IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN STEVEN OLAUSEN,
Appellant,
vs.
JAMES BENEDETTI, WARDEN,
NORTHERN NEVADA
CORRECTIONAL CENTER,
Respondent.

No. 63360

FILED

JAN 16 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE AND REMAND FOR CORRECTION OF CLERICAL ERROR IN RECORD

This is a proper person appeal from an order of the district court dismissing a post-conviction petition for a writ of habeas corpus.[1] Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

Appellant filed his petition on January 20, 2012,[2] more than twenty-six years after issuance of the remittitur on direct appeal on

[1]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).

[2]Appellant filed an identical petition on January 23, 2012. This appeal is limited to the petitions filed in January 2012, the respondent's answer and motion to dismiss, and the opposition to the answer and the motion to dismiss. The district court denied appellant's motion to amend the petition. We conclude that the district court did not abuse its discretion in declining to consider supplemental pleadings. *See* NRS 34.750(5). We further conclude that the district court did not abuse its

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December 19, 1985, which affirmed the conviction for murder, first-degree kidnapping with the use of a deadly weapon, and robbery with the use of a deadly weapon, *see Wilson v. State*, 99 Nev. 362, 664 P.2d 328 (1983), *aff'd on rehearing*, 101 Nev. 452, 705 P.2d 151 (1985),[3] and more than twenty-two years after appellant was resentenced upon being granted post-conviction relief on his sentence on December 7, 1989.[4] Thus, appellant's petition was untimely filed. *See* NRS 34.726(1). Moreover, appellant's petition was successive because he had previously litigated several post-conviction petitions for relief, and it constituted an abuse of the writ as he raised claims new and different from those raised in his previous petitions.[5] *See* NRS 34.810(1)(b); NRS 34.810(2). Appellant's petition was

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discretion in declining to appoint counsel for the proceedings on the instant petitions. *See* NRS 34.750(1).

[3]Edward Thomas Wilson was one of appellant's codefendants and appellant's appeal was consolidated with Wilson's appeal.

[4]The December 7, 1989, document labeled "Findings, Determinations, and Imposition of Sentence" [FDIS] has previously been determined to be a valid judgment of conviction. *See Olausen v. State*, Docket No. 48841 (Order of Affirmance, September 7, 2007); *Olausen v. State*, Docket No. 49989 (Order Dismissing Appeal, September 7, 2007); *Olausen v. State*, Docket No. 56066 (Order of Affirmance, November 8, 2010). No timely direct appeal was taken from the December 7, 1989, FDIS. *See Olausen v. State*, Docket No. 28669 (Order Dismissing Appeals, September 14, 1996). Further, the petition was filed more than nineteen years after the effective date of NRS 34.726. *See* 1991 Nev. Stat., ch. 44, §§ 5, 33, at 75-76, 92; *Pellegrini v. State*, 117 Nev. 860, 874-75, 34 P.3d 519, 529 (2001).

[5]*Wilson v. State*, 105 Nev. 110, 771 P.2d 583 (1989); *Olausen v. State*, Docket No. 36918 (Order of Affirmance, December 10, 2002); *Olausen v. State*, Docket No. 48841 (Order of Affirmance, September 7,
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procedurally barred absent a demonstration of good cause and actual prejudice. *See* NRS 34.726(1); NRS 34.810(1)(b)(2); NRS 34.810(3). Moreover, because the State specifically pleaded laches, appellant was required to overcome the rebuttable presumption of prejudice. NRS 34.800(2).

Preliminarily, we note that the January 2012 petitions largely challenge the denial of his 2009 motion to withdraw a guilty plea and the proceedings relating to the motion, the denial of which was affirmed on appeal. *See Olausen v. State*, Docket No. 56066 (Order of Affirmance, November 8, 2010). Claims challenging the denial of a post-conviction motion to withdraw a guilty plea are not permissible in a post-conviction petition for a writ of habeas corpus as these claims do not directly challenge the validity of the judgment of conviction or sentence. *See* NRS 34.724(1). Even assuming that appellant's claims challenged the validity of his judgment of conviction and sentence in some fashion, they are procedurally barred.

Appellant first claimed that the State did not plead the procedural bars with sufficient specificity as the State failed to address which claims were subject to the procedural bars. This argument is without merit. First, application of the procedural bars does not require the State's successful pleading of such as the procedural bars are mandatory and good cause must be alleged on the face of the petition. *See State v. Eighth Judicial Dist. Court (Riker)*, 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005) (recognizing that procedural bars are mandatory); *State*

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2007). Appellant did not timely appeal from the denial of his 2008 habeas corpus petition.

v. Haberstroh, 119 Nev. 173, 180-81, 69 P.3d 676, 681-82 (2003) (recognizing that NRS chapter 34 requires a demonstration of good cause on the face of the petition). The January 2012 petitions were in their entirety subject to the procedural bars.[6]

Next, appellant claimed that the State could not file both an answer and a motion to dismiss the petition and therefore any arguments that the petition was procedurally barred or barred by laches were not properly before the court. Appellant was mistaken. NRS 34.745(1)(a)(1) and (b) provide that the district attorney shall file a response or an answer to the petition and may take other action deemed appropriate by the judge. A motion to dismiss is one of the appropriate actions that may be filed by the State as NRS 34.750(4) contemplates the filing of a motion to dismiss and NRS 34.726(1) and NRS 34.810 require the dismissal of an untimely and successive (or abusive petition) for which there is not good cause or actual prejudice. Even assuming without deciding that both documents could not be filed by the State, as stated earlier, the procedural bars are mandatory. *Riker*, 121 Nev. at 231, 112 P.3d at 1074.

