

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MACK C. MASON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 71296

FILED

MAY 16 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Mack C. Mason appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus.¹ Eighth Judicial District Court, Clark County; Eric Johnson, Judge.

Mason argues the district court erred in denying his petition as procedurally barred. Mason filed his petition on June 9, 2016, more than 13 years after issuance of the remittitur on direct appeal on September 3, 2002. *Mason v. State*, 118 Nev. 554, 51 P.3d 521 (2002). Thus, Mason's petition was untimely filed. See NRS 34.726(1). Moreover, Mason's petition was successive because he had previously filed several 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 his previous petitions.² See NRS 34.810(1)(b)(2); NRS 34.810(2).

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

²*Mason v. State*, Docket No. 58517 (Order of Affirmance, November 17, 2011). Mason also filed a postconviction petition for a writ of habeas corpus in the district court on September 5, 2002, but he voluntarily
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Mason'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, Mason was required to overcome the rebuttable presumption of prejudice. See NRS 34.800(2).

Mason argues the district court erred in denying his petition without conducting an evidentiary hearing concerning his claim of actual innocence. Mason supported his actual-innocence claim with assertions that he suffered from the ineffective assistance of counsel.

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 is entitled to an evidentiary hearing regarding a gateway claim of actual innocence if he raises specific factual allegations which would “show that it is more likely than not that no reasonable juror would have convicted him in the light of . . . new evidence.” *Berry v. State*, 131 Nev. 363 P.3d 1148, 1154 (2015) (internal quotation marks omitted). Mason's claim failed to meet that narrow standard because it was not based upon an assertion of factual innocence. Therefore, the district court did not err in denying Mason's petition as procedurally barred without conducting an evidentiary hearing.


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withdrew that petition. In addition, Mason filed a postconviction petition for a writ of habeas corpus in the district court on January 23, 2003, but he did not appeal the denial of that petition.

To the extent Mason also argued he has good cause due to ineffective assistance of his trial counsel, a procedurally barred claim of ineffective assistance of trial counsel cannot constitute good cause for additional claims of ineffective assistance of counsel. *See Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). Mason's claims of ineffective assistance of trial counsel were reasonably available to be raised in his previous petition, and Mason failed to demonstrate an impediment external to the defense prevented him from raising his claims in a timely manner.³ *See id.* at 252-53, 71 P.3d at 506. Accordingly, we

ORDER the judgment of the district court AFFIRMED.⁴


_____, C.J.
Silver


_____, J.
Gibbons

cc: Hon. Eric Johnson, District Judge
Mack C. Mason
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

³We have reviewed all documents Mason has submitted in this matter, and we conclude no relief based upon those submissions is warranted. To the extent Mason has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we decline to consider them in the first instance.

⁴The Honorable Jerome T. Tao, Judge, did not participate in the decision in this matter.