

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARSHALL BURGESS, JR.,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 60265

**FILED**

NOV 15 2012

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court dismissing appellant Marshall Burgess, Jr.'s post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Janet J. Berry, Judge.

The district court found that Burgess' petition was untimely, determined that Burgess failed to overcome the procedural bar, and granted the State's motion to dismiss the petition. Burgess contends that the district court erred because (1) his claim that the district court lacked subject matter jurisdiction can be raised at any time, and (2) the fundamental miscarriage of justice standard is not limited to cases in which a colorable showing of actual innocence can be shown. We disagree.

Even assuming that a jurisdictional challenge can be raised in an untimely petition and satisfies the good cause requirement, Burgess failed to demonstrate any prejudice by the dismissal of his petition. See NRS 34.726(1); Pellegrini v. State, 117 Nev. 860, 886, 34 P.3d 519, 537 (2001) (to overcome procedural defects, petitioner must demonstrate both

good cause and actual prejudice). Burgess claims that the district court lacked subject matter jurisdiction because the Nevada Revised Statutes under which he was charged and convicted did not contain the enacting clause mandated by Article 4, Section 23 of the Nevada Constitution. However, the actual laws of Nevada are contained in the Statutes of Nevada, see NRS 220.170(3), and each of the laws relevant to Burgess' conviction contains an enacting clause, 1999 Nev. Stat., ch. 517, at 2636, and § 6, at 2639-40 (trafficking in controlled substances); 1995 Nev. Stat., ch. 455, at 1431, and § 1, at 1431 (deadly weapon enhancement); 1995 Nev. Stat., ch. 443, at 1167, and § 60, at 1187-88 (robbery). Therefore, Burgess failed to demonstrate the prejudice necessary to overcome the procedural default rules.


The district court found that Burgess failed to make a colorable showing of actual innocence and declined to extend the fundamental miscarriage of justice standard beyond a claim of actual innocence to reach Burgess' claims. The fundamental miscarriage of justice standard can be met where the petitioner makes a colorable showing he is actually innocent of the crime, the aggravating circumstance, or the death penalty and no reasonable juror would have found him guilty absent a constitutional violation. Leslie v. Warden, 118 Nev. 773, 780, 59 P.3d 440, 445 (2002); Pellegrini, 117 Nev. at 887, 34 P.3d at 537. Burgess has not made a colorable showing that the fundamental miscarriage of justice standard applies to his circumstances, the record on appeal supports the district court's factual findings, and we conclude that the district court did not err by dismissing the petition as procedurally

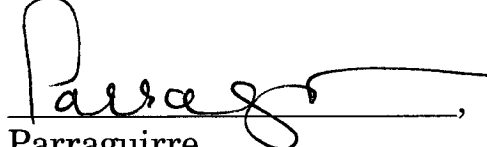
barred, see State v. Dist. Ct. (Riker), 121 Nev. 225, 233, 112 P.3d 1070, 1075 (2005) (application of procedural default rules is mandatory).

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

ORDER the judgment of the district court AFFIRMED.

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

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

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

cc: Hon. Janet J. Berry, District Judge  
Janet S. Bessemer  
Attorney General/Carson City  
Washoe County District Attorney  
Washoe District Court Clerk