

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ELOY PADILLA-SALDANA,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 75237

FILED

SEP 11 2018

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

*ORDER OF AFFIRMANCE*

Eloy Padilla-Saldana appeals from an order of the district court dismissing a postconviction petition for a writ of habeas corpus.<sup>1</sup> Second Judicial District Court, Washoe County; Lynne K. Simons, Judge.

Padilla-Saldana filed his petition on November 7, 2017, more than 19 years after issuance of the remittitur on direct appeal on October 27, 1998. *Padilla-Saldana v. State*, Docket No. 30827 (Order Dismissing Appeal, October 5, 1998). Thus, Padilla-Saldana's petition was untimely filed. See NRS 34.726(1). Moreover, Padilla-Saldana's petition was successive because he had previously filed several postconviction petitions for a writ of habeas corpus, and it constituted an abuse of the writ as he raised a claim new and different from those raised in his previous petitions. See NRS 34.810(1)(b)(2); NRS 34.810(2).<sup>2</sup> Padilla-Saldana's petition was

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

<sup>2</sup>*Padilla-Saldana v. State*, Docket No. 38468 (Order of Affirmance, November 5, 2002). Padilla-Saldana also filed a postconviction petition for a writ of habeas corpus in the district court on April 15, 2008, but the

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, Padilla-Saldana was required to overcome the rebuttable presumption of prejudice. See NRS 34.800(2).

Padilla-Saldana argued he is actually innocent and the failure to consider his claims on the merits would result in a fundamental miscarriage of justice. In support of this claim, Padilla-Saldana submitted recently made affidavits from his daughters, who were very young during the incident that led to their mother's death and the subsequent trial. In those affidavits, the daughters state that after Padilla-Saldana was convicted for killing their mother, they went to live with their aunt and uncle. In the first affidavit, one daughter asserted that she heard both her aunt and uncle laugh about how they lied when testifying at Padilla-Saldana's trial. In the second affidavit, the other daughter stated her aunt had told her she lied during her trial testimony. Padilla-Saldana argued the affidavits show the testimony provided by the aunt and uncle was untruthful, and he is actually innocent because the remaining evidence demonstrates the shooting was an accident.

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. 957, 966, 363 P.3d 1148,

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Nevada Supreme Court dismissed his appeal from the denial of that petition for lack of jurisdiction because Padilla-Saldana did not timely file a notice of appeal. *Padilla-Saldana v. State*, Docket No. 62762 (Order Dismissing Appeal, April 18, 2013). In addition, Padilla-Saldana filed a postconviction petition for a writ of habeas corpus in the district court on August 22, 2013, but he did not appeal the denial of that petition.

1154 (2015). A petitioner can show 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 the new evidence.” *Id.* (internal quotation marks omitted). “To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial.” *Schlup v. Delo*, 513 U.S. 298, 324 (1995). 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.” *Berry*, 131 Nev. at 967, 363 P.3d at 1154.

We conclude Padilla-Saldana failed to demonstrate he was actually innocent. The affidavits filed by Padilla-Saldana, which were made more than 20 years after the trial in this matter, provide general impeachment evidence concerning two of the State’s witnesses and “[t]his sort of latter-day evidence brought forward to impeach a prosecution witness will seldom, if ever,” demonstrate that no reasonable juror would have convicted a defendant. *Sawyer v. Whitley*, 505 U.S. 333, 349 (1992); *see also Gandarela v. Johnson*, 286 F.3d 1080, 1086 (9th Cir. 2002) (stating “speculative and collateral impeachment falls far short of showing actual innocence.”). Moreover, the information Padilla-Saldana provided in his petition concerning his accident theory of defense was already presented at his trial and, therefore, cannot form a basis for a credible claim of actual innocence. *See Schlup*, 513 U.S. at 324.

In addition, our review of the record reveals strong evidence of Padilla-Saldana’s guilt was presented at trial. Padilla-Saldana testified

that the victim accidentally shot herself as she attempted to prevent him from retrieving a firearm following an argument he had with the victim's brother. However, the evidence presented at trial demonstrated the victim did not shoot herself.

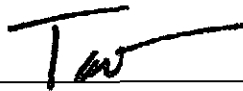
This included forensic and medical evidence that revealed the victim did not have gunshot residue on her hands, the pattern of the gunpowder and lead particles on the victim's shirt demonstrated the firearm was between 1.5 and 2.5 feet from the victim when it fired, and the bullet entered the victim's upper left chest at a downward 45-degree angle. A forensic pathologist testified that the victim's position and the angle of the bullet wound were consistent with the victim having been seated on the edge of the bed when she was shot. Given the strong medical and forensic evidence, Padilla-Saldana failed to demonstrate it is more likely than not that no reasonable juror would have convicted him in light of the affidavits provided by his daughters concerning their aunt and uncle. *See Barry*, 131 Nev. at 969, 363 P.3d at 1156 (when considering new evidence in support of a claim of actual innocence courts must "assess how reasonable jurors would react to the overall, newly supplemented record.") (internal quotation marks omitted). Therefore, we conclude the district court did not err by denying Padilla-Saldana's actual-innocence claim without considering it at an evidentiary hearing.<sup>3</sup> *See id.* at 967, 363 P.3d at 1155.


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<sup>3</sup>The district court denied Padilla-Saldana's actual-innocence claim based upon Padilla-Saldana's failure to properly explain his delay in raising the claim. However, a delay in raising an actual-innocence claim is not a sufficient reason on its own to deny such a claim; rather the district court should assess "how the delay affected the reliability of the evidence or why it prevented [the petitioner] from meeting the high standard of an actual

Therefore, we conclude the district court did not err by concluding Padilla-Saldana's petition was procedurally barred. In addition, the district court properly concluded Padilla-Saldana failed to overcome the presumption of prejudice to the State. *See* NRS 34.800(2). Accordingly, we ORDER the judgment of the district court AFFIRMED.<sup>4</sup>

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

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

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

cc: Hon. Lynne K. Simons, District Judge  
Eloy Padilla-Saldana  
Attorney General/Carson City  
Washoe County District Attorney  
Washoe District Court Clerk

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innocence claim.” *See id.* at 972, 363 P.3d at 1158. Nevertheless, the district court properly denied relief, and we therefore affirm. *See Wyatt v. State*, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970).

<sup>4</sup>We have considered Padilla-Saldana's August 1, 2018, motion for the appointment of counsel and conclude no relief is warranted.