

IN THE SUPREME COURT OF THE STATE OF NEVADA

ERIBERTO LEON,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 49904

**FILED**

DEC 03 2008

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person 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; Lee A. Gates, Judge.

On March 31, 2004, the district court convicted appellant, pursuant to a jury verdict, of conspiracy to commit burglary, burglary while in possession of a firearm, conspiracy to commit kidnapping, first-degree kidnapping with the use of a deadly weapon, first-degree kidnapping with the use of a deadly weapon resulting in substantial bodily harm, conspiracy to commit murder, attempted murder with the use of a deadly weapon, conspiracy to commit robbery with the use of a deadly weapon, robbery with the use of a deadly weapon, and grand larceny. The district court sentenced appellant to serve multiple consecutive and concurrent terms totaling life with the possibility of parole after 30 years

in the Nevada State Prison.<sup>1</sup> This court affirmed appellant's judgment of conviction and sentence on direct appeal.<sup>2</sup> The remittitur issued on May 17, 2005.

On June 9, 2004, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The district court denied appellant's petition. Appellant did not appeal the denial of the petition.

On August 14, 2006, appellant filed a second proper person post-conviction petition for a writ of habeas corpus in the district court. The district court appointed counsel to represent appellant, and counsel filed a supplemental petition. The State opposed and moved to dismiss the petition and supplemental petition. Appellant filed a reply to the State's opposition and motion to dismiss. The district court denied appellant's petition on June 29, 2007, after conducting an evidentiary hearing. This appeal followed.

Appellant filed his petition more than one year after this court issued the remittitur from his direct appeal. Thus, appellant's petition was untimely filed.<sup>3</sup> Moreover, to the extent that appellant's petition raised claims of ineffective assistance of trial counsel, the petition was

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<sup>1</sup>The district court entered an amended judgment of conviction on September 21, 2006, removing the sentence for the deadly weapon enhancement on appellant's conviction for conspiracy to commit robbery with the use of a deadly weapon.

<sup>2</sup>Leon v. State, Docket No. 43156 (Order of Affirmance, April 21, 2005).

<sup>3</sup>See NRS 34.726(1).

successive and constituted an abuse of the writ because appellant had previously filed a post-conviction petition for a writ of habeas corpus and failed to raise his claims in his prior petition.<sup>4</sup> Appellant's petition was procedurally barred absent a demonstration of good cause and prejudice.<sup>5</sup>

First, appellant argued that good cause supported the untimely filing of his petition because, as a youthful offender, he was denied all access to the law library and he did not have access to a competent inmate law clerk. Appellant acknowledged that he received assistance from an inmate law clerk who was classified to the law library when he drafted his first petition, but asserted that the inmate law clerk was incompetent.

We conclude that appellant failed to demonstrate good cause. Although appellant claimed he was denied all physical access to the law library, he failed to demonstrate that he could not have requested books to be brought to him. Additionally, appellant acknowledged that he received the assistance of an inmate law clerk. Appellant's claim that his inmate law clerk was incompetent did not constitute good cause to excuse his procedural defects.<sup>6</sup>

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<sup>4</sup>See NRS 34.810(1)(b)(2), (2).

<sup>5</sup>See NRS 34.726(1); NRS 34.810(1)(b), (3).

<sup>6</sup>See Phelps v. Director, Prisons, 104 Nev. 656, 660, 764 P.2d 1303, 1306 (1988) (holding that petitioner's claim of organic brain damage, borderline mental retardation and reliance on assistance of inmate law clerk unschooled in the law did not constitute good cause for the filing of a successive post-conviction petition), superceded by statute on other grounds by State v. Haberstroh, 119 Nev. 173, 69 P.3d 676 (2003).

Second, appellant claimed that good cause supported the filing of an untimely petition because the district court lacked jurisdiction to hear his first petition while his direct appeal was pending. However, because the petition was an independent proceeding, the district court did not lack jurisdiction to rule on appellant's petition while his appeal was pending.<sup>7</sup>

Third, appellant claimed that his petition was timely filed with regard to the entry of the amended judgment of conviction. However, because appellant's claims did not challenge the amended language in his judgment of conviction, the entry of the amended judgment of conviction did not constitute good cause for filing an untimely petition.<sup>8</sup>

Fourth, appellant claimed that the failure to consider his petition would result in a fundamental miscarriage of justice.

A petitioner may be entitled to review of defaulted claims if failure to review the claims would result in a fundamental miscarriage of justice.<sup>9</sup> In order to demonstrate a fundamental miscarriage of justice, a

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<sup>7</sup>See Sheriff v. Gleave, 104 Nev. 496, 498, 761 P.2d 416, 418 (1988) (holding that habeas corpus is an independent proceeding); Bongiovi v. Bongiovi, 94 Nev. 321, 579 P.2d 1246 (1978) (holding that the district court retains jurisdiction over matters collateral to and independent from that part of a case taken on appeal).

<sup>8</sup>See Sullivan v. State, 120 Nev. 537, 541, 96 P.3d 761, 764 (2004) (holding that "untimely post-conviction claims that arise out of the proceedings involving the initial conviction . . . and that could have been raised before the judgment of conviction was amended are procedurally barred").

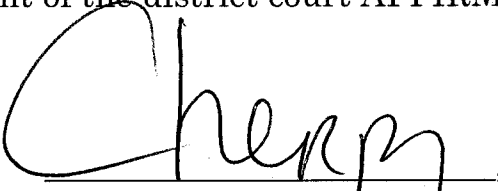
<sup>9</sup>Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

petitioner must make a colorable showing of actual innocence.<sup>10</sup> To demonstrate actual innocence, a petitioner must show that it is more likely than not that no reasonable juror would have convicted him.<sup>11</sup> Appellant failed to demonstrate a fundamental miscarriage of justice in this case because he failed to demonstrate that he was actually innocent.

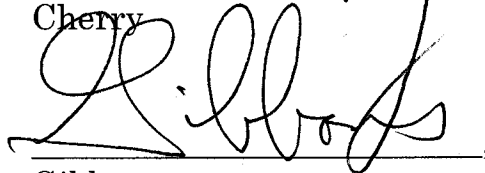
For the reasons set forth above, we conclude appellant failed to demonstrate good cause and actual prejudice to excuse his procedural defects and the district court did not err by denying the petition as procedurally barred.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.<sup>12</sup> Accordingly, we

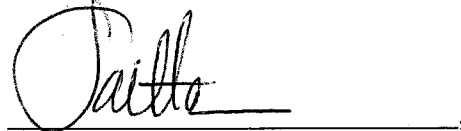
ORDER the judgment of the district court AFFIRMED.

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

Cherry

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

Gibbons

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

Saitta

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<sup>10</sup>Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001).

<sup>11</sup>Id.

<sup>12</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

cc: Hon. Lee A. Gates, District Judge  
Eriberto Leon  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk