

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN R. LUCKETT,

No. 36945

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

**FILED**

**DEC 12 2001**

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Richards*  
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus.

On January 29, 1986, the district court convicted appellant, pursuant to a jury verdict, of two counts of first degree murder with the use of a deadly weapon, one count of conspiracy to commit murder, and one count of burglary. The district court sentenced appellant to serve four consecutive terms of life without the possibility of parole and two concurrent terms of six years each.<sup>1</sup> This court dismissed appellant's direct appeal.<sup>2</sup> The remittitur issued on July 14, 1987.

<sup>1</sup>On December 9, 1993, appellant filed a motion to correct an illegal sentence in the district court. The district court determined that a clerical error had occurred and entered an amended judgment of conviction correcting the clerical error on December 23, 1993. Appellant then filed a proper person appeal from the amended judgment of conviction. This court dismissed appellant's appeal concluding that the district court properly amended appellant's conviction. Lockett v. State, Docket No. 26019 (Order Dismissing Appeal, December 24, 1997). In denying appellant's proper person petition for rehearing this court observed that the appeal "did not constitute a direct appeal from a judgment of conviction." Lockett v. State, Docket No. 26019 (Order Denying Rehearing, February 6, 1998). Another department of the Eighth Judicial District Court entered a second amended judgment of conviction on September 22, 1994, to correct the same clerical mistake. The second amended judgment of conviction specified that it was entered "nunc pro tunc as of November 27, 1985," appellant's original sentencing date.

<sup>2</sup>Lockett v. State, Docket No. 17094 (Order Dismissing Appeal, June 25, 1987).

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On February 2, 1996, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. On March 14, 1996, the district court denied appellant's petition, concluding that it was untimely filed and that appellant had failed to demonstrate good cause for the delay.<sup>3</sup> This court affirmed the district court's judgment.<sup>4</sup>

On August 23, 2000, appellant filed another proper person post-conviction petition for a writ of habeas corpus in the district court. The State filed an opposition to appellant's petition, arguing that the petition was untimely,<sup>5</sup> and specifically pleading laches.<sup>6</sup> The district court declined to appoint counsel for appellant, and entered an order on October 19, 2000, denying the petition. The district court specifically found that the petition was untimely filed and that appellant had failed to demonstrate good cause for the late filing.<sup>7</sup>

Appellant argued that the procedural defect should be excused because he is actually innocent. Even if a petitioner fails to show good cause for a procedural default, a reviewing court must reach a claim if failure to consider it would result in a fundamental miscarriage of justice, *i.e.*, where a constitutional violation has probably resulted in the conviction of someone who is actually innocent.<sup>8</sup> This requires a petitioner

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<sup>3</sup>See NRS 34.726(1).

<sup>4</sup>Lockett v. State, Docket No. 28591 (Order Dismissing Appeal, April 16, 1999).

<sup>5</sup>See NRS 34.726(1).

<sup>6</sup>See NRS 34.800.

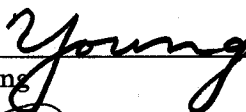
<sup>7</sup>The district court also found that relief was precluded in this case because the State had pleaded laches, pursuant to NRS 34.800, and appellant had failed to overcome the presumption of prejudice to the state. We note, however, that appellant was not allowed time to respond to the State's argument that laches should apply, and so the State's motion to dismiss should not have been granted on this ground. See NRS 34.800(2) ("The petitioner must be given an opportunity to respond to the [State's] allegations [of prejudice due to laches] in the pleading before a ruling on the motion is made."). Nevertheless, any error is not material, as the petition was properly denied for being untimely pursuant to NRS 34.726(1).

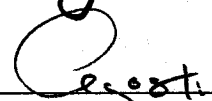
<sup>8</sup>See Schlup v. Delo, 513 U.S. 298, 327-28 (1995); Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).


to "show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt."<sup>9</sup> Appellant has not made this requisite showing. Therefore, the district court did not err in denying appellant's petition.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.<sup>10</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 J.  
Young

 J.  
Agosti

 J.  
Leavitt

cc: Hon. Mark W. Gibbons, District Judge  
Attorney General/Carson City  
Clark County District Attorney  
John R. Lockett  
Clark County Clerk

<sup>9</sup>Schlup, 513 U.S. at 327.

<sup>10</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).