

IN THE SUPREME COURT OF THE STATE OF NEVADA

PHILLIP ARTHUR COVARRUBIAS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 63865

**FILED**

**MAR 12 2014**

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

*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; Joseph T. Bonaventure, Senior Judge.

Appellant filed his petition on June 6, 2013, more than eight years after entry of the judgment of conviction on December 8, 2004.<sup>2</sup> Thus, appellant's petition was untimely filed. See NRS 34.726(1). Moreover, appellant's petition constituted an abuse of the writ as he

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<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>2</sup>Appellant's petition did not challenge any changes made in the amended judgment of conviction filed on February 14, 2005, and thus the proper measure for filing a timely petition was the entry of the judgment of conviction. See *Sullivan v. State*, 120 Nev. 537, 541, 96 P.3d 761, 764 (2004).

raised claims new and different from those raised in his previous petition.<sup>3</sup> See NRS 34.810(2). Appellant's petition was procedurally barred absent a demonstration of good cause and actual prejudice. See NRS 34.726(1); NRS 34.810(3). Furthermore, because the State specifically pleaded laches, appellant was required to overcome the rebuttable presumption of prejudice. See NRS 34.800(2).

In an attempt to overcome the procedural bars, appellant claimed that he had newly discovered evidence that was relevant to the plea process, that would have persuaded appellant to insist on going to trial, and that demonstrates appellant's innocence. Appellant claimed that, due to the State's withholding of evidence, he was unable to obtain copies of the audio and videotapes from the victim's interview in Kansas until 2008 and has never received copies of the transcripts from the same interview. Purported evidence of innocence obtained by appellant in 2008 does not qualify as newly discovered evidence in a 2013 petition. There is no explanation for the nearly five-year delay in raising a claim relating to this purported new evidence. See *State v. Huebler*, 128 Nev. \_\_\_, \_\_\_ n.3, 275 P.3d 91, 95 n.3 (2012) (recognizing that a *Brady* claim raised in an untimely petition "still must be raised within a reasonable time after the withheld evidence was disclosed to or discovered by the defense."). Furthermore, appellant failed to demonstrate that the alleged "newly discovered evidence" was in fact newly discovered. Our review of the

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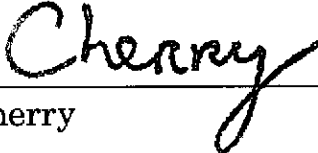
<sup>3</sup>*Covarrubias v. State*, Docket No. 45320 (Order of Affirmance, March 13, 2006). Appellant also filed a motion to withdraw guilty plea, or alternatively, post-conviction petition for a writ of habeas corpus. *Covarrubias v. State*, Docket No. 51434 (Order of Affirmance, December 24, 2008).

record reveals that trial counsel was aware of these materials in 2004, and he filed a motion to compel discovery and to continue trial, alleging that the State had not provided him with these materials. The State's opposition indicated that the prosecutor and appellant's counsel went through the State's file and that appellant's counsel either acknowledged everything to be in his possession or a copy was provided to him, including the materials now alleged to be newly discovered. Therefore, the district court did not err in denying the petition as procedurally barred.<sup>4</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>5</sup>

  
\_\_\_\_\_, J.  
Hardesty

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

  
\_\_\_\_\_, J.  
Cherry

<sup>4</sup>To the extent appellant claims actual innocence, he failed to demonstrate that "it is more likely than not that no reasonable juror would have convicted him in light of . . . new evidence." *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).

<sup>5</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. To the extent that appellant has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.

cc: Chief Judge, Eighth Judicial District Court  
Hon. Joseph T. Bonaventure, Senior Judge  
Phillip Arthur Covarrubias  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk