

IN THE SUPREME COURT OF THE STATE OF NEVADA

TYREND MATTHEW GOINS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 38634

**FILED**

**MAR 12 2002**

JANEITE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Richards*  
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant Tyrend Matthew Goins' post-conviction petition for a writ of habeas corpus.

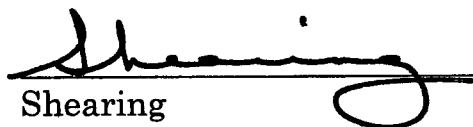
The district court dismissed the petition, finding that Goins had failed to show good cause to excuse his procedural default. Goins has not demonstrated that the district court's factual findings are not supported by substantial evidence or that the district court erred as a matter of law.<sup>1</sup>

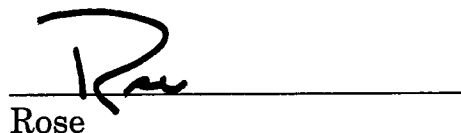
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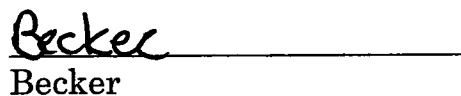
<sup>1</sup>See id.

Accordingly, for the reasons stated in the attached order of the district court, we

ORDER the judgment of the district court AFFIRMED.

 J.  
Shearing

 J.  
Rose

 J.  
Becker

cc: Hon. Connie J. Steinheimer, District Judge  
Attorney General/Carson City  
Washoe County District Attorney  
Mary Lou Wilson  
Washoe District Court Clerk

FILED

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AMY W. CLERK

BY P. Meacham

CLERK

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6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
7 IN AND FOR THE COUNTY OF WASHOE

8 \* \* \*

9 TYREND MATTHEW GOINS,

10 Petitioner,

11 v.

Case No. CR97P2548

12 THE STATE OF NEVADA,

Dept. No. 4

13 Respondent.  
14 \_\_\_\_\_ /

15 ORDER DISMISSING PETITION FOR WRIT OF HABEAS CORPUS  
16 (POST-CONVICTION)

17 This cause is before the court upon the State's Renewed  
18 Motion to Dismiss Petition for Writ of Habeas Corpus (Post-  
19 Conviction). The records of this court reveal that petitioner  
20 Goins pleaded guilty and was convicted of first degree murder and  
21 first degree arson in September, 1998. He did not appeal in a  
22 timely fashion. A later attempt to appeal resulted in a  
23 dismissal for lack of jurisdiction. Goins v. State, Docket No.  
24 34354, Order Dismissing Appeal (July 14, 1999).

25 Goins then filed a document that the court treated as a  
26 Petition for Writ of Habeas Corpus (Post-Conviction) on August

1 19, 1999. This court appointed attorney Karla Butko to represent  
2 petitioner.

3 On September 23, 1999, attorney Butko and counsel for  
4 the State filed a stipulation to dismiss the petition. That  
5 stipulation was supported by a letter from Goins to his attorney  
6 directing her to dismiss the action. This court then dismissed  
7 the petition.

8 Subsequently, the court received hand written  
9 correspondence from Goins. The court then appointed Mary Lou  
10 Wilson to represent petitioner. Ms. Wilson filed a "Second  
11 Supplement" to the petition on April 26, 2001, two and one-half  
12 years after entry of the conviction. The State then moved to  
13 dismiss. The State asserted alternatively that 1) the attempt to  
14 supplement was inappropriate because the cause had been  
15 dismissed, or 2) that if the second supplement were to be treated  
16 as a petition for writ of habeas corpus, it should be dismissed  
17 as being abusive and untimely filed. That motion was originally  
18 denied with leave to renew it.

19 The State then filed its "renewed" motion. Goins  
20 opposed that motion through counsel. Upon consideration of the  
21 pleadings and the records of this court, the court finds that the  
22 cause must be dismissed.

23 To the extent that the Second Supplement is to be taken  
24 literally, as a supplement to the first petition, it is a  
25 fugitive pleading. That first petition was dismissed. The  
26 dismissal was a final, appealable judgment. Once it was reduced

1 to writing, signed by the judge and entered by the clerk, it  
2 became final. At that moment it became appealable but it also  
3 became no longer subject to reconsideration. See Tener v.  
4 Babcock, 97 Nev. 369, 632 P.2d 1140 (1981). Thus, there was no  
5 petition pending which could be supplemented.

