

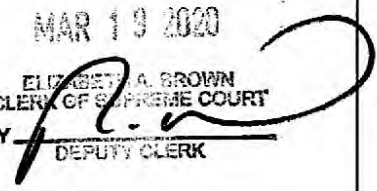
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CHARLIE MUNA CABRERA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 78686-COA

FILED

MAR 19 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Charlie Muna Cabrera appeals from an order of the district court denying a motion to withdraw his guilty plea. Eighth Judicial District Court, Clark County; Tierra Danielle Jones, Judge.

Cabrera filed his motion on February 19, 2019, and the district court construed the motion as a postconviction petition for a writ of habeas corpus. Cabrera's motion was filed more than seven years after entry of the judgment of conviction on September 14, 2011. Thus, Cabrera's motion was untimely filed. *See* NRS 34.726(1). Moreover, Cabrera's motion was successive because he had previously filed two postconviction petitions 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 petitions.¹ *See* NRS 34.810(2). Cabrera's motion was procedurally barred absent a demonstration of good cause and actual prejudice. *See* NRS 34.726(1); NRS 34.810(3).

¹*Cabrera v. State*, Docket No. 67759 (Order of Affirmance, November 12, 2015); *Cabrera v. State*, Docket No. 61114 (Order of Affirmance, April 10, 2013).

First, Cabrera claimed the procedural bars contained within NRS Chapter 34 should not apply to a motion to withdraw guilty plea because such a motion is incident to the trial proceedings. However, the Nevada Supreme Court has already considered this issue and concluded a postconviction petition for a writ of habeas corpus is the exclusive remedy to challenge the validity of a guilty plea after sentencing. *See Harris v. State*, 130 Nev. 435, 448-49, 329 P.3d 619, 628 (2014). Therefore, the district court properly construed Cabrera's motion as a postconviction petition for a writ of habeas corpus. *See id.* Moreover, "[a]pplication of the statutory procedural default rules to postconviction habeas petitions is mandatory," *see State v. Eighth Judicial Dist. Court (Riker)*, 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005), and, therefore, the procedural bars apply to Cabrera's motion.

Second, Cabrera claimed he had good cause because his counsel failed to pursue a direct appeal after entry of his guilty plea. However, procedurally barred claims of ineffective assistance of counsel cannot constitute cause for raising additional claims of ineffective assistance of counsel and Cabrera did not demonstrate an impediment external to the defense prevented him from raising this claim in a timely manner. *See Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). Therefore, Cabrera was not entitled to relief based upon this issue.


Next, Cabrera argues the district court erred by conducting a hearing outside of his presence. A criminal defendant does not have an unlimited right to be present at every proceeding. *See Gallego v. State*, 117 Nev. 348, 367-68, 23 P.3d 227, 240 (2001), *abrogated on other grounds by Nunnery v. State*, 127 Nev. 749, 776 n.12, 263 P.3d 235, 253 n.12 (2011). A "defendant must show that he was prejudiced by the absence." *Kirksey v.*

State, 112 Nev. 980, 1000, 923 P.2d 1102, 1115 (1996). The record indicates the hearing at issue was not an evidentiary hearing, no testimony was presented, and the district court merely directed the State to prepare an order denying the petition. *Cf. Gebers v. State*, 118 Nev. 500, 504, 50 P.3d 1092, 1094-95 (2002) (concluding a petitioner's statutory rights were violated when she was not present at hearing where testimony and evidence were presented). Cabrera does not demonstrate he was prejudiced by his absence from the relevant hearing. Accordingly, we conclude the district court did not err in this regard.

Next, Cabrera argues the district court erred by denying the petition without appointing postconviction counsel. The appointment of counsel in this matter was discretionary. *See* NRS 34.750(1). A review of the record reveals the issues in this matter were not difficult, Cabrera was able to comprehend the proceedings, and discovery with the aid of counsel was not necessary. *See id.* Therefore, Cabrera fails to demonstrate the district court abused its discretion by declining to appoint postconviction counsel. *See Renteria-Novoa v. State*, 133 Nev. 75, 76, 391 P.3d 760, 760-61 (2017). Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Tierra Danielle Jones, District Judge
Charlie Muna Cabrera
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk