## IN THE SUPREME COURT OF THE STATE OF NEVADA

SAMMY LEWIS JOHNSON, Appellant, vs. THE STATE OF NEVADA, Respondent. No. 63195

## DEC 17 2013 DEC 17 2013 CLEAN OF SUBJEME COURT BY JEPUTY JEAN

## ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus.<sup>1</sup> Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Appellant filed his petition on May 3, 2012, more than fourteen years after issuance of the remittitur on direct appeal on July 8, 1997. Johnson v. State, Docket No. 27255 (Order Dismissing Appeal, June 17, 1997). Thus, appellant's petition was untimely filed. See NRS 34.726(1). Moreover, appellant's petition was successive because he had previously filed two post-conviction petitions for a writ of habeas corpus.<sup>2</sup> See NRS 34.810(2). Appellant's petition was procedurally barred absent a

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<sup>&</sup>lt;sup>1</sup>This appeal has been submitted for decision without oral argument, NRAP 34(f)(3), and we conclude that the record is sufficient for our review and briefing is unwarranted. *See Luckett v. Warden*, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

<sup>&</sup>lt;sup>2</sup>Johnson v. State, Docket No. 31133 (Order Dismissing Appeal, June 16, 2000); Johnson v. State, Docket No. 38541 (Order of Affirmance, May 23, 2002).

demonstration of good cause and actual prejudice. See NRS 34.726(1); NRS 34.810(3).

Appellant did not attempt to demonstrate good cause to excuse the procedural defects. Instead, appellant argued that he is actually innocent of the attempted murder count, as demonstrated by a codefendant's written declaration that appellant was merely a getaway driver and not a shooter and by the United States District Court's conclusion that appellant was not the shooter. Additionally, relying upon *Sharma v. State*, 118 Nev. 648, 56 P.3d 868 (2002), and *Mitchell v. State*, 122 Nev. 1269, 149 P.3d 33 (2006), appellant claimed that he did not acknowledge a specific intent to kill during the plea bargaining process, as the element was not present in the charging document, and that the absence of proof of such intent in the record demonstrates actual innocence.

As appellant pleaded guilty, he must demonstrate not only that he is factually innocent of the charge to which he pleaded guilty but that he is factually innocent of any more serious charges forgone in the plea bargaining process. Bousley v. United States, 523 U.S. 614, 623-24 (1998). Appellant did not address actual innocence relative to the multiple charges relinguished by the State during negotiations. felony Nevertheless, we conclude that appellant failed to demonstrate actual innocence, as his claims related to legal insufficiency and not factual innocence, see Mitchell, 122 Nev. at 1273-74, 149 P.3d at 36, and appellant did not show that "it is more likely than not that no reasonable juror

SUPREME COURT OF NEVADA would have convicted him in light of . . . new evidence."<sup>3</sup> Calderon v. Thompson, 523 U.S. 538, 559 (1998) (quoting Schlup v. Delo, 513 U.S. 298, 327 (1995)); see also Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001); Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996). Therefore, the district court did not err by denying appellant's petition as procedurally barred, and we

ORDER the judgment of the district court AFFIRMED.<sup>4</sup>

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cc: Hon. Michelle Leavitt, District Judge Sammy Lewis Johnson Attorney General/Carson City Clark County District Attorney Eighth District Court Clerk

<sup>3</sup>We note that *Sharma* and *Mitchell* relate to jury instructions. As appellant entered a guilty plea, there was no instruction error to complain of.

<sup>4</sup>We have reviewed all documents that appellant has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted.

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