

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

SALLY DORIAN VILLAVERDE,
Appellant,
vs.
BRIAN WILLIAMS, WARDEN,
Respondent.

No. 77563-COA

FILED

OCT 30 2019

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

ORDER OF AFFIRMANCE

Sally Dorian Villaverde appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on August 26, 2018. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

Villaverde filed his petition more than 12 years after issuance of the remittitur on direct appeal on March 14, 2006. *See Villaverde v. State*, Docket No. 43443 (Order of Affirmance, February 15, 2006). Thus, Villaverde's petition was untimely filed. *See* NRS 34.726(1). Moreover, Villaverde's petition was successive because he had previously filed a postconviction petition 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 petition.¹ *See* NRS 34.810(1)(b)(2); NRS 34.810(2). Villaverde'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).

¹*Villaverde v. State*, Docket No. 51000 (Order of Affirmance, May 10, 2010).

Villaverde claims the district court erred by denying his claim that he demonstrated good cause to overcome the procedural bars based on actual innocence. Specifically, Villaverde claimed he was actually innocent because his codefendant, who actually committed the physical act of killing the victim, pleaded guilty to voluntary manslaughter and the other charges against him were dropped. He claimed his codefendant's guilty plea was new evidence, not presented at trial, that showed that he could not have committed first-degree murder with the use of a deadly weapon, robbery with the use of a deadly weapon, and burglary.

“A habeas petitioner may overcome these [procedural] bars and secure review of the merits of defaulted claims by showing that the failure to consider the petition on its merits would amount to a fundamental miscarriage of justice.” *Berry v. State*, 131 Nev. 957, 967, 363 P.3d 1148, 1154 (2015). 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). To demonstrate actual innocence a “petitioner must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence.” *Id.* (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)); see also *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). “[A]ctual innocence means factual innocence, not mere legal insufficiency.” *Bousley v. United States*, 523 U.S. 614, 623 (1998). “[A]n evidentiary hearing regarding actual innocence is required where the new evidence, if credited, would show that it is more likely than not no reasonable jury would find the petitioner guilty beyond a reasonable doubt.” *Berry*, 131 Nev. at 967, 363 P.3d at 1155 (internal quotation marks omitted).

Villaverde failed to demonstrate he was actually innocent. Villaverde's codefendant's *Alford*² plea to lesser charges did not demonstrate Villaverde was factually innocent of the charges he was convicted of. Accordingly, because Villaverde failed to demonstrate it was more likely than not that no reasonable jury would find him guilty beyond a reasonable doubt based on his codefendant's plea, we conclude the district court did not err by denying this claim without first holding an evidentiary hearing.

Next, Villaverde appears to have argued he had good cause based on the State's failure to inform him that his codefendant pleaded guilty to lesser charges, which he claimed violated *Brady v. Maryland*, 373 U.S. 83 (1963). "Good cause and prejudice [to excuse a procedural bar] parallel the second and third *Brady* components; in other words proving that the State withheld the evidence generally establishes cause, and proving that the withheld evidence was material establishes prejudice." *State v. Bennett*, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003). An evidentiary hearing