Appellant appeared to claim that he had good cause because of newly discovered evidence not previously available. However, as appellant did not identify any such evidence in his January 2012 petitions or his June 29, 2012, opposition to the motion to dismiss, we conclude that

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[6]Appellant also claimed that the State could not seek to have his petition dismissed based upon his failure to specify the complete procedural history, *see* NRS 34.810(4), when the State opposed his motion to amend the petition. Because of the procedural bars set forth in NRS 34.726(1), NRS 34.810(2), and because the State pleaded statutory laches pursuant to NRS 34.800(2), we need not reach the issue of the application of NRS 34.810(4).

the district court did not err in determining that appellant failed to demonstrate good cause.

Finally, appellant claimed that he was actually and legally innocent of first-degree murder and he had suffered a miscarriage of justice throughout the proceedings. Again, appellant failed to specifically identify the basis for his actual innocence argument. Thus, appellant did not demonstrate actual innocence because he failed to show that "'it is more likely than not that no reasonable juror would have convicted him in light of . . . new evidence.'"[7] *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). Appellant failed to overcome the presumption of prejudice to the State. We therefore conclude that the district court did not err in dismissing appellant's petition.

In reviewing the volumes of documents before this court, we observed a potential clerical error in the record—the record appears to be missing a judgment of conviction setting forth the sentences for the kidnapping and robbery counts. In 1979, appellant entered a guilty plea to first-degree murder, kidnapping with the use of a deadly weapon, and robbery with the use of a deadly weapon. On December 14, 1979, the three-judge panel returned a death sentence for the crime of murder, and the district court entered a judgment of conviction on that same date

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[7]A fundamental miscarriage of justice sufficient to overcome application of the procedural bars requires a demonstration of factual innocence, not mere legal insufficiency. *See Mitchell v. State*, 122 Nev. 1269, 1273-74, 149 P.3d 33, 36 (2006).

reflecting that sentence.[8] On December 14, 1979, the district court also sentenced appellant to serve two consecutive terms of life without the possibility of parole for the kidnapping count and two consecutive terms of fifteen years for the robbery count, to be served consecutively to one another and concurrently with the sentence for the murder count. The sentences for the kidnapping and robbery counts are not reflected in the December 14, 1979, judgment of conviction, although the record does contain a document labeled "certified copy of judgment of imprisonment" as attested by the clerk of the court under seal pursuant to NRS 176.325. This document is not, however, itself a judgment of conviction as it is not signed by the district court—the district court judge's name is typewritten. *See* NRS 176.105. It is not clear if the original judgment of conviction has been lost over the lengthy passage of time. We direct the district court to inquire into the whereabouts of the original judgment of conviction setting forth the sentences for the kidnapping and robbery counts, and if an original cannot be found, to enter a judgment of conviction nunc pro tunc to the sentencing date of December 14, 1979, reflecting the sentences as set forth at the December 14, 1979, sentencing hearing and discussed above.[9] Accordingly, we

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[8]In 1989, appellant was sentenced to serve a term of life without the possibility of parole for the murder count at a resentencing hearing for the murder count.

[9]Appellant has already appealed from the validity of his guilty plea in *Wilson v. State*, 99 Nev. 362, 664 P.2d 328 (1983), and the guilt-phase of the proceedings was final with the conclusion of his direct appeal proceedings and the expiration of the period to seek a petition for certiorari to the Supreme Court. Entry of a new judgment of conviction is not intended to serve as a basis for a second direct appeal, which is not permitted, or to restart the clock to file a post-conviction petition for a writ

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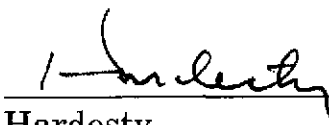
ORDER the judgment of the district court AFFIRMED and REMAND for proceedings consistent with this order.



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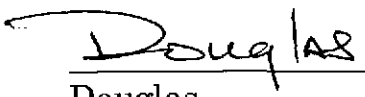
Hardesty



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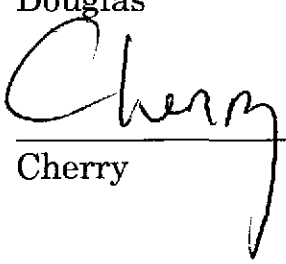

_____, J.
Cherry

cc: Hon. Connie J. Steinheimer, District Judge
John Steven Olausen
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

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of habeas corpus in view of the fact that appellant has already litigated or had an opportunity to litigate the guilt phase of his conviction over the decades since his conviction was final.