

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DAVID JAMES GALINDO-CLOUD,
Appellant,
vs.
ISIDRO BACA, WARDEN,
Respondent.

No. 78493-COA

FILED

DEC 27 2019

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

ORDER OF AFFIRMANCE

David James Galindo-Cloud appeals from an order of the district court dismissing a postconviction petition for a writ of habeas corpus filed on December 13, 2018. Second Judicial District Court, Washoe County; Elliott A. Sattler, Judge.

Galindo-Cloud filed his petition more than seven years after entry of the judgment of conviction on September 9, 2011. No direct appeal was taken. Galindo-Cloud's petition was therefore untimely filed and procedurally barred absent a demonstration of good cause—cause for the delay and undue prejudice, *see* NRS 34.726(1), or that he was actually innocent such that it would result in a fundamental miscarriage of justice were his claims not decided on the merits, *see Berry v. State*, 131 Nev. 957, 966, 363 P.3d 1148, 1154 (2015).¹

¹Galindo-Cloud's probation was revoked pursuant to an order filed December 2, 2014. This court affirmed the revocation and issued the remittitur on July 13, 2015. *See Galindo-Cloud v. State*, Docket No. 67152-COA (Order of Affirmance, June 16, 2015). Galindo-Cloud's petition was also untimely from this decision.

Galindo-Cloud was convicted, pursuant to a guilty plea, of trafficking in methamphetamine. He argued he had good cause to overcome the procedural bars because he was unaware Nevada's State Board of Pharmacy (Board) improperly listed methamphetamine as a schedule I substance rather than in accord with federal regulations as a schedule II substance. Good cause must be "an impediment external to the defense" that prevented him from complying with the time bar. *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). And "a claim or allegation that was reasonably available to the petitioner during the statutory time period would not constitute good cause to excuse the delay." *Id.* at 253, 71 P.3d at 506.

Galindo-Cloud's ignorance of an alleged discrepancy in how methamphetamine is scheduled was not an impediment external to the defense and thus could not demonstrate good cause. *See Phelps v. Dir., Nev. Dep't of Prisons*, 104 Nev. 656, 660, 764 P.2d 1303, 1306 (1988). Further, contrary to Galindo-Cloud's claim, nothing in NRS 453.146 required the Board to adopt the same scheduling of controlled substances as the federal government does. We therefore conclude Galindo-Cloud failed to demonstrate he had good cause to overcome his procedural defect.

Next, Galindo-Cloud argued he was actually innocent such that a failure to consider his claims on the merits would result in a fundamental miscarriage of justice. "[A]ctual innocence' means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623 (1998). Galindo-Cloud did not dispute that he was trafficking in methamphetamine; he challenged only the schedule on which methamphetamine was listed. Galindo-Cloud's argument was of legal insufficiency, not factual innocence. Further, as indicated above, his claim


lacked merit. We therefore conclude Galindo-Cloud failed to demonstrate he was actually innocent.

Finally, the district court denied Galindo-Cloud's motion to appoint postconviction counsel. The issues Galindo-Cloud presented were not difficult, he appeared able to comprehend the proceedings, and it does not appear counsel was necessary to proceed with any discovery. We therefore conclude the district court did not abuse its discretion by denying Galindo-Cloud's motion for the appointment of postconviction counsel. See NRS 34.750(1); see generally *Renteria-Novoa v. State*, 133 Nev. 75, 391 P.3d 760 (2017).

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Elliott A. Sattler, District Judge
David James Galindo-Cloud
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk