

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ALEJANDRO A. MANZO,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 73480

FILED

JUN 13 2018

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

*ORDER OF AFFIRMANCE*

Alejandro A. Manzo appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus.<sup>1</sup> Eighth Judicial District Court, Clark County; Jennifer P. Togliatti, Judge.

Manzo filed his petition on February 21, 2017, more than eight years after issuance of the remittitur on direct appeal on November 12, 2008. *Manzo v. State*, Docket No. 49002 (Order of Affirmance, October 17, 2008). Thus, Manzo's petition was untimely filed. *See* NRS 34.726(1). Moreover, Manzo's petition was successive because he had previously filed a postconviction petition 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 petition.<sup>2</sup> *See* NRS 34.810(1)(b)(2); NRS 34.810(2). Manzo'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, Manzo was

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

<sup>2</sup>*Manzo v. State*, Docket No. 54418 (Order of Affirmance, May 10, 2010).

required to overcome the rebuttable presumption of prejudice. *See* NRS 34.800(2).

First, Manzo argued he had good cause because his counsel was ineffective for failing to object to jury instructions and challenge them on direct appeal. This claim failed to demonstrate an impediment external to the defense prevented Manzo from complying with the procedural bars. *See Hathaway v. State*, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003). Manzo's claims of ineffective assistance of counsel were reasonably available to be raised in Manzo's first petition and, therefore, cannot constitute good cause to overcome the procedural bars. *See id.* at 252, 71 P.3d at 506 (“[I]n order to constitute adequate cause, the ineffective assistance of counsel claim itself must not be procedurally defaulted.”).


Second, Manzo argued the district court erred by denying his petition without conducting an evidentiary hearing concerning his claim of actual innocence. Manzo asserted he was actually innocent because the witnesses who testified at trial did not establish that he actually shot the victim.


A petitioner may overcome the procedural bars and “secure review of the merits of defaulted claims by showing that the failure to consider the petition on its merits would amount to a fundamental miscarriage of justice.” *Berry v. State*, 131 Nev. \_\_\_, \_\_\_, 363 P.3d 1148, 1154 (2015). A petitioner can demonstrate a fundamental miscarriage of justice occurred because he is actually innocent by demonstrating “it is more likely than not that no reasonable juror would have convicted him in the light of . . . new evidence.” *Id.* (internal quotation marks omitted). A petitioner is entitled to an evidentiary hearing regarding his actual-innocence claim when the claim is “supported by specific factual allegations

not belied by the record that, if true, would entitle him to relief.” *Id.* (internal quotation marks omitted). Manzo’s claim did not involve new evidence and, therefore, he failed to raise a valid claim of actual innocence. *See Calderon v. Thompson*, 523 U.S. 538, 559 (1998) (stating “a claim of actual innocence must be based on reliable evidence not presented at trial.”). We therefore conclude the district court did not err by denying Manzo’s petition without conducting an evidentiary hearing.

Finally, we conclude Manzo did not overcome the rebuttable presumption of prejudice to the State. Therefore, 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.

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

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

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

cc: Hon. Jennifer P. Togliatti, District Judge  
Alejandro A. Manzo  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk