

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JUAN JACOBO GARCIA, A/K/A  
JACOBO JUAN GARCIA,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 71005

**FILED**

FEB 23 2017

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

*ORDER OF AFFIRMANCE*

Appellant Juan Jacobo Garcia 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; Michelle Leavitt, Judge.

Garcia argues the district court erred in denying his petition as procedurally barred. Garcia filed his petition on March 3, 2016, more than eight years after issuance of the remittitur from Garcia's direct appeal filed pursuant to *Lozada v. State*, 110 Nev. 349, 871 P.2d 944 (1994) on June 27, 2007.<sup>2</sup> Thus, Garcia's petition was untimely filed. See NRS 34.726(1). Moreover, Garcia's petition was successive because he had

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

<sup>2</sup>*Garcia v. State*, Docket No. 47059 (Order Affirming in Part and Reversing in Part and Remanding, May 31, 2007). Following that decision the district court entered an amended judgment of conviction on December 3, 2007. Garcia did not file a direct appeal challenging the amended judgment of conviction.

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.<sup>3</sup> See NRS 34.810(1)(b)(2); NRS 34.810(2). Garcia'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, the district court concluded the petition was barred by laches, requiring Garcia to overcome the rebuttable presumption of prejudice to the State. See NRS 34.800(2).

First, Garcia argues the district court erred in denying his petition as procedurally barred without conducting an evidentiary hearing concerning his good-cause claims. Garcia asserts he raised claims that if true, would warrant him relief, and he was therefore entitled to an evidentiary hearing. See *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

In his petition, Garcia claimed the decisions in *Martinez v. Ryan*, 566 U.S. \_\_\_, 132 S. Ct. 1309 (2012), and *Nguyen v. Curry*, 736 F.3d 1287 (9th Cir. 2013), provided good cause. 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 decision in *Martinez* did not provide good cause for filing a late and successive petition. And because *Nguyen* merely

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<sup>3</sup>*Garcia v. State*, Docket No. 65158 (Order of Affirmance, July 23, 2014); *Garcia v. State*, Docket No. 62119 (Order of Affirmance, July 23, 2013); *Garcia v. State*, Docket No. 56137 (Order of Affirmance, March 29, 2011). Garcia also filed a petition in the district court on November 4, 2015, and the appeal of the district court's denial of that petition is pending in Docket no. 70604.

discussed and applied the decision in *Martinez*, that decision also did not provide good cause to overcome the procedural bars. Accordingly, Garcia did not raise a good-cause claim that would warrant relief and the district court properly denied the petition without conducting an evidentiary hearing. See *Rubio v. State*, 124 Nev. 1032, 1046 & n.53, 194 P.3d 1224, 1233-34 & n.53 (2008).

Second, Garcia argues the district court erred in denying his petition without conducting an evidentiary hearing concerning his claim of actual innocence. Garcia asserted he was actually innocent because there was insufficient evidence to support his conviction for kidnapping.

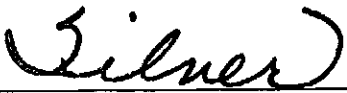
In order to demonstrate a fundamental miscarriage of justice, a petitioner must make a colorable showing of actual innocence—factual innocence, not legal innocence. *Calderon v. Thompson*, 523 U.S. 538, 559 (1998); *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). A petitioner is entitled 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).

In his petition, Garcia merely alleged he was legally innocent, and his claim of insufficient evidence to support his kidnapping conviction was not based upon new evidence. Because Garcia’s claim failed to meet the narrow standard to support a valid actual-innocence claim, the district court properly denied the petition without conducting an evidentiary

hearing concerning his actual-innocence claim.<sup>4</sup> *See id.* at \_\_\_, 363 P.3d at 1155.

Finally, Garcia failed to overcome the rebuttable presumption of prejudice to the State because he did not demonstrate a fundamental miscarriage of justice has occurred. *See* NRS 34.800(1)(b). Therefore, 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.<sup>5</sup>

  
\_\_\_\_\_, C.J.  
Silver

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

cc: Hon. Michelle Leavitt, District Judge  
Juan Jacobo Garcia  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk

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<sup>4</sup>Garcia also appears to assert the Nevada Revised Statutes are void due to the failure to contain enacting clauses. However, Garcia did not raise this issue in the instant petition before the district court and we decline to consider this issue in the first instance on appeal. *See McNelton v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999).

<sup>5</sup>The Honorable Jerome T. Tao, Judge, did not participate in the decision in this matter.