

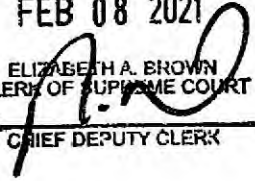
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOSE VASALLO-ALVAREZ, A/K/A  
JOSE ALVAREZ VASALLO,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 80058-COA

FILED

FEB 08 2021

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
CHIEF DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Jose Vasallo-Alvarez appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus and later-filed supplement. Eighth Judicial District Court, Clark County; Joseph T. Bonaventure, Senior Judge.

First, Vasallo-Alvarez argues the district court erred by denying his challenge to the validity of his *Alford*<sup>1</sup> plea without conducting an evidentiary hearing. Vasallo-Alvarez filed his petition on July 26, 2018, more than three years after entry of the judgment of conviction on June 17, 2015. Thus, Vasallo-Alvarez's petition was untimely filed. See NRS 34.726(1). Vasallo-Alvarez's petition was procedurally barred absent a demonstration of good cause—cause for the delay and undue prejudice. See *id.*

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<sup>1</sup>See *North Carolina v. Alford*, 400 U.S. 25 (1970).

Vasallo-Alvarez claimed his plea was not knowingly entered because he did not understand that the sentencing court did not have to impose the stipulated sentence that was agreed to by the parties in the written plea agreement. This claim was reasonably available to be raised in a timely filed petition, and Vasallo-Alvarez did not demonstrate an impediment external to the defense prevented him from doing so.<sup>2</sup> *Hathaway v. State*, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003). Therefore, this claim is procedurally barred, and the district court properly denied this claim without conducting an evidentiary hearing. *See Rubio v. State*, 124 Nev. 1032, 1046 n.53, 194 P.3d 1224, 1234 n.53 (2008) (“The court may also reject a substantive post-conviction claim without an evidentiary hearing when the claim is procedurally barred and the defendant cannot overcome the procedural bar.”)

Second, Vasallo-Alvarez argues the district court erred by denying his challenge to the revocation of his probation without conducting an evidentiary hearing. Because Vasallo-Alvarez raised this challenge within one year of the entry of the order revoking probation, he had good

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<sup>2</sup>Vasallo-Alvarez argues in his reply brief that he has cause for his delay due to a language barrier because he does not speak English. However, Vasallo-Alvarez did not raise this good-cause claim in his petition, and we decline to consider it on appeal in the first instance. *See McNelton v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999). Moreover, reply briefs are limited to answering new matters set forth in the answering brief. *See* NRAP 28(c); *Bongiovi v. Sullivan*, 122 Nev. 556, 569 n.5, 138 P.3d 433, 443 n.5 (2006).

cause to overcome the procedural time bar. *See Sullivan v. State*, 120 Nev. 537, 541, 96 P.3d 761, 764 (2004).

Vasallo-Alvarez claimed his counsel was ineffective during the 2017 probation revocation proceedings. However, “[w]here there is no right to counsel there can be no deprivation of effective assistance of counsel.” *McKague v. Warden*, 112 Nev. 159, 164-65, 912 P.2d 255, 258 (1996). There is no absolute right to counsel at a probation revocation hearing. *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973). The need for counsel at a probation revocation proceeding is made on a case-by-case basis. *Id.*; *see Fairchild v. Warden*, 89 Nev. 524, 525, 516 P.2d 106, 107 (1973) (adopting the approach set forth in *Gagnon*). Counsel is constitutionally required if the probationer makes a colorable claim (1) that he did not commit the alleged violations or (2) that there are justifying or mitigating circumstances which make revocation inappropriate and these circumstances are difficult or complex to develop or present. *Gagnon*, 411 U.S. at 790.

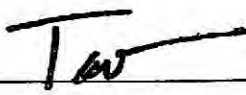
Vasallo-Alvarez stipulated that he violated his probation. In mitigation, Vasallo-Alvarez asserted that he had a good job and that he had been trying to comply with his probationary conditions. Vasallo-Alvarez did not demonstrate there were any mitigating circumstances in this matter that were difficult or complex to develop or present. He thus failed to demonstrate he had the right to counsel for the probation revocation proceedings. And because Vasallo-Alvarez failed to demonstrate he had the right to counsel for those proceedings, he could not demonstrate he was entitled to relief due to the ineffective assistance of counsel. We therefore

conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Finally, Vasallo-Alvarez argues he was entitled to relief due to the cumulative effect of counsel's errors. However, there was nothing to cumulate because Vasallo-Alvarez failed to demonstrate any errors. Therefore, the district court did not err by denying this claim. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Bulla

cc: Chief Judge, Eighth Judicial District Court  
Hon. Joseph T. Bonaventure, Senior Judge  
Zaman & Trippiedi, PLLC  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk