

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOSE A. GALLIMORT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 72826

FILED

OCT 12 2017

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

ORDER OF AFFIRMANCE

Jose A. Gallimort appeals from a district court order denying the postconviction petition for a writ of habeas corpus he filed on November 4, 2016.¹ Eighth Judicial District Court, Clark County; Eric Johnson, Judge.

Gallimort's petition was untimely because it was filed more than sixteen years after the remittitur on direct appeal was issued on April 5, 2000,² and it was successive because he had previously filed four postconviction petitions for writs of habeas corpus.³ See NRS 34.726(1);

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

²See *Gallimort v. State*, 116 Nev. 315, 997 P.2d 796 (2000).

³See *Gallimort v. State*, Docket No. 61815 (Order of Affirmance, June 12, 2013); *Gallimort v. State*, Docket No. 49438 (Order of Affirmance, October 11, 2007); *Gallimort v. State*, Docket Nos. 33289 and 36826 (Order of Affirmance, August 7, 2001).

NRS 34.810(2). Therefore, Gallimort's petition was procedurally barred absent a demonstration of good cause and actual prejudice. See NRS 34.726(1); NRS 34.810(2). Moreover, because the State specifically pleads laches, Gallimort was required to overcome the rebuttable presumption of prejudice to the State. See NRS 34.800(2).

Gallimort claims the district court erred by finding his petition was procedurally barred without allowing for discovery or conducting an evidentiary hearing because his petition was sufficient in form and content to establish a gateway claim of actual innocence.

A colorable showing of actual innocence may overcome procedural bars under the fundamental miscarriage of justice standard. *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). However, "actual innocence means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623 (1998). "[A] claim of actual innocence must be based on reliable evidence not presented at trial." *Calderon v. Thompson*, 523 U.S. 538, 559 (1998) (quoting *Schulp v. Delo*, 513 U.S. 298, 324 (1995)). And, the petitioner must show "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence' presented in his habeas petition." *Id.* (quoting *Schulp*, 513 U.S. at 327).

We conclude Gallimort did not make a colorable showing of actual innocence in his petition and the district court did not err by denying his procedurally-barred petition. See *State v. Eighth Judicial Dist. Court*

(*Riker*), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005) (explaining that the application of procedural bars is mandatory). Accordingly, we

ORDER the judgment of the district court AFFIRMED.⁴


_____, C.J.
Silver


_____, J.
Gibbons

cc: Hon. Eric Johnson, District Judge
Jose A. Gallimort
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

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