

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOAQUIN ERNESTO HERNANDEZ-
AYALA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 68705

FILED

JUN 22 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Appellant Joaquin Ernesto Hernandez-Ayala claims the district court erred by denying his postconviction petition for a writ of habeas corpus as procedurally barred. This claim lacks merit.

Hernandez-Ayala filed his petition on February 26, 2015, more than five years after issuance of the remittitur on direct appeal on September 1, 2009.¹ Thus, Hernandez-Ayala's petition was untimely filed. See NRS 34.726(1). Moreover, Hernandez Ayala's petition was successive because he had previously filed a postconviction petition for a writ of habeas corpus, and it constituted an abuse of the writ as he raised a claim that was new and different from those raised in his previous petition. See NRS 34.810(1)(b)(2); NRS 34.810(2). Hernandez-Ayala's petition was

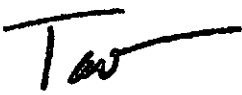
¹See *Hernandez-Ayala v. State*, Docket No. 50720 (Order of Affirmance, August 5, 2009).


procedurally barred absent a demonstration of good cause and actual prejudice. *See* NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3).

Hernandez-Ayala asserted ineffective assistance of his first postconviction counsel constituted good cause and actual prejudice to overcome the procedural bars. The district court denied the petition as procedurally barred after finding Hernandez-Ayala failed to demonstrate good cause and actual prejudice to excuse the procedural bars because his claims of ineffective assistance of counsel were themselves procedurally barred. We conclude the district court did not err by denying Hernandez-Ayala's petition as procedurally barred. *See Brown v. McDaniel*, 130 Nev. ___, ___, 331 P.3d 867, 870 (2014) (explaining that postconviction counsel's performance does not constitute good cause to excuse the procedural bars unless the appointment of postconviction counsel was mandated by statute); *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (“[I]n order to constitute adequate cause, the ineffective assistance of counsel claim itself must not be procedurally defaulted.”). Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Michelle Leavitt, District Judge
Federal Public Defender/Las Vegas
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk