IN THE SUPREME COURT OF THE STATE OF NEVADA

ENOMA UYG IGBINOVIA,
Appellant,
vs.
WARDEN, HIGH DESERT STATE PRISON, J. M. SCHOMIG,
Respondent.

No. 46072

FILED

APR 21 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

Appellant Enoma Igbinovia was found guilty, pursuant to a jury trial of multiple counts. Igbinovia filed a direct appeal that was dismissed by this court.[1] The remittitur was issued on June 29, 1999. Igbinovia raises four issues on appeal.

First, Igbinovia contends the district court abused its discretion by denying the petition as time barred and not holding an evidentiary hearing regarding his purported new evidence. Igbinovia filed his habeas petition almost six years after remittitur issued.[2] The State filed a motion to dismiss the petition as untimely and pleaded laches.

[1]Igbinovia v. State, Docket No. 32572 (May 13, 1999).

[2]See NRS 34.726(1).

06-08442

Because the State pleaded laches, Igbinovia was required to overcome the presumption of prejudice to the State.[3] In an effort to overcome this presumption, Igbinovia asserts that the State's pleading of laches was "a naked assertion." In light of this conclusory statement, we cannot say that the district court abused its discretion in its determination that Igbinovia failed to overcome the procedural defaults.

Second, Igbinovia contends the district court abused its discretion by determining that the alleged new evidence would not establish a reasonable probability that the outcome of the trial would have been different. A petitioner may be entitled to a review of defaulted claims if failure to review the claims would result in a fundamental miscarriage of justice,[4] i.e., where a constitutional violation has probably resulted in the conviction of someone who is actually innocent.[5] This requires a petitioner to show that "'it is more likely than not that no

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[3]See NRS 34.800(2).

[4]Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

[5]See Bousley v. U.S., 523 U.S. 614, 623 (1998); Mazzan, 112 Nev. at 842, 921 P.2d at 922.

reasonable juror would have convicted him."[6] "'[A]ctual innocence' means factual innocence, not mere legal insufficiency."[7]

The new evidence comes from an affidavit of a person who happened to be an inmate incarcerated with Igbinovia. "[T]he testimony of a jailhouse informant should be regarded with particular scrutiny."[8] The fellow inmate of Igbinovia claims that the victim told him that the incidents that led to Igbinovia's conviction were not true. This affidavit was an attempt to discredit or contradict a former witness and is not a permissible ground to secure a new trial.[9] Here, the witness has waited nearly a decade after the crime was committed to come forward. Even assuming the new evidence to be true, Igbinovia failed to show how this new information would overcome the presumption of prejudice to the State, which pled laches. Therefore, the district court did not err in dismissing the petition as procedurally barred or lacking merit.

Third, Igbinovia claims the district court abused its discretion by not requiring the State to reveal alleged favorable treatment to a

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[6]Bousley, 523 U.S. at 623 (quoting Schlup v. Delo, 513 U.S. 298, 327-28 (1995)).

[7]Bousley, 523 U.S. at 623-24 (citing Sawyer v. Whitley, 505 U.S. 333, 339 (1992)).

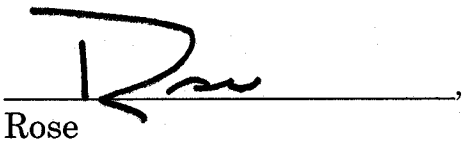
[8]Lobato v. State, 120 Nev. 512, 522, 96 P.3d 765, 772 (2004).

[9]Callier v. Warden, 111 Nev. 976, 988, 901 P.2d 619, 626 (1995).

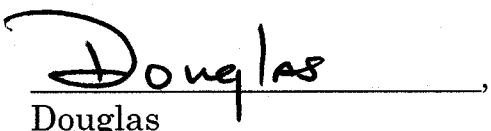
witness not called by the State. This issue is not appropriate in a habeas petition as it could have been raised on direct appeal.[10]

Fourth, Igbinovia contends that he is entitled to the same sentencing disposition as a co-defendant. There is no such rule of law that requires the exact same sentence for co-defendants. This court has consistently afforded the district court wide discretion in its sentencing decision.[11] Having considered appellant's contentions and concluded they are without merit, we

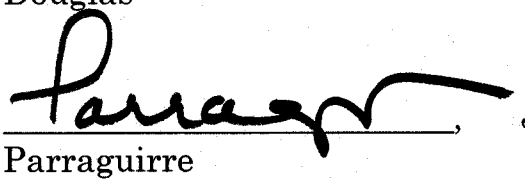
ORDER the judgment of the district court AFFIRMED.



_____, C.J.
Rose



_____, J.
Douglas



_____, J.
Parraguirre

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[10]See NRS 34.810(1)(b)(2).

[11]See Houk v. State, 103 Nev. 659, 747 P.2d 1376 (1987).

cc: Honorable Jackie Glass, District Judge
C. Conrad Claus, A Prof. Corp.
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk