

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BRANDEN JAMES HERMANSEN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 70043

FILED

DEC 28 2016

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

Appellant Branden James Hermansen appeals from a district court order dismissing the postconviction petition for a writ of habeas corpus he filed on June 26, 2015. Second Judicial District Court, Washoe County; Jerome M. Polaha, Judge.

Hermansen filed his habeas petition more than one year after the issuance of the remittitur on direct appeal on October 14, 2013;¹ consequently, his petition was untimely and procedurally barred absent a demonstration of good cause and undue prejudice or that failure to consider his claims would result in a fundamental miscarriage of justice. *See* NRS 34.726(1); *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001).

Hermansen claims the district court erred by dismissing his untimely habeas petition without conducting an evidentiary hearing. He argues his motion to modify sentence was timely filed; the district court should have advised him to modify his motion into a petition for a writ of habeas corpus pursuant to *Harris v. State*, 130 Nev. ___, 329 P.3d 619

¹*See Hermansen v. State*, Docket No. 62011 (Order of Affirmance, September 18, 2013).


(2014); he has mental health issues, a limited education, and no access to the outside world; and he is actually innocent because he acted in self-defense.

However, the district court had no duty to advise Hermansen to transform his motion to modify sentence motion into a habeas petition. *See id.* at ___, 329 P.3d at 628. Hermansen's mental health issues, limited education, and lack of access to the outside world do not provide good cause to excuse the procedural bar. *See Phelps v. Dir., Nev. Dep't of Prisons*, 104 Nev. 656, 660, 764 P.2d 1303, 1306 (1988), *superseded by statute on other grounds as stated in State v. Haberstroh*, 119 Nev. 173, 180-81, 69 P.3d 676, 681 (2003). And, because Hermansen has not presented any new reliable evidence in support of his claim of actual innocence, he has not made a colorable showing of actual innocence that would excuse the untimely filing of his habeas petition or that would warrant an evidentiary hearing. *See Berry v. State*, 131 Nev. ___, ___, 363 P.3d 1148, 1155 (2015); *Brown v. McDaniel*, 130 Nev. ___, ___, 331 P.3d 867, 875 (2014).

Accordingly, we conclude the district court did not err by dismissing Hermansen's habeas petition, and we

ORDER the judgment of the district court AFFIRMED.²


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

²In light of our decision, we decline to address the remaining claims in Hermansen's opening brief.

cc: Hon. Jerome M. Polaha, District Judge
Karla K. Butko
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk