

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CARLOS ANTONIO OTERO ESCOBAR,  
A/K/A CARLOS ANTONIO ESCOBAR,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 73638-COA

FILED

JAN 17 2019

ELISSA F. CADISH  
CLERK OF APPELLATE COURT  
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Carlos Antonio Otero Escobar appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on April 13, 2017.<sup>1</sup> Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

Escobar filed his petition more than 16 years after issuance of the remittitur on direct appeal on September 6, 2000. *See Escobar v. State*, Docket No. 33570 (Order Dismissing Appeal, August 11, 2000). Escobar's petition was therefore untimely filed. *See* NRS 34.726(1). Escobar's petition was also successive.<sup>2</sup> *See* NRS 34.810(1)(b)(2); NRS 34.810(2). Escobar's petition was therefore 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). Further, because the State specifically pleaded laches, Escobar

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<sup>1</sup>This appeal has been submitted for decision without oral argument and we conclude the record is sufficient for our review and briefing is unwarranted. NRAP 34(f)(3), (g).

<sup>2</sup>*See Escobar v. State*, Docket No. 64118 (Order of Affirmance, September 16, 2014); *Escobar v. State*, Docket No. 53502 (Order of Affirmance, September 29, 2010).

was required to overcome the presumption of prejudice to the State. See NRS 34.800(2).

Escobar's underlying claim was that he is entitled to the retroactive application of *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000). He claimed the United States Supreme Court's decisions in *Welch v. United States*, 578 U.S. \_\_\_, 136 S. Ct. 1257 (2016), and *Montgomery v. Louisiana*, 577 U.S. \_\_\_, 136 S. Ct. 718 (2016), provided good cause to excuse his procedural bars because they changed the framework under which retroactivity is analyzed. However, Escobar's conviction was not yet final when *Byford* was decided, see *Colwell v. State*, 118 Nev. 807, 820, 59 P.3d 463, 472 (2002); see also U.S. Sup. Ct. R. 13, such that retroactivity is not at issue in Escobar's case. Accordingly, any new retroactivity case law could not constitute cause for the delay. Further, Escobar cannot demonstrate undue prejudice because the Nevada Supreme Court has applied *Byford* to Escobar's case and concluded the evidence was sufficient to support a conviction for willful, deliberate, and premeditated murder such that reversal was not warranted. *Escobar v. State*, Docket No. 53502 (Order of Affirmance, September 29, 2010). That holding is the law of the case. See *Hall v. State*, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975).

Escobar also claimed he could demonstrate a fundamental miscarriage of justice to overcome the procedural bars because "there is a significant risk that [he] stands convicted of an act that the law does not make criminal." A petitioner may overcome procedural bars by demonstrating he is actually innocent such that the failure to consider his petition would result in a fundamental miscarriage of justice. *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001), *abrogated on other grounds by Ripppo v. State*, 134 Nev. \_\_\_, \_\_\_ n.12, 423 P.3d 1084, 1097 n.12

(2018). “It is important to note in this regard that ‘actual innocence’ means factual innocence, not mere legal insufficiency.” *Bousley v. United States*, 523 U.S. 614, 623 (1998). Escobar claimed that “[t]he facts in this case established that [he] only committed a second-degree murder.” This is not factual innocence. Accordingly, Escobar failed to demonstrate he is actually innocent such that failing to consider his claims on the merits would result in a fundamental miscarriage of justice. And for this same reason, he failed to overcome the presumption of prejudice to the State. *See* NRS 34.800.

For the foregoing reasons, we conclude the district court did not err by denying Escobar’s petition as procedurally barred, and we

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



Tao

J.



Gibbons

J.

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<sup>3</sup>We 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. 75, 76, 391 P.3d 760, 760-61 (2017).

The Honorable Michael L. Douglas did not participate in the decision in this matter.

cc: Chief Judge, Eighth Judicial District  
Carlos Antonio Otero Escobar  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk