

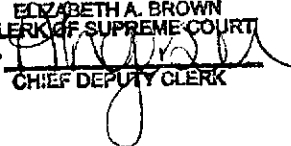
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOHN MICHAEL FARNUM,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 70570

FILED

SEP 13 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

John Michael Farnum appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Stefany Miley, Judge.

Farnum argues the district court erred in denying his petition as procedurally barred. Farnum filed his petition on January 25, 2016, more than nine years after issuance of the remittitur on direct appeal on October 6, 2006. *Farnum v. State*, Docket No. 45275 (Order Affirming in Part, Reversing in Part, and Remanding, September 11, 2006). Thus, Farnum's petition was untimely filed. See NRS 34.726(1). Moreover, Farnum'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 claims new and different from those raised in his previous petition.¹ See NRS 34.810(1)(b)(2); NRS 34.810(2). Farnum's petition was procedurally barred absent a demonstration of good cause and

¹*Farnum v. State*, Docket No. 60335 (Order of Affirmance, January 16, 2013).

actual prejudice. See NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3). Moreover, because the State specifically pleaded laches, Farnum was required to overcome the rebuttable presumption of prejudice. See NRS 34.800(2).

First, Farnum appeared to assert good cause due to his pursuit of relief in federal court and because he had to exhaust state court remedies in order to proceed in federal court. However, Farnum's pursuit of relief in federal court did not provide an impediment external to the defense that excused the procedural bars. See *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003); *Colley v. State*, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989), *abrogated by statute on other grounds as recognized by State v. Huebler*, 128 Nev. 192, 197-98 n.2, 275 P.3d 91, 95 n.2 (2012).

Second, Farnum appeared to argue he had good cause due to the ineffective assistance of trial and appellate counsel. However, Farnum's claims of ineffective assistance of trial and appellate counsel were procedurally barred because they were reasonably available to be raised in Farnum's first petition, and therefore, cannot constitute cause for additional procedurally barred claims. See *Hathaway*, 119 Nev. at 252, 71 P.3d at 506 ("[I]n order to constitute adequate cause, the ineffective assistance of counsel claim itself must not be procedurally barred.").

Third, Farnum argued he had good cause to re-raise claims because the Nevada Supreme Court enforced the briefing page limits contained in the Nevada Rules of Appellate Procedure during the appellate proceedings concerning his prior postconviction petition. See NRAP 32(7)(A)(i). Farnum asserted the page limitation forced him to abandon claims during the prior appellate proceeding and forced him to file a

successive petition in order to re-raise and exhaust state court remedies for those claims. Preliminarily, Farnum did not provide any authority supporting the proposition that limitations on pages for appellate briefs can provide good cause to re-raise claims in a later postconviction petition, and accordingly, Farnum failed to demonstrate briefing page limitations constitute good cause. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (explaining it is the appellant's responsibility to present relevant authority and cogent argument).

Additionally, we note during the appellate proceedings concerning Farnum's previous petition, the Nevada Supreme Court rejected Farnum's original 70-page opening brief because he did not show diligence in complying with the 30-page-limit rule, noting the conclusion of the proposed opening brief spanned approximately 14 pages. The Nevada Supreme Court informed Farnum he could again request leave to file an opening brief that exceeded the page limit "upon a showing of good cause and diligence." *Farnum v. State*, Docket No. 60335 (Order Denying Motion, August 10, 2012). Farnum made no further requests to file an opening brief with excess pages, but rather filed an opening brief in compliance with the Nevada Rules of Appellate Procedure. As Farnum specifically had the opportunity to demonstrate why he needed to file an opening brief containing excess pages, yet did not avail himself of the opportunity to provide such an explanation, the rule of appellate procedure regarding page limits for opening briefs did not constitute an impediment external to the

defense that excused the procedural bars.² See *Murray v. Carrier*, 477 U.S. 478, 488 (1986) (explaining good cause can be demonstrated when “the prisoner can show that some objective factor external to the defense impeded counsel’s efforts to comply with the State’s procedural rule.”).

Next, in his reply brief Farnum argues the procedural bars do not apply because he is actually innocent as his trial counsel failed to investigate, present evidence, and pursue a viable defense at trial. Farnum also argues the procedural bars are unconstitutional. However, Farnum did not raise these issues in his opening brief, and we decline to consider these issues because a reply brief is limited to answering new matters set forth in the answering brief.³ See NRAP 28(c); *Bongiovi v. Sullivan*, 122 Nev. 556, 569 n.5, 138 P.3d 433, 443 n.5 (2006).


²The denial of Farnum’s first petition was originally reversed and remanded by the Nevada Supreme Court in order for the district court to conduct an evidentiary hearing. *Farnum v. State*, Docket No. 53753 (Order Affirming in Part, Reversing in Part, and Remanding, March 17, 2011). In that appeal, the Nevada Supreme Court also rejected Farnum’s opening brief due to excess pages, noting Farnum sought to file an opening brief three times longer than permitted in a death penalty appeal. *Farnum v. State*, Docket No. 53753 (Order Denying Motion, October 2, 2009). To the extent Farnum asserted the refusal to permit him to file the original opening brief during the proceeding in Docket No. 53753 constituted good cause, Farnum did not demonstrate his failure to concisely state his issues amounted to an impediment external to the defense that prevented him from complying with the procedural bars. See *Hathaway*, 119 Nev. at 252, 71 P.3d at 506.

³As a separate and independent ground for denying relief, Farnum did not argue the procedural bars were unconstitutional before the district court and we decline to consider this issue in the first instance on appeal. See *McNelson v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999).

Finally, Farnum failed to overcome the rebuttable presumption of prejudice to the State because he did not demonstrate he suffered from a fundamental miscarriage of justice. See NRS 34.800(1)(b). 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.


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Stefany Miley, District Judge
Law Office of Michael H. Schwarz
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk