

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MARIANO MADRID,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 77724-COA

**FILED**

AUG 13 2019

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
CLERK

*ORDER OF AFFIRMANCE*

Mariano Madrid appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus.<sup>1</sup> Eighth Judicial District Court, Clark County; Ronald J. Israel, Judge.

Madrid filed his petition on October 9, 2017, more than eight years after issuance of the remittitur on direct appeal on May 26, 2009. *Madrid v. State*, Docket No. 50115 (Order of Affirmance, May 1, 2009). Thus, Madrid's petition was untimely filed. *See* NRS 34.726(1). Moreover, Madrid'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 different from those raised in

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<sup>1</sup>This appeal has been submitted for decision without oral argument. NRAP 34(f)(3).

his previous petitions.<sup>2</sup> See NRS 34.810(1)(b)(2); NRS 34.810(2). Madrid's petition was 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). Moreover, because the State specifically pleaded laches, Madrid was required to overcome the rebuttable presumption of prejudice to the State. See NRS 34.800(2). A district court need not conduct an evidentiary hearing concerning claims that are procedurally barred when the petitioner cannot overcome the procedural bars. *Rubio v. State*, 124 Nev. 1032, 1046 & n.53, 194 P.3d 1224, 1233-34 & n.53 (2008).

First, Madrid alleged he had good cause due to the ineffective assistance of trial and appellate counsel. However, procedurally barred claims of ineffective assistance of counsel cannot constitute cause for raising additional claims of ineffective assistance of counsel and Madrid did not demonstrate an impediment external to the defense prevented him from raising his claims in a timely manner. See *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). Therefore, the district court did not err by finding Madrid failed to demonstrate good cause to overcome the procedural bars.

Second, Madrid claimed the holdings 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 assert changes to NRS 193.165 regarding the penalty for use of a deadly weapon should be applied

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<sup>2</sup>*Madrid v. State*, Docket No. 73454-COA (Order of Affirmance, March 14, 2018); *Madrid v. State*, Docket No. 63916 (Order of Affirmance, November 13, 2014).

retroactively to his benefit. However, *Welch* and *Montgomery* are inapplicable to Madrid's underlying substantive claim. Madrid claimed he was entitled to the retroactive application of the 2007 amendments to NRS 193.165. *Welch* and *Montgomery* address situations in which a court interpreted a statute or made a constitutional determination. See *Welch*, 578 U.S. at \_\_\_, 136 S. Ct. at 1264-65; *Montgomery*, 577 U.S. at \_\_\_, 136 S. Ct. at 726. The Legislature's changes to NRS 193.165 were not the result of a court decision and were not of constitutional dimension. See *State v. Second Judicial Dist. Court*, 124 Nev. 564, 565-66, 571, 188 P.3d 1079, 1080, 1084 (2008). Accordingly, the district court did not err by finding *Welch* and *Montgomery* did not provide good cause to reach Madrid's underlying claim.

Third, Madrid alleged he was actually innocent. Madrid based his actual-innocence claim upon assertions that he was intoxicated on the night of the murder, he acted in self-defense, and the trial court erred by failing to instruct the jury on voluntary manslaughter as a lesser-included offense.

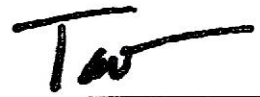
A petitioner may overcome the procedural bars and "secure review of the merits of defaulted claims by showing that the failure to consider the petition on its merits would amount to a fundamental miscarriage of justice." *Berry v. State*, 131 Nev. 957, 966, 363 P.3d 1148, 1154 (2015). In order to demonstrate 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). A petitioner can demonstrate actual innocence by demonstrating "it is more


likely than not that no reasonable juror would have convicted him in the light of . . . new evidence.” *Berry*, 131 Nev. at 966, 363 P.3d at 1154 (quotation marks omitted). Madrid’s claims did not involve factual innocence. In addition, Madrid failed to demonstrate that no reasonable juror would have convicted him. Therefore, the district court did not err by finding Madrid failed to overcome the procedural bars.

Finally, Madrid failed to overcome the rebuttable presumption of prejudice to the State. *See* NRS 34.800(2). Therefore, the district court did not err by denying the petition without conducting an evidentiary hearing. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

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

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

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

cc: Hon. Ronald J. Israel, District Judge  
Mariano Madrid  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk