

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JAMES JACI GINA, III,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 71340

FILED

AUG 15 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

James Jaci Gina, III, appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

Gina argues the district court erred in denying his petition as procedurally barred and declining to consider his underlying claim on the merits. Gina filed his petition¹ on March 25, 2016, more than one year after entry of the judgment of conviction on August 18, 2014. Thus, Gina's petition was untimely filed. *See* NRS 34.726(1). Gina's petition was procedurally barred absent a demonstration of good cause—cause for the delay and undue prejudice. *See id.*

¹Gina filed a motion for modification of sentence, but the district court construed the motion to be a postconviction petition for a writ of habeas corpus given the nature of Gina's claims.

Gina argued his mental health issues should excuse his seven-month delay. However, Gina's alleged mental health issues did not constitute an impediment external to the defense that prevented him from complying with the procedural time bar. *See Phelps v. Dir., Nev. Dep't of Prisons*, 104 Nev. 656, 660, 764 P.2d 1303, 1306 (1988) (holding 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 postconviction petition); *see also State v. Eighth Judicial Dist. Court (Riker)*, 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005) ("Application of the statutory procedural default rules to post-conviction habeas petitions is mandatory."). Therefore, we conclude the district court did not err in concluding Gina did not demonstrate cause for his delay.


As Gina had the burden to demonstrate both cause for the delay and undue prejudice sufficient to overcome the procedural time bar, we conclude the district court did not err by declining to consider the petition on the merits. *See NRS 34.726(1); Rubio v. State*, 124 Nev. 1032, 1046 & n.53, 194 P.3d 1224, 1233-34 & n.53 (2008) (noting a district court need not conduct an evidentiary hearing concerning claims that are

procedurally barred when the petitioner cannot overcome the procedural bars). Accordingly, we

ORDER the judgment of the district court AFFIRMED.²


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

²Gina also asserts the district court waived application of the procedural time bar by appointing postconviction counsel and should have also waived the application of the procedural time bar to consider the merits of the petition. However, the district court did not waive application of the procedural bars by appointing postconviction counsel and NRS 34.750(1) does not limit appointment of postconviction counsel to timely-filed petitions. *See Renteria-Novoa v. State*, 133 Nev. ___, ___, 391 P.3d 760, 762 (2017) (explaining appointment of postconviction counsel is not limited solely to petitions “that clearly have merit or would warrant an evidentiary hearing.”). As stated previously, application of the procedural bars is mandatory and the district court properly declined to consider the merits of Gina’s petition when it determined he did not demonstrate cause for his delay.

cc: Hon. Michael Villani, District Judge
Law Office of Nadine Morton
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk