

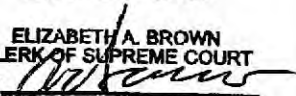
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JUAN GIRON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 80770-COA

FILED

OCT 23 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Juan Giron appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Cristina D. Silva, Judge.

Giron argues the district court erred by denying his petition without conducting an evidentiary hearing. Giron filed his petition on November 4, 2019, more than six years after entry of the judgment of conviction on March 19, 2013.¹ Thus, Giron's petition was untimely filed. *See* NRS 34.726(1). Moreover, Giron's petition was successive because he had previously filed a postconviction petition for a writ of habeas corpus that was decided on the merits, and it constituted an abuse of the writ as he raised claims new and different from those raised in his previous petitions.² *See* NRS 34.810(2). Giron's petition was procedurally barred absent a demonstration of good cause and actual prejudice, *see* NRS 34.726(1); NRS 34.810(3), or that he was actually innocent such that it would result in a fundamental miscarriage of justice were his claims not

¹Giron did not pursue a direct appeal.

²Giron filed postconviction petitions for a writ of habeas corpus in the district court on October 10, 2013, and on March 20, 2014. Giron did not appeal from the district court's denial of either petition.

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decided on the merits, *see Berry v. State*, 131 Nev. 957, 966, 363 P.3d 1148, 1154 (2015). Further, because the State specifically pleaded laches, Giron was required to overcome the rebuttable presumption of prejudice to the State. *See* NRS 34.800(2).

First, Giron appeared to assert that he had good cause because he has a learning disability and lacked access to legal assistance. However, those issues did not demonstrate that an impediment external to the defense prevented Giron from raising his underlying claims at an earlier time. *See Phelps v. Dir., Nev. Dep't of Prisons*, 104 Nev. 656, 660, 764 P.2d 1303, 1306 (1988), *superseded by statute on other grounds as stated in State v. Haberstroh*, 119 Nev. 173, 181, 69 P.3d 676, 681 (2003). Therefore, we conclude the district court did not err by denying the petition as procedurally barred without conducting an evidentiary hearing. *See Rubio v. State*, 124 Nev. 1032, 1046 n.53, 194 P.3d 1224, 1234 n.53 (2008) (noting a district court need not conduct an evidentiary hearing concerning claims that are procedurally barred when the petitioner cannot overcome the procedural bars).³

Second, Giron appeared to claim in his petition that the procedural bars did not apply because he was actually innocent of lewdness with a minor under the age of 14. Giron contended that his statements during an interview with the police showed that the victim initiated the sexual encounter and he told her to stop. Giron also appeared to contend that there was no physical evidence to support the victim's version of events. Giron did not demonstrate actual innocence because he failed to show that

³Giron argues on appeal that he has good cause because he retained attorneys to pursue postconviction petitions on his behalf but those attorneys failed to do so. However, Giron did not raise this good-cause claim in his petition, and we decline to consider it in the first instance on appeal. *See McNelton v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999).

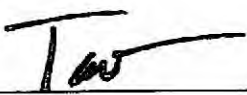
“it is more likely than not that no reasonable juror would have convicted him in light of . . . new evidence.” *Calderon v. Thompson*, 523 U.S. 538, 559 (1998) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)); see also *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001), *abrogated on other grounds by Ripppo v. State*, 134 Nev. 411, 423 n.12, 423 P.3d 1084, 1097 n.12 (2018). We therefore conclude the district court did not err by denying Giron’s petition without conducting an evidentiary hearing. See *Berry*, 131 Nev. at 968, 363 P.3d at 1155.

Giron also failed to overcome the presumption of prejudice to the State. See NRS 34.800(2). Therefore, we conclude the district court did not err by denying the petition as procedurally barred.

Finally, Giron argues the district court erred by denying his request for the appointment of postconviction counsel. NRS 34.750(1) provides for the discretionary appointment of postconviction counsel if the petitioner is indigent and the petition is not summarily dismissed. Here, the district court found the petition was procedurally barred pursuant to NRS 34.810(2) and declined to appoint counsel. Because the petition was subject to summary dismissal, see NRS 34.745(4), we conclude the district court did not abuse its discretion by declining to appoint counsel. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Cristina D. Silva, District Judge
Juan Giron
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk