

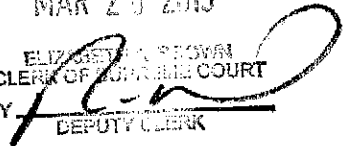
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ROME RICHARD CHACON,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 74552-COA

FILED

MAR 20 2019

ELIZABETH A. PROVAN  
CLERK OF APPEALS COURT  
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Rome Richard Chacon appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on April 18, 2017. Eighth Judicial District Court, Clark County; Douglas Smith, Judge.

Chacon filed his petition 23 years after issuance of the remittitur on direct appeal on February 8, 1994, *see Chacon v. State*, Docket No. 24085 (Order Dismissing Appeal, January 20, 1994), and 24 years after the effective date of NRS 34.726, *see* 1991 Nev. Stat., ch. 44, § 5, at 75-76, § 33, at 92; *Pellegrini v. State*, 117 Nev. 860, 874-75, 34 P.3d 519, 529 (2001), *abrogated on other grounds by Rippo v. State*, 134 Nev. \_\_\_, \_\_\_ n.12, 423 P.3d 1084, 1097 n.12 (2018). Chacon's petition was therefore untimely filed. *See* NRS 34.726(1). Chacon's petition was also successive.<sup>1</sup> *See* NRS

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<sup>1</sup>*See Chacon v. State*, Docket No. 47444 (Order of Affirmance, September 6, 2007); *Chacon v. State*, Docket No. 39384 (Order of Affirmance, February 27, 2003).


34.810(1)(b)(2); NRS 34.810(2). Chacon'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, Chacon was required to overcome the presumption of prejudice to the State. See NRS 34.800(2).

Chacon 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). Further, Chacon failed to overcome the presumption of prejudice to the State pursuant to NRS 34.800(2).

Chacon argues for the first time on appeal that he can demonstrate a fundamental miscarriage of justice to overcome the procedural bars. Because Chacon did not raise this claim below, we need not consider it on appeal. See *McNelton v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999). We nevertheless note that Chacon's claim lacks merit. 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*, 117 Nev. at 887, 34 P.3d at 537. Chacon argues that "[t]he facts in this case established that [he] should only have been convicted of second-degree murder." This is not actual innocence, and Chacon's argument would thus have 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.”). Accordingly, we

ORDER the judgment of the district court AFFIRMED.

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

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

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

cc: Hon. Douglas Smith, District Judge  
Federal Public Defender/Las Vegas  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk