

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

GARY SHEPARD,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 72089

FILED

NOV 14 2017

ELIZABETH A. CROWN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

ORDER OF AFFIRMANCE

Gary Shepard appeals from an order of the district court denying the postconviction petition for a writ of habeas corpus he filed on April 24, 2015.<sup>1</sup> Second Judicial District Court, Washoe County; Scott N. Freeman, Judge.

Shepard filed his petition more than 12 years after issuance of the remittitur on direct appeal on October 8, 2002. *See Shepard v. State*, Docket No. 38308 (Order of Affirmance, September 10, 2002). Thus, Shepard's petition was untimely filed. *See* NRS 34.726(1). Moreover, Shepard's petition was successive because he had previously filed postconviction petitions for a writ of habeas corpus, and it constituted an abuse of the writ as he raised claims new and different from those raised in his previous petitions.<sup>2</sup> *See* NRS 34.810(1)(b)(2); NRS 34.810(2). Shepard's

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

<sup>2</sup>*Shepard v. State*, Docket No. 68699 (Order of Affirmance, April 14, 2016); *Shepard v. State*, Docket No. 45481 (Order of Affirmance, November 8, 2006).

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).

Shepard claims he has good cause to overcome the procedural bars because he received ineffective assistance of postconviction counsel. He also claimed he could demonstrate a fundamental miscarriage of justice to overcome the procedural bars because he is actually innocent because an expert witness, who did not testify at trial, concluded he could not have formed the requisite intent to commit first-degree murder. These claims were raised by Shepard in a previous petition and were rejected by the Nevada Supreme Court. *Shepard v. State*, Docket No. 68699 (Order of Affirmance, April 14, 2016). Therefore, these claims are barred by the doctrine of law of the case, which cannot be avoided by a more detailed and focused argument. *See Hall v. State*, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975). Therefore, the district court did not err by denying these claims.


Shepard also claims he could demonstrate a fundamental miscarriage of justice to overcome the procedural bars because he is actually innocent. Shepard claims the district court's failure to instruct the jury on the specific intent necessary to convict him of first-degree murder demonstrated he is actually innocent. In order to demonstrate a fundamental miscarriage of justice, a petitioner must make a colorable showing of actual innocence—factual innocence, not legal innocence. *See Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001); *see also Calderon v. Thompson*, 523 U.S. 538, 559 (2001). Shepard's jury instruction claim implicated his legal innocence not factual innocence. Therefore, he failed to demonstrate a fundamental miscarriage of justice, and we conclude the district court did not err by denying this claim.

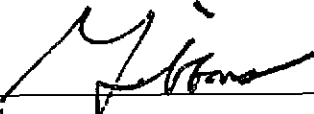
Finally, Shepard claims the courts in Nevada fail to apply the procedural bars in a consistent manner. This claim was not raised in Shepard's petition filed below, and we decline to consider it for the first time on appeal. *See McNelton v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999).

Having concluded Shepard failed to demonstrate good cause to overcome the procedural bars, we conclude the district court did not err by denying the petition as procedurally barred. Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>3</sup>

  
\_\_\_\_\_, C.J.  
Silver

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Gibbons

cc: Hon. Scott N. Freeman, District Judge  
Gary Shepard  
Attorney General/Carson City  
Washoe County District Attorney  
Washoe District Court Clerk

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<sup>3</sup>We also conclude the district court did not abuse its discretion by declining to appoint postconviction counsel. *See* NRS 34.750(1); *Renteria-Novoa v. State*, 133 Nev. \_\_\_, \_\_\_, 391 P.3d 760, 760-61 (2017).