

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ROGER DON JONES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 68586

FILED

DEC 29 2015

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 denying a postconviction petition for a writ of habeas corpus.¹ Eighth Judicial District Court, Clark County; Susan Johnson, Judge.

Appellant Roger Don Jones, filed his petition on April 21, 2015, more than four years after issuance of the remittitur on direct appeal on October 11, 2011. *Jones v. State*, Docket No. 55707 (Order of Affirmance, September 14, 2011). Thus, Jones' petition was untimely filed and procedurally barred absent a demonstration of good cause—cause for the delay and undue prejudice. *See* NRS 34.726(1).

First, Jones claimed he had good cause because he suffers from mental illness, is not legally trained, and has to rely upon law clerks for legal help. These issues did not demonstrate that there was an impediment external to the defense that prevented him from complying with the procedural bars. *See Phelps v. Dir., Nev. Dep't of Prisons*, 104

¹This 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).

Nev. 656, 660, 764 P.2d 1303, 1306 (1988) (holding that petitioner's claim of organic brain damage, borderline mental retardation and reliance on assistance of inmate law clerk unschooled in the law did not constitute good cause for the filing of a successive post-conviction petition).


Second, Jones claimed the district court's failure to appoint postconviction counsel constituted good cause. We conclude this argument lacked merit. The appointment of postconviction counsel was discretionary, *see* NRS 34.750(1), and therefore, Jones failed to demonstrate this claim provided good cause. *See Brown v. McDaniel*, 130 Nev. ___, ___, 331 P.3d 867, 871-72 (2014) (explaining claims of ineffective assistance of postconviction counsel do not constitute cause to excuse the procedural bars unless the appointment of postconviction counsel was mandated by statute).

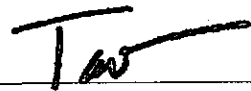
Third, Jones claimed he had good cause due to ineffective assistance of his trial and appellate counsel. A procedurally barred claim of ineffective assistance of trial and appellate counsel cannot constitute good cause for additional claims of ineffective assistance of counsel. *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). Jones' claims of ineffective assistance of counsel were reasonably available to be raised in a timely petition, and therefore, Jones failed to demonstrate an impediment external to the defense prevented him from complying with the procedural time bar. *See id.* at 252-53, 71 P.3d at 506.

Fourth, Jones claimed failure to consider his claims on the merits would result in a fundamental miscarriage of justice. In order to demonstrate a fundamental miscarriage of justice, a petitioner must make a colorable showing of actual innocence—factual innocence, not legal innocence. *Calderon v. Thompson*, 523 U.S. 538, 559 (1998); *Pellegrini v.*

State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). Jones did not attempt to demonstrate his factual innocence. Therefore, Jones failed to show "it is more likely than not that no reasonable juror would have convicted him in light of . . . new evidence." *Calderon*, 523 U.S. at 559 (quoting *Schlup v. Delo*, 513 U.S. 298, 327, (1995)); *see also Pellegrini*, 117 Nev. at 887, 34 P.3d at 537; *Mazzan v. Warden*, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996). Therefore, we conclude the district court did not err in denying the petition as procedurally barred, and we

ORDER the judgment of the district court AFFIRMED.²


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Susan Johnson, District Judge
Roger Don Jones
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

²We note the district court denied the petition in part based upon application of statutory laches pursuant to NRS 34.800(2). However, that statute is not applicable because the petition was not filed more than five years after the issuance of the remittitur on direct appeal. *See id.* Nevertheless, the district court correctly concluded the petition was procedurally barred pursuant to NRS 34.726(1), and we therefore affirm. *See Wyatt v. State*, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970).