

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JUSTIN D. PORTER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 70206

FILED

AUG 17 2016

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

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a postconviction petition for a writ of habeas corpus.¹ Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

Appellant Justin Porter contends the district court erred in denying his habeas petition filed on October 26, 2015, as untimely and successive because he made a colorable showing of actual innocence. In his petition, Porter claimed he was actually innocent of second-degree murder because he was accused of committing open murder under the felony-murder rule and he was acquitted of the underlying felonies.

A colorable showing of actual innocence may overcome procedural bars under the fundamental miscarriage of justice standard. *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). "Actual innocence' means factual innocence, not mere legal insufficiency." *Mitchell v. State*, 122 Nev. 1269, 1273-74, 149 P.3d 33, 36 (2006) (internal quotation marks and brackets omitted). "To be credible,' a claim of actual

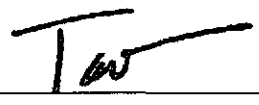
¹This appeal has been submitted for decision without oral argument. NRAP 34(f)(3).


innocence must be based on reliable evidence not presented at trial.” *Calderon v. Thompson*, 523 U.S. 538, 559 (1998) (quoting *Schulp v. Delo*, 513 U.S. 298, 324 (1995)). And, to demonstrate actual innocence of the underlying crime, the petitioner must show “it is more likely than not that no reasonable juror would have convicted him in light of the new evidence’ presented in his habeas petition.” *Id.* (quoting *Schulp*, 513 U.S. at 327).

The district court found Porter’s actual-innocence claim was a legal claim, it had nothing to do with him being innocent based on the facts, and it was not supported with newly discovered evidence. The district court’s factual findings are supported by the record and we conclude the district court did not err in denying Porter’s procedurally-barred petition. *See State v. Eighth Judicial Dist. Court (Riker)*, 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005) (“Application of the statutory procedural default rules to post-conviction habeas petitions is mandatory.”). Accordingly, we

ORDER the judgment of the district court AFFIRMED.²


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

²To the extent Porter claims the district court erred by failing to consider his reply brief, we conclude he has not demonstrated error. Porter was not allowed to file the additional pleading because the State did not move to dismiss his petition. *See* NRS 34.750(4) & (5).

cc: Hon. Elissa F. Cadish, District Judge
Justin D. Porter
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk