

IN THE SUPREME COURT OF THE STATE OF NEVADA

JEFFREY LYNN FRANKLIN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 65231

FILED

JUL 23 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.¹ Eighth Judicial District Court, Clark County; Jessie Elizabeth Walsh, Judge.

Appellant filed his petition on November 21, 2013, more than five years after issuance of the remittitur on direct appeal on January 22, 2008. *Franklin v. State*, Docket No. 48848 (Order of Affirmance, December 27, 2007). Thus, appellant's petition was untimely filed. See NRS 34.726(1). Appellant's petition was also successive because he had previously filed two post-conviction petitions for a writ of habeas corpus,² and it constituted an abuse of the writ as he raised claims new and

¹This 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).

²See *Franklin v. State*, Docket No. 52422 (Order of Affirmance, December 11, 2009); *Franklin v. State*, Docket No. 63352 (Order of Affirmance, December 12, 2013).

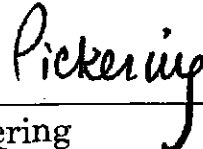
different from those raised in his previous petitions. See NRS 34.810(1)(b)(2); NRS 34.810(2). Appellant's petition was procedurally barred absent a demonstration of good cause and actual prejudice. See NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3). Moreover, because the State specifically pleaded laches,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

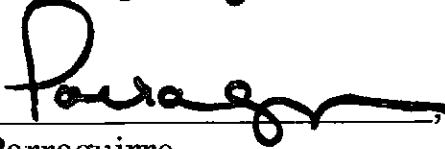
In his petition, appellant claimed that his appellate counsel's failure to raise certain claims on direct appeal excused any procedural bar. Appellant failed to demonstrate cause because his claims of ineffective assistance of appellate counsel were reasonably available to be raised in his first petition and ineffective-assistance claims that are themselves procedurally barred cannot establish cause. See *Hathaway v. State*, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003).


Appellant also claimed that he suffered from a fundamental miscarriage of justice. In order to demonstrate a fundamental miscarriage of justice, a petitioner must make a colorable showing of actual innocence—factual innocence, not legal innocence. *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001); *Calderon v. Thompson*, 523 U.S. 538, 559 (1998). Appellant did not demonstrate actual innocence as his claims involved legal innocence, and therefore he failed to show that “it is more likely than not that no reasonable juror would have convicted him in light of . . . new evidence.” *Calderon*, 523 U.S. at 559 (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)); see also *Pellegrini*, 117 Nev. at 887, 34 P.3d at 537; *Mazzan v. Warden*, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

Finally, appellant failed to overcome the presumption of prejudice to the State. Therefore, the district court did not err in denying the petition. Accordingly, we

ORDER the judgment of the district court AFFIRMED.³


_____, J.
Pickering


_____, J.
Parraguirre


_____, J.
Saitta

cc: Hon. Jessie Elizabeth Walsh, District Judge
Jeffrey Lynn Franklin
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

³In light of this disposition, we deny appellant's motion for appointment of counsel.