

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

VICTORINO ELIZALDE-HERNANDEZ,  
Appellant,  
vs.  
BRIAN E. WILLIAMS, SR., WARDEN,  
Respondent.

No. 69084

**FILED**

OCT 19 2016

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
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; Kathleen E. Delaney, Judge.

Appellant Victorino Elizalde-Hernandez challenges the district court's determination that his petition was procedurally barred under NRS 34.726(1). Elizalde-Hernandez claims he established "good cause" to excuse his untimely petition by demonstrating the delay was caused by previous defense counsel's failure to send him his case file. And Elizalde-Hernandez argues he made numerous attempts to obtain his case file from counsel, without the file he could not provide the information required for filing his petition, and he would be prejudiced if his petition was not decided on the merits because he did not enter his guilty plea knowingly, voluntarily, or intelligently.

To establish good cause to excuse an untimely petition, a petitioner must demonstrate the delay was not his fault and he will be unduly prejudiced if the petition is dismissed. *State v. Huebler*, 128 Nev.

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192, 197, 275 P.3d 91, 94-95 (2012). A delay is not the petitioner's fault when an impediment external to the defense prevented him from complying with the procedural default rules, and a petitioner is unduly prejudiced when the alleged error works to his actual and substantial disadvantage. *Id.* at 197, 275 P.3d at 95. We review the district court's good cause determination de novo, giving deference to the court's factual findings if they are supported by substantial evidence and not clearly wrong. *Id.*


Here, the district court made the following findings: Elizalde-Hernandez's judgment of conviction was entered on October 13, 2010; he did not pursue a direct appeal; he made several oral requests to defense counsel for his file shortly after the judgment of conviction was entered; he made a written request for a portion of the file on April 27, 2012; he acknowledged receiving the file shortly after counsel sent it on January 9, 2014; he filed his habeas petition on May 14, 2014; and he asserted his inability to obtain his file provided good cause to overcome the procedural bar.


Our review of the record reveals the district court's factual findings are supported by substantial evidence and are not clearly wrong. We note the Nevada Supreme Court has previously held defense counsel's failure to send appellant his case files does not constitute good cause because it does "prevent appellant from filing a timely petition." *Hood v. State*, 111 Nev. 335, 338, 890 P.2d 797, 798 (1995); *see also Sullivan v. State*, 120 Nev. 537, 542 n.14, 96 P.3d 761, 765 n.14 (2004); *Hathaway v. State*, 119 Nev. 248, 254 n.13, 71 P.3d 503, 507 n.13 (2003). And we

conclude Elizalde-Hernandez failed to establish good cause to overcome the procedural bar. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

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

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

  
\_\_\_\_\_, J.  
Silver

cc: Hon. Kathleen E. Delaney, District Judge  
Jean J. Schwartzner  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk