

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BRANDON MONTANE JEFFERSON,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 79052-COA

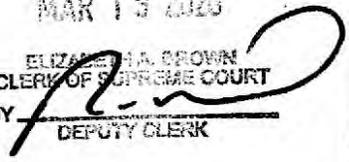
BRANDON MONTANE JEFFERSON,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 79053-COA

**FILED**

MAR 19 2020

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT

BY   
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Brandon Montane Jefferson appeals from a single district court order filed in district court case numbers A-19-793338-W (Docket No. 79052-COA) and C-10-268351-1 (Docket No. 79053-COA) that denies a single postconviction petition for a writ of habeas corpus filed on April 10, 2019. Eighth Judicial District Court, Clark County; Jerry A. Wiese, Judge.

Jefferson claims the district court erred by concluding his second postconviction habeas petition was procedurally barred. However, his petition was untimely because it was filed more than four years after

the remittitur on direct appeal was issued on August 26, 2014,<sup>1</sup> see NRS 34.726(1), and it was successive because he had previously filed a postconviction petition for a writ of habeas corpus that was decided on the merits,<sup>2</sup> see NRS 34.810(2). Therefore, the district court did not err by concluding his petition was procedurally barred absent a demonstration of good cause and actual prejudice. See NRS 34.726(1); NRS 34.810(3).

Next, Jefferson claims the district court erred by concluding he failed to demonstrate good cause and prejudice to overcome the procedural defects in his second postconviction habeas petition. He raised the following good cause claims in his petition.

First, Jefferson claimed that he had good cause because he was deprived of effective assistance of counsel during the pendency of his first postconviction habeas petition. He cited to *Martinez v. Ryan* for the proposition that “ineffective assistance in an initial-review collateral proceeding on a claim of ineffective assistance at trial may provide cause for a procedural default in a federal habeas proceeding.” 566 U.S. 1, 9 (2012). However, he was not entitled to the effective assistance of postconviction counsel because the appointment of counsel in the postconviction proceeding was not statutorily or constitutionally required. *McKague v. Warden*, 112 Nev. 159, 164, 912 P.2d 255, 258 (1996). And the United States Supreme Court’s holding in *Martinez* does not apply to habeas petitions

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<sup>1</sup>See *Jefferson v. State*, Docket No. 62120 (Order of Affirmance, July 29, 2014).

<sup>2</sup>See *Jefferson v. State*, 133 Nev. 874, 410 P.3d 1000 (Ct. App. 2017).

filed in state courts. *Brown v. McDaniel*, 130 Nev. 565, 571, 331 P.3d 867, 871-72 (2014). Accordingly, this good cause claim lacked merit.

Second, Jefferson claimed that he had good cause because he was raising claims the district court had not “squarely addressed” when it resolved his first postconviction habeas petition. He cited to *Lozada v. State* for the proposition that if his “claim had merit, the denial of relief by the district court, and the subsequent denial of relief by this court, would constitute an impediment external to the defense that would excuse appellant’s default in presenting the same claim in a successive petition.” 110 Nev. 349, 353, 871 P.2d 944, 946 (1994), *overruled on other grounds by Rippo v. State*, 134 Nev. 411, 426 n.18, 423 P.3d 1084, 1100 n.18 (2018). However, our review of the record reveals that all of his claims were fairly addressed by the district court order and he had abandoned all but one of those claims in his appeal from that order. *See Jefferson*, 133 Nev. at 876, 410 P.3d at 1002. Moreover, this good cause claim was reasonably available two years before he filed the instant petition and therefore it did not excuse the petition’s procedural defects. *See Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (recognizing that a claim must be raised within a reasonable time after it arises and a claim that is procedurally barred itself will not provide good cause). Accordingly, this good cause claim lacked merit.

Third, Jefferson claimed that he had good cause because a federal district court stayed his federal habeas proceedings so that he could exhaust his claims in the state courts. However, a federal court’s exhaustion requirements do not constitute an impediment external to the

defense and therefore they do not provide good cause to excuse a petition's procedural defects. See *Hathaway*, 119 Nev. at 252, 71 P.3d at 506; *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). Accordingly, this good cause claim lacked merit.

Fourth, Jefferson also appears to have claimed he was actually innocent because a statement suppressed by the district court might have produced a different trial result if it had been disclosed to the jury. A colorable showing of actual innocence may overcome procedural bars under the fundamental miscarriage of justice standard. *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). "Actual innocence means factual innocence, not mere legal insufficiency." *Mitchell v. State*, 122 Nev. 1269, 1273-74, 149 P.3d 33, 36 (2006) (internal quotation marks and brackets omitted). "To be credible, a claim of actual innocence must be based on reliable evidence not presented at trial." *Calderon v. Thompson*, 523 U.S. 538, 559 (1998) (quoting *Schlup v. Delo*, 513 U.S. 298, 324 (1995)). And, to demonstrate actual innocence of the underlying crime, the petitioner must show "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence' presented in his habeas petition." *Id.* (quoting *Schlup*, 513 U.S. at 327). Jefferson did not make a colorable showing of actual innocence under this standard and therefore he did not demonstrate a fundamental miscarriage of justice sufficient to excuse the petition's procedural defects.

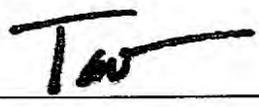
Finally, Jefferson claims the district court erred by denying him the opportunity to reply to the State's answer to his petition. NRS 34.750(4)

states that “[t]he *petitioner shall* respond within 15 days after service to a motion by the State to dismiss the action.” (Emphasis added.) Here, Jefferson made no attempt to file a response in the district court and therefore he cannot show that he was prejudiced by the early entry of the district court order.

For the foregoing reasons, we conclude the district court did not err by denying Jefferson’s procedurally barred postconviction habeas petition, and we

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

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

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

  
\_\_\_\_\_, J.  
Bulla

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<sup>3</sup>In light of our disposition of this appeal, we decline to address Jefferson’s claims regarding the doctrine of the law of the case and the doctrine of res judicata.

cc: Hon. Jerry A. Wiese, District Judge  
Brandon Montane Jefferson  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk