

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KEVIN ANTOINE BANKS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 86395-COA

FILED

JAN 30 2024

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

ORDER OF AFFIRMANCE

Kevin Antoine Banks appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on January 18, 2023. Eighth Judicial District Court, Clark County; Carli Lynn Kierny, Judge.

Banks filed his petition more than eight years after issuance of the remittitur on direct appeal on March 11, 2014. *See Banks v. State*, No. 62533, 2014 WL 586388 (Nev. Feb. 13, 2014) (Order of Affirmance). Thus, Banks' petition was untimely filed. *See* NRS 34.726(1). Moreover, Banks' petition was successive because he had previously litigated 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(1)(b)(2); NRS 34.810(3).² Banks'


¹*See Banks v. State*, No. 73741, 2018 WL 4190967 (Nev. Ct. App. Aug. 14, 2018) (Order of Affirmance); *Banks v. State*, No. 68237, 2015 WL 7283067 (Nev. Nov. 13, 2015) (Order of Affirmance).

²The subsections within NRS 34.810 were recently renumbered. We note the substance of the subsections cited herein was not altered. *See* A.B. 49, 82d Leg. (Nev. 2023).

petition was procedurally barred absent a demonstration of good cause and actual prejudice. See NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(4).

On appeal, Banks contends only that the district court erred by failing to address his claims of structural error because structural errors are not subject to the procedural bars. Banks did not make this argument below, and we need not consider it on appeal in the first instance. See *McNelson v. State*, 115 Nev. 396, 415-16, 990 P.2d 1263, 1275-76 (1999). Nevertheless, we note that the application of the procedural bars is mandatory. See *State v. Eighth Jud. Dist. Ct. (Riker)*, 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). And asserting an error constitutes structural error does not relieve Banks of his burden to show good cause and prejudice to overcome the procedural bars. See *Thornburg v. Mullin*, 422 F.3d 1113, 1141 (10th Cir. 2005) (“[E]ven structural errors are subject to state procedural bars.”). Therefore, we conclude the district court did not err by denying Banks’ petition as procedurally barred, and we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

cc: Hon. Carli Lynn Kierny, District Judge
Kevin Antoine Banks
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk