

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DAMIAN MICHAEL GONZALEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 69808

FILED

DEC 28 2016

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

ORDER OF AFFIRMANCE


Appellant Damian Gonzalez appeals from a district court order denying his postconviction petition for a writ of habeas corpus filed on April 20, 2015. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.


Gonzalez filed his petition on April 20, 2015, nearly three years after issuance of the remittitur on direct appeal on July 10, 2012. *Gonzales v. State*, Docket No. 57811 (Order of Affirmance, June 14, 2012). Thus, Gonzalez' petition was untimely filed. *See* NRS 34.726(1). Gonzalez' petition was procedurally barred absent a demonstration of good cause—cause for the delay and undue prejudice. *See id.*

Gonzalez argues the district court erred by denying his petition as procedurally barred because he is actually innocent. Gonzalez raised his claim for the first time in his reply to the State's response to his supplemental petition. This did not give the State an opportunity to respond to his claim below and the district court did not address this claim in its order. We conclude the district court did not err by not considering

this claim in its order denying the petition.¹ See *Barnhart v. State*, 122 Nev. 301, 130 P.3d 650 (2006) (the district court should only consider issues pleaded in the petition or supplemental petition to which the State has had an opportunity to respond). Because Gonzalez does not otherwise challenge the district court's determination that he failed to demonstrate good cause to overcome the procedural bar, we conclude Gonzalez has failed to demonstrate the district court erred by denying the petition as procedurally barred. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

¹We note Gonzalez failed to support his actual innocence claim with specific and new evidence that, if true, would entitle him to relief. See *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984); *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); *Berry v. State*, 131 Nev. ___, ___, 363 P.3d 1148, 1154 (2015).

cc: Hon. Valerie Adair, District Judge
Terrence M. Jackson
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk