

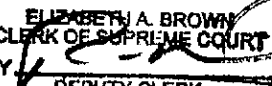
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KEVIN ANTOINE BANKS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 73741

**FILED**

AUG 14 2018

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Kevin Antoine Banks appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on March 7, 2017.<sup>1</sup> Eighth Judicial District Court, Clark County; Douglas Smith, Judge.

Banks filed his petition nearly three years after issuance of the remittitur on direct appeal on March 11, 2014. *See Banks v. State*, Docket No. 62533 (Order of Affirmance, February 13, 2014). Banks' petition was therefore untimely filed. *See* NRS 34.726(1). Banks' petition was also successive insofar as his challenge to the voir dire procedure could have been raised in his direct appeal, *see* NRS 34.810(1)(b)(2), and it was abusive

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

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insofar as he raised a new claim not raised in his previous petition,<sup>2</sup> see NRS 34.810(2). Banks' petition was therefore 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).

Banks' underlying substantive claim challenged the district court's failure to swear in prospective jurors prior to voir dire. Banks claimed the Nevada Supreme Court opinion in *Barral v. State* provided good cause to reach the merits of this claim because the court held, as a matter of first impression, that such a failure is structural error. 131 Nev. 520, 524, 525, 353 P.3d 1197, 1199, 1200 (2015). Banks failed to demonstrate good cause because he raised his claim nearly two years after the decision in *Barral*, which was an unreasonable delay. See *Hathaway v. State*, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003) (holding good-cause claims cannot themselves be procedurally defaulted). Further, Banks did not attempt to demonstrate prejudice to overcome the procedural bar. See *Weaver v. Massachusetts*, 582 U.S. \_\_\_, \_\_\_, 137 S. Ct. 1899, 1910 (2017) (indicating structural errors warrant automatic reversal only when the issue was preserved at trial and raised on direct appeal).


Banks also claimed he was actually innocent. Banks' bare claim failed to show "it is more likely than not that no reasonable juror would

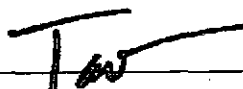
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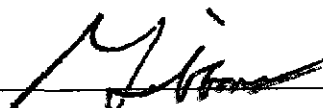
<sup>2</sup>See *Banks v. State*, Docket No. 68237 (Order of Affirmance, November 13, 2015).

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). We therefore conclude the district court did not err by denying Banks’ petition as procedurally barred, and we

ORDER the judgment of the district court AFFIRMED.<sup>3</sup>

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

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

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

cc: Hon. Douglas Smith, District Judge  
Kevin Antoine Banks  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk

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<sup>3</sup>We conclude the district court did not abuse its discretion by declining to appoint postconviction counsel. See NRS 34.750(1); *Renteria-Novoa v. State*, 133 Nev. \_\_\_, \_\_\_, 391 P.3d 760, 760-61 (2017).