

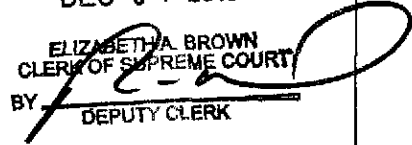
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOHN BENJAMIN KURKOWSKI,
Appellant,
vs.
D. W. NEVEN, WARDEN,
Respondent.

No. 74160-COA

FILED

DEC 04 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

John Benjamin Kurkowski appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on October 1, 2012. Fourth Judicial District Court, Elko County; Nancy L. Porter, Judge.


In his petition below, Kurkowski sought either a withdrawal of his guilty plea or a modification of his sentence on the ground that the State breached the guilty plea agreement. Kurkowski claimed the State did so by refusing to require the Nevada Department of Corrections to release Kurkowski to federal custody when he began to serve his final sentence. The district court denied Kurkowski's petition, finding the State did not breach the plea agreement.

On appeal, Kurkowski contends his plea bargain should be rescinded because his guilty plea was void due to a mutual mistake of fact. This argument was not raised in Kurkowski's petition and was not properly before the district court below. *See Barnhart v. State*, 122 Nev. 301, 303-04, 130 P.3d 650, 651-52 (2006). We therefore decline to consider this argument on appeal. *See McNelton v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999). And for this reason, we do not reach whether the district

court properly concluded that Kurkowski demonstrated cause for the delay in filing his petition, *see* NRS 34.726(1), or overcame the presumption of prejudice to the State, *see* NRS 34.800(2). Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Nancy L. Porter, District Judge
Lockie & Macfarlan, Ltd.
Attorney General/Carson City
Elko County District Attorney
Elko County Clerk