

IN THE SUPREME COURT OF THE STATE OF NEVADA

DONTE JOHNSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 67492

FILED

FEB 09 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a pro se appeal from a district court order denying appellant Donte Johnson's postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge. Johnson was convicted of first-degree murder and other felonies and was sentenced to death. *Johnson v. State*, 122 Nev. 1344, 148 P.3d 767 (2006). He filed a timely postconviction petition for a writ of habeas corpus; the district court denied the petition and Johnson appealed. While that appeal was pending, Johnson filed the instant pro se petition and requested counsel. The district court denied the petition.¹ This appeal followed.

Johnson's petition raised a freestanding claim of actual innocence based on newly discovered evidence in the form of a declaration from one of his coconspirators, Sikia Smith, who claims he lied when he inculcated Johnson during an interview with police. Even assuming that a freestanding claim of actual innocence exists, *see Berry v. State*, 131 Nev., Adv. Op. 96, 363 P.3d 1148, 1154 n.3 (2015), Johnson fails to demonstrate

¹This appeal has been submitted for decision on the record without briefing or oral argument. NRAP 34(f)(3), (g); *see also* NRAP 31(d)(1); *Lockett v. Warden*, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).



that no reasonable juror would have convicted him in light of Smith's declaration. *See id.* (explaining that a petitioner must demonstrate "that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995))). Smith's declaration contains no indicia of reliability given the overwhelming evidence against Johnson, the lack of specificity in the declaration, and the fact that Smith stands convicted of the murders and therefore faces no further adverse consequences. Moreover, Smith did not testify at trial and therefore his declaration does not undermine any of the evidence presented. Accordingly, we

ORDER the judgment of the district court AFFIRMED.²

Cherry, J.
Cherry

Douglas, J.
Douglas

Gibbons, J.
Gibbons

Pickering, J.
Pickering

Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

Stiglich, J.
Stiglich

²Considering the factors outlined in NRS 34.750(1), we conclude that the district court did not abuse its discretion by declining to appoint counsel. We also deny Johnson's motion for appellate counsel.

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