes "specific information regarding other suspects, specific names, specific follow-up that was then blunted as soon as Mr. Snow's name came up." Appellant failed to articulate adequate and specific factual information regarding this Brady claim.<sup>14</sup> We conclude that appellant has therefore failed to demonstrate good cause to excuse the procedural bars. We also conclude that the district court did not err in failing to conduct an evidentiary hearing.<sup>15</sup> Moreover, to the extent that appellant is making a claim of actual innocence, appellant's claim is not credible.<sup>16</sup> Thus, appellant failed to

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<sup>13</sup>See Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

<sup>14</sup>See id. at 502, 686 P.2d at 225; Mazzan v. Warden, 116 Nev. 48, 66-67, 993 P.2d 25, 36-37 (2000); see also NRS 34.810(3).


<sup>15</sup>See Hargrove, 100 Nev. at 502-03, 686 P.2d at 225.

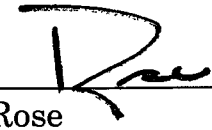
<sup>16</sup>See Snow, 101 Nev. at 447 n.6, 705 P.2d at 638 n.6 (stating that there was "overwhelming evidence of Snow's guilt").

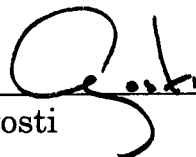
demonstrate that a fundamental miscarriage of justice would result from failure to consider his claims.<sup>17</sup>

We conclude that appellant's petition is procedurally barred and that he failed to demonstrate good cause and prejudice to excuse the procedural defaults and failed to overcome the presumption of prejudice to the State. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 \_\_\_\_\_, C.J.  
Young

 \_\_\_\_\_, J.  
Rose

 \_\_\_\_\_, J.  
Agosti

cc: Hon. Lee A. Gates, District Judge  
Attorney General/Carson City  
Clark County District Attorney  
Scott W. Edwards  
Marc P. Picker  
Clark County Clerk

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<sup>17</sup>See Mazzan v. Warden, 112 Nev. 838, 843, 921 P.2d 920, 923 (1996).