6 To the extent that the Second Supplement could be  
7 treated as a petition for writ of habeas corpus, the court finds  
8 that it is abusive, successive and untimely. The only  
9 explanations given to excuse the unusual procedure do not serve  
10 to excuse the procedural defaults.<sup>1</sup>

11 Goins' current counsel asserts that Goins directed Ms.  
12 Butko to dismiss the first petition because he accepted her  
13 advice. While one might infer that he is asserting that Ms.  
14 Butko rendered ineffective assistance of counsel, the court notes  
15 that Goins had no right to the effective assistance of his first  
16 post-conviction counsel. McKague v. Warden, 112 Nev. 159, 912  
17 P.2d 255 (1996).

18 In responding to the renewed motion to dismiss, counsel  
19 suggested that the dismissal of the original petition may have  
20 been the product of "fear, confusion, ignorance and possible  
21 incompetence of Mr. Goins." A procedural default caused by fear,  
22 confusion and ignorance is not an excusable default. The State  
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24 <sup>1</sup>NRS 34.726 provides that a petition must be filed within one  
25 year of the conviction. In addition, any claim that was or could  
26 have been raised in any prior proceeding is barred. Franklin v.  
State, 110 Nev. 750, 877 P.2d 1058 (1994). The exception to both  
requires petitioner to show good cause and prejudice.

1 need not show that the petitioner knowingly and voluntarily  
2 abandoned claims. Instead, it is the petitioner's burden to  
3 demonstrate some external impediment that made it impossible for  
4 him to comply with the relevant procedural rules. Lozada v.  
5 State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994). The alleged  
6 fear, confusion and ignorance do not constitute external  
7 impediments that prevented Goins from pursuing all possible  
8 claims in a timely petition.

9 Counsel also suggested that she had concerns about  
10 Goins' competency. In Ford v. Warden, 111 Nev. 872, 881, 901  
11 P.2d 123, 128 (1995), the court suggested that incompetency might  
12 excuse a default, but only if the incompetency existed at the  
13 time of the default, and that the incompetency itself caused the  
14 failure to comply with the procedural rules. Even then, noted  
15 the court, the petitioner must bear the burden of referring to  
16 specific evidence tending to show that at the time of the default  
17 the petitioner was incompetent and that his incompetence caused  
18 the default. Here, counsel has expressed a general concern that  
19 Goins now demonstrates a low intelligence (as he did when he was  
20 found competent to plead or stand trial) and a lack of  
21 independent thought (as noted by Dr. Dickson in a report opining  
22 that Goins was competent to plead or stand trial). In addition,  
23 in responding to the renewed motion to dismiss, counsel provided  
24 this court with the name and telephone number of a psychologist  
25 "who may lend some insight into Mr. Goins' mental and  
26 intellectual functioning." Inviting the court to conduct its own

1 investigation hardly meets the burden of pleading described in  
2 Ford.

3           The initial stipulation to dismiss included a letter  
4 written by Goins instructing Ms. Butko to inform the court that  
5 he no longer wished to go back to court. Counsel has cited to  
6 nothing specific that would lead this court to conclude that  
7 Goins was unable to decide to not write that letter. In the  
8 letter he indicates that he may get lucky on his first board,  
9 thus indicating he is aware of his circumstances, aware that his  
10 sentence allows for the possibility of parole and aware of his  
11 choices.

12           Goins may well be pliable, but there is nothing in the  
13 record leading the court to believe that the decision to dismiss  
14 the first petition was not his own decision. There is no  
15 allegation or evidence that someone exercised such dominion over  
16 him to compel him to write that letter. On the contrary, it  
17 appears he sat down and purposefully wrote a letter to his  
18 attorney and purposefully chose to instruct the attorney to  
19 discontinue the litigation. Ms. Butko indicated in the  
20 stipulation to dismiss that after receipt of the letter she fully  
21 explained the available options to Goins but that he insisted  
22 that he did not wish to go forward.

23           The court finds that Goins has failed to adequately  
24 plead any reason to allow a second or untimely petition.

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1 Accordingly, the Petition for Writ of Habeas Corpus denominated  
2 as the "Second Supplement to the Petition for Writ of Habeas  
3 Corpus" is dismissed.

4 DATED this 4 day of October, 2001.

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6 Connie J. Steinheimer  
7 DISTRICT JUDGE  
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