

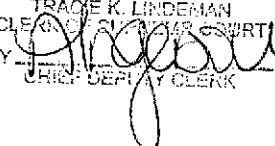
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DARION NICHOLSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 68299

FILED

DEC 18 2015

TRACIE K. LINDENMAN
CLERK OF CLERK OF COURT
BY 
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying a postconviction petition for a writ of habeas corpus.¹ Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Appellant Darion Nicholson filed his petition on May 22, 2015, more than ten years after issuance of the remittitur on direct appeal on May 6, 2005. *Nicholson v. State*, Docket No. 44461 (Order of Affirmance, April 11, 2005). Thus, Nicholson's petition was untimely filed. See NRS 34.726(1). Moreover, Nicholson'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

¹This 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).

different from those raised in his previous petitions.² See NRS 34.810(2). Nicholson's petition was procedurally barred absent a demonstration of good cause and actual prejudice. See NRS 34.726(1); NRS 34.810(3).

First, relying in part on *Martinez v. Ryan*, 566 U.S. ___, 132 S. Ct. 1309 (2012), Nicholson claimed he had good cause because he was not appointed counsel in the first postconviction proceedings. We conclude this argument lacked merit. The appointment of counsel was discretionary in the first postconviction proceedings, see NRS 34.750(1), and Nicholson failed to demonstrate an abuse of discretion. Further, the Nevada Supreme Court has held *Martinez* does not apply to Nevada's statutory postconviction procedures. See *Brown v. McDaniel*, 130 Nev. ___, ___, 331 P.3d 867, 871-72 (2014). Thus, the failure to appoint postconviction counsel and the decision in *Martinez* did not provide good cause for this late and successive petition.

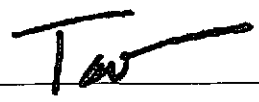
Second, Nicholson claimed failure to consider his claims of ineffective assistance of counsel on the merits would result in a fundamental miscarriage of justice. In order to demonstrate a fundamental miscarriage of justice, a petitioner must make a colorable showing of actual innocence—factual innocence, 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). Nicholson did not attempt to demonstrate his factual innocence. Therefore, Nicholson failed to show “it

²*Nicholson v. State*, Docket No. 56516 (January 13, 2011); *Nicholson v. State*, Docket No. 47182 (Order of Affirmance, July 28, 2006).

is more likely than not that no reasonable juror would have convicted him in light of . . . new evidence." *Calderon*, 523 U.S. at 559 (quoting *Schlup v. Delo*, 513 U.S. 298, 327, (1995)); see also *Pellegrini*, 117 Nev. at 887, 34 P.3d at 537; *Mazzan v. Warden*, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996). We conclude the district court did not err in denying the petition as procedurally barred, and we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Michelle Leavitt, District Judge
Darion Nicholson
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk