

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

HORACE CALVIN HOUSTON,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 73884

**FILED**

JUL 17 2018

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY  DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Horace Calvin Houston appeals from a district court order denying a postconviction petition for a writ of habeas corpus filed on April 22, 2017.<sup>1</sup> Eighth Judicial District Court, Clark County; Kathleen E. Delaney, Judge.

Houston's petition was filed more than 12 years after the remittitur on direct appeal was issued on September 22, 2004;<sup>2</sup> consequently, it was untimely filed and procedurally barred absent a demonstration of good cause—cause for the delay and undue prejudice. *See* NRS 34.726(1). Moreover, because the State specifically pleaded laches, Houston was required to overcome the rebuttable presumption of prejudice to the State. *See* NRS 34.800(2).

First, Houston claims he had good cause because his legal files were seized by Nevada Department of Corrections personnel, which impinged upon his ability to file his first postconviction habeas petition on

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

<sup>2</sup>*See Houston v. State*, Docket Nos. 42011 & 42046 (Order of Affirmance, August 27, 2004).

time. However, Houston failed to demonstrate the factual basis for his postconviction habeas claims was unavailable until his legal files were returned and this good cause claim was not itself procedurally barred.<sup>3</sup> See *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (explaining good cause may be demonstrated when the factual basis for a claim was not reasonably available to be raised in a timely petition and the good cause claim must not itself be procedurally defaulted). Therefore, Houston has not demonstrated good cause to overcome the procedural bar to his petition,

Second, Houston claims he had good cause to overcome the procedural bar because his claims challenged the jurisdiction of the district court. However, none of Houston's claims implicate the jurisdiction of the district court; therefore, he has not demonstrated good cause to overcome the procedural bar to his petition. See Nev. Const. art. 6, § 6; NRS 171.010; *United States v. Cotton*, 535 U.S. 625, 630 (2002) (“[T]he term jurisdiction . . . means the court’s statutory or constitutional *power* to adjudicate the case.” (internal quotation marks omitted)).

Third, Houston claims the procedural bar does not apply because he was entitled to equitable tolling. However, the Nevada Supreme Court has expressly “rejected equitable tolling of the one-year filing period set forth in NRS 34.726 because the statute’s plain language requires a petitioner to demonstrate a legal excuse for any delay in filing a petition.” *Brown v. McDaniel*, 130 Nev. 565, 576, 331 P.3d 867, 874 (2014). Therefore, Houston has not demonstrated good cause to overcome the procedural bar to his petition.

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<sup>3</sup>We note Houston attempted to raise this good cause claim in his appeal from the district court order denying his previous postconviction habeas petition. See *Houston v. State*, Docket No. 69629 (Order of Affirmance, October 19, 2016).

Fourth, Houston claims the procedural bar should not apply because he is actually innocent due to errors in the charging document and the jury instructions. 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). However, "actual innocence means factual innocence, not mere legal insufficiency," *Bousley v. United States*, 523 U.S. 614, 623 (1998), and 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," *Calderon v. Thompson*, 523 U.S. 538, 559 (1998) (quoting *Schulp v. Delo*, 513 U.S. 298, 327 (1995)). Houston did not make a colorable showing of actual innocence.

We conclude Houston failed to demonstrate good cause or a fundamental miscarriage of justice sufficient to excuse the procedural bar to his petition and the State's specific plea of laches. See 34.726(1); NRS 34.800(1). Therefore, the district court did not err in denying the petition,<sup>4</sup> and we

ORDER the judgment of the district court AFFIRMED.



Silver

, C.J.



Tao

, J.



Gibbons

, J.

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<sup>4</sup>Although the district court reached the correct result, it erred in finding this petition was successive because none of Houston's previous postconviction habeas petitions were decided on the merits. See NRS 34.810(2).

cc: Hon. Kathleen E. Delaney, District Judge  
Horace Calvin Houston  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk