

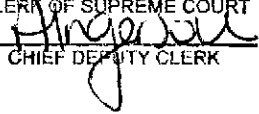
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BRANDON KALE HARRIS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 70068

FILED

SEP 20 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY 
CHIEF 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; J. Charles Thompson, Senior Judge.

Appellant Brandon Kale Harris filed his petition on November 25, 2015, more than five years after entry of the judgment of conviction on November 8, 2010.² Thus, Harris' petition was untimely filed. See NRS 34.726(1). Moreover, Harris' petition constituted an abuse of the writ as he raised claims new and different from those raised in his previous petitions.³ See NRS 34.810(2). Harris' petition was procedurally barred

¹This appeal has been submitted for decision without oral argument. NRAP 34(f)(3).

²No direct appeal was taken.

³*Harris v. State*, Docket No. 64721 (Order of Affirmance, May 13, 2014). Harris also filed a postconviction petition for a writ of habeas corpus in the district court on June 5, 2015, and the appeal from the denial of that petition is pending in Docket No. 69486.

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

Harris first argues the procedural bars do not apply because he timely filed this petition within one year of the issuance of the remittitur from a previous appeal. We conclude the district court properly concluded the procedural bars precluded consideration of the merits of Harris' underlying claims. NRS 34.726(1) provides that a postconviction petition for a writ of habeas corpus must be filed within one year after the entry of the judgment of conviction or the issuance of the remittitur from the denial of a direct appeal from the judgment of conviction. *Dickerson v. State*, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998). Harris' prior appeals were not a direct appeal from the judgment of conviction. The timely filing date for a postconviction petition for a writ of habeas corpus was one year from the filing of the judgment of conviction on November 8, 2010, and Harris did not file the instant petition prior to that date.

Second, Harris argues the district court erred by failing to apply federal equitable tolling standards to his petition. However, the Nevada Supreme Court has rejected federal equitable tolling because the plain language of NRS 34.726 "requires a petitioner to demonstrate a legal excuse for any delay in filing a petition." *Brown v. McDaniel*, 130 Nev. ___, ___, 331 P.3d 867, 874 (2014).

Third, Harris argues he had good cause because his counsel delayed sending him a portion of his case file until March 2013, counsel improperly sent him another client's case file, and he has yet to receive his entire file. The Nevada Supreme Court has previously held that counsel's failure to send a petitioner his case files does not constitute good cause because it does not "prevent [the petitioner] from filing a timely petition."

Hood v. State, 111 Nev. 335, 338, 890 P.2d 797, 798 (1995); *see also Hathaway v. State*, 119 Nev. 248, 254 n.13 71 P.3d 503, 507 n.13 (2003) (stating “trial counsel’s failure to send a petitioner his or her file does not constitute good cause to excuse a procedural default.”).


Fourth, Harris argues he had good cause because he was denied access to the prison law library for three weeks in April 2013. Harris also asserted he had good cause because the prison was locked down for two weeks in May 2013 due to a stabbing incident. Harris does not allege how these incidents prevented him from complying with the procedural bars, and thus, makes only a bare claim. A bare claim, such as this one, is insufficient to demonstrate a petitioner is entitled to relief and Harris failed to demonstrate these incidents constituted an impediment external to the defense that prevented him from raising his claims in a timely manner. *See Hargrove v. State*, 100 Nev. 498, 502-03 686 P.2d 222, 225 (1984); *Hathaway*, 119 Nev. at 252-53 71 P.3d at 506.

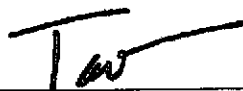
Fifth, Harris argues he would be prejudiced by imposition of the procedural bars because he is actually innocent. Harris did not demonstrate actual innocence because he failed to show “it is more likely than not that no reasonable juror would have convicted him in light of . . . new evidence.” *Calderon v. Thompson*, 523 U.S. 538, 559 (1998) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)); *see also Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001); *Mazzan v. Warden*, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).


Next, Harris argues the State waived application of the procedural bars because it filed an untimely opposition to Harris’ petition. “Application of the statutory procedural default rules to post-conviction habeas petitions is mandatory.” *State v. Eighth Judicial Dist. Court*

(*Riker*), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). In addition, a petitioner has the burden of pleading and proving facts to demonstrate good cause to excuse the delay. *State v. Haberstroh*, 119 Nev. 173, 181, 69 P.3d 676, 681 (2003). As application of the procedural bars is mandatory and Harris had the burden of demonstrating good cause, he fails to demonstrate that the district court should have waived the procedural bars due to an untimely opposition from the State. Therefore, the district court did not err in denying the petition as procedurally barred.

Having concluded Harris is not entitled to relief, we
ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Chief Judge, Eighth Judicial District Court
Hon. J. Charles Thompson, Senior Judge
Brandon Kale Harris
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk