

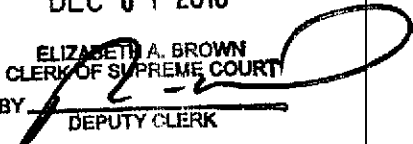
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MARCUS SHEREEF MCNEAL,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 74502-COA

**FILED**

DEC 04 2018

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY  DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Marcus Shereef McNeal 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; Michael Villani, Judge.

McNeal filed his petition on August 3, 2017, more than three years after issuance of the remittitur on direct appeal on June 6, 2014. *McNeal v. State*, Docket No. 64076 (Order of Affirmance, May 13, 2014). Thus, McNeal's petition was untimely filed. *See* NRS 34.726(1). Moreover, McNeal's petition was successive because he had previously filed two 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

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

his previous petitions.<sup>2</sup> See NRS 34.810(1)(b)(2); NRS 34.810(2). McNeal'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).

McNeal claimed he would suffer a fundamental miscarriage of justice if his claims were not reviewed on their merits because he is actually innocent. McNeal contended he was innocent of attempted murder because the attempt statute does not define criminal conduct and, therefore, the trial court lacked jurisdiction to convict him.

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, 1154 (2015). In order to demonstrate a fundamental miscarriage of justice, a petitioner must make a colorable showing of actual innocence—factual innocence, not legal innocence. *Calderon v. Thompson*, 523 U.S. 538, 559 (1998); *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). A petitioner can demonstrate actual innocence by demonstrating "it is more likely than not that no reasonable juror would have convicted him in the light of . . . new evidence." *Berry*, 131 Nev. at 966, 363 P.3d at 1154 (quotation marks omitted). McNeal's claim was not based upon newly discovered evidence and did not demonstrate he was factually innocent. See *Schlup v. Delo*, 513 U.S. 298, 324 (1995) ("To be credible, [an actual-


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<sup>2</sup>*McNeal v. State*, Docket No. 71446 (Order of Affirmance, June 14, 2017); *McNeal v. State*, Docket No. 68765 (Order of Affirmance, March 16, 2016).

innocence claim] requires petitioner to support his allegations of constitutional error with new reliable evidence.”). 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. Michael Villani, District Judge  
Marcus Shereef McNeal  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk