

IN THE SUPREME COURT OF THE STATE OF NEVADA

TIM MICHAEL ANDERSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53696

FILED

FEB 03 2010

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

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying appellant Tim Anderson's untimely, second post-conviction petition for a writ of habeas corpus. Third Judicial District Court, Lyon County; William Rogers, Judge.

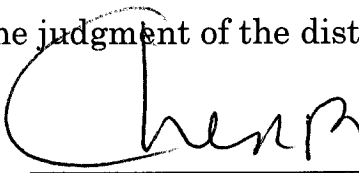
Anderson contends that, because he had a legitimate claim of ineffective assistance of counsel, the district court erred by finding that he failed to demonstrate good cause and prejudice to excuse the filing of his untimely and successive post-conviction petition for a writ of habeas corpus. We disagree. Anderson's petition was procedurally barred because the petition was filed more than 11 years after the remittitur had issued in his direct appeal, NRS 34.726(1), and because he could have raised the issues presented on direct appeal or in his prior petition for a writ of habeas corpus, NRS 34.810(1)(b). Moreover, the State pleaded laches under NRS 34.800(2). The district court properly determined that Anderson's ineffective assistance of appellate counsel claim did not constitute good cause to excuse the procedural bars because this claim could have been raised in his first, timely petition. See Hathaway v. State, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003). The district court


also properly determined that dismissal of the petition as untimely would not unduly prejudice Anderson. Therefore, we conclude the district court did not err by denying the petition as procedurally barred.

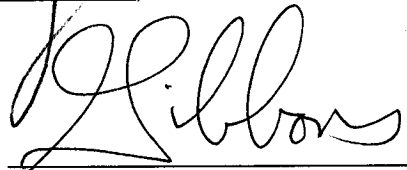
Anderson also contends that the district court erred by finding that his claim of actual innocence was insufficient to overcome the procedural bars. This claim lacks merit because Anderson failed to demonstrate that he is actually innocent of second-degree murder. The district court properly found that Anderson failed to make “any showing of intentional misconduct on the part of the treating physician with regards to withdrawing life sustaining treatment that would overcome the evidence at trial that [Anderson’s] act was the direct actual and legal cause of [the] victim’s demise.” See Mitchell v. State, 122 Nev. 1269, 1273-74, 149 P.3d 33, 36 (2006) (“Actual innocence means factual innocence, not mere legal insufficiency.” (internal quotation marks and alteration omitted)); Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001) (“[A] petitioner claiming actual innocence must show that it is more likely than not that no reasonable juror would have convicted him absent a constitutional violation.”).

Having considered Anderson’s contentions and concluded they lack merit, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Hon. William Rogers, District Judge
Federal Public Defender/Las Vegas
Attorney General/Carson City
Lyon County District Attorney
Lyon County Clerk