

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES WHEATON,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 58311

**FILED**

MAY 10 2012

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *Tracie K. Lindeman*  
DEPUTY CLERK

ORDER OF AFFIRMANCE

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

Wheaton filed his petition on April 1, 2010, more than five years after his judgment of conviction was entered on December 8, 2004. Thus, his petition was untimely filed and procedurally barred absent a demonstration of good cause for the delay and undue prejudice. See NRS 34.726(1). Further, because the State specifically pleaded laches, Wheaton also was required to overcome the rebuttable presumption of prejudice. See NRS 34.800(2).

Wheaton argues that he was unable to obtain his case file from his trial counsel and thus could not file a timely post-conviction petition. This court has held that failure of trial counsel to send a petitioner his case file does not demonstrate cause to excuse the delay in filing a post-conviction petition. Hood v. State, 111 Nev. 335, 338, 890 P.2d 797, 798 (1995). Further, Wheaton did not file a formal motion requesting his file until almost three years after his judgment of conviction was entered, and he did not explain the entire length of his

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delay. See Hathaway v. State, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003).


Wheaton appears to concede that counsel's failure to send his file does not alone constitute good cause, but rather argues that the procedural bar should be excused because he is actually innocent of two of the six offenses to which he pleaded guilty. In support of this argument, Wheaton submitted documents that purportedly show that he was out of the country during the charged time period of the two offenses. We conclude that Wheaton has failed to make a colorable showing of actual innocence. See Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). Wheaton did not demonstrate that the documents are new evidence and were unavailable when he entered his guilty plea. See Calderon v. Thompson, 523 U.S. 538, 559 (1998) (holding that to demonstrate actual innocence, a petitioner "must show 'it is more likely than not that no reasonable juror would have convicted him in light of the new evidence' presented in his habeas petition." (quoting Schlup v. Delo, 513 U.S. 298, 327 (1995))). Furthermore, Wheaton failed to show that he is actually innocent of the 25 charges that the State chose to forego as part of the plea negotiation. See Bousley v. United States, 523 U.S. 614, 623-24 (1998) (providing in habeas proceedings that when the conviction is based upon a guilty plea, a petitioner must demonstrate that he is innocent of charges foregone in the plea bargaining process). Therefore, we conclude that the district court did not err by denying Wheaton's petition as procedurally barred.

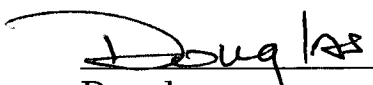
Wheaton also argues that the district court's refusal to conduct an evidentiary hearing on the claims that he raised in his petition violates due process and equal protection because other similarly situated

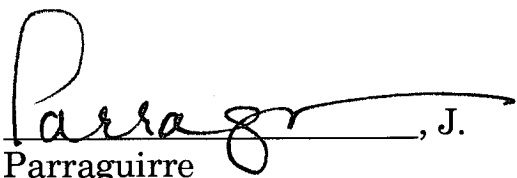
petitioners received evidentiary hearings on their meritorious claims. We conclude that this argument is without merit. Because Wheaton's petition was procedurally barred, the district court was not required to consider the claims in his petition or conduct an evidentiary hearing on these claims. See State v. Dist. Ct. (Riker), 121 Nev. 225, 233-34, 112 P.3d 1070, 1075-76 (2005); Passanisi v. Dep't of Prisons, 105 Nev. 63, 67, 769 P.2d 72, 75 (1989). Wheaton could have received an evidentiary hearing on his claims of good cause and actual innocence if he had supported those claims with specific allegations that would entitle him to relief, and his failure to do so did not entitle him to an evidentiary hearing. See Riker, 121 Nev. at 232, 112 P.3d at 1075.

Having considered Wheaton's contentions and concluded that he is not entitled to relief, we

ORDER the judgment of the district court AFFIRMED.

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

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

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

cc: Hon. James M. Bixler, District Judge  
The Kice Law Group, LLC  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk