

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JAMES COOK,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 77370-COA

FILED

SEP 25 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a postconviction petition for a writ of habeas corpus filed on August 17, 2017. Eighth Judicial District Court, Clark County; Ronald J. Israel, Judge.

Cook's petition was filed more than 16 years after the judgment of conviction was entered on January 18, 2001;¹ consequently, it was untimely filed and procedurally barred absent a demonstration of good cause—cause for the delay and undue prejudice. *See* NRS 34.726(1). Moreover, because the State specifically pleaded laches, the petition was not justiciable unless Cook successfully rebutted the presumption of prejudice to the State. *See* NRS 34.800(2).

Cook claims he has good cause to overcome the procedural bar to his petition because he was a juvenile offender. However, Cook did not raise this claim in the court below and we decline to consider it for the first

¹Cook did not pursue a direct appeal.

time on appeal.² See *Davis v. State*, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991) (“This ground for relief was not part of appellant’s original petition for post-conviction relief and was not considered in the district court’s order denying that petition. Hence, it need not be considered by this court.”), *overruled on other grounds by Means v. State*, 120 Nev. 1001, 1012-13, 103 P.3d 25, 33 (2004).


Cook also claims he is actually innocent because the record establishes he was not guilty of first-degree murder. A colorable showing of actual innocence may overcome a procedural bar 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,” and the “petitioner must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him.” *Bousley v. United States*, 523 U.S. 614, 623 (1998) (quotation marks omitted) (addressing actual innocence in guilty plea cases). Cook did not make a colorable showing of actual innocence and therefore he did not demonstrate a fundamental miscarriage of justice sufficient to excuse the procedural bar to his petition.

²To the extent Cook argues postconviction counsel was ineffective for failing to raise the juvenile-offender claim and therefore he is entitled to relief pursuant to *Martinez v. Ryan*, 566 U.S. 1 (2012), his argument lacks merit because *Martinez* does not apply to Nevada’s statutory postconviction procedures. See *Brown v. McDaniel*, 130 Nev. 565, 571-72, 331 P.3d 867, 871 (2014).

We note Cook made no attempt to respond to the State's specific plea of laches, and we conclude the district court did not err by denying his procedurally barred habeas petition. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Ronald J. Israel, District Judge
Resch Law, PLLC d/b/a Conviction Solutions
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk