

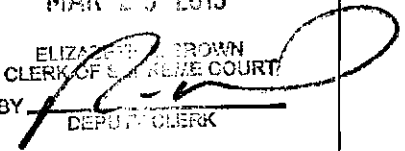
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DAMON J. ARMSTRONG,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 73718-COA

FILED

MAR 20 2019

ELIZABETH BROWN  
CLERK OF SUPREME COURT  
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Damon J. Armstrong appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on April 29, 2017.<sup>1</sup> Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

Armstrong filed his petition 19 years after issuance of the remittitur on direct appeal on March 18, 1998. *See Armstrong v. State*, Docket No. 28547 (Order Dismissing Appeal, February 27, 1998). Armstrong's petition was therefore untimely filed. *See* NRS 34.726(1). Armstrong's petition was also successive.<sup>2</sup> *See* NRS 34.810(1)(b)(2); NRS 34.810(2). Armstrong's petition was therefore procedurally barred absent a

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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 Armstrong v. State*, Docket No. 56483 (Order of Affirmance, September 15, 2011); *Armstrong v. State*, Docket No. 34317 (Order of Affirmance, June 11, 2001).


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

Armstrong claimed the 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 the procedural bars to his claim that he is entitled to the retroactive application of *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000). We conclude the district court did not err by concluding the cases did not provide good cause to overcome the procedural bars. See *Branham v. Warden*, 134 Nev. \_\_\_, \_\_\_, 434 P.3d 313, 316 (Ct. App. 2018).

Armstrong also claimed he could demonstrate a fundamental miscarriage of justice to overcome the procedural bars. 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). Armstrong claimed that “[t]he facts in this case established that [he] only committed a second-degree murder.” This is not actual innocence, and Armstrong thus failed to overcome the procedural bars. See *Bousley v. United States*, 523 U.S. 614, 623 (1998) (“[A]ctual innocence’ means factual innocence, not mere legal insufficiency.”). And because he failed to demonstrate a fundamental

miscarriage of justice, Armstrong failed to overcome the presumption of prejudice to the State. *See* NRS 34.800. Accordingly, we

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

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

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

  
\_\_\_\_\_, J.  
Bulla

cc: Chief Judge, Eighth Judicial District  
Damon J. Armstrong  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk

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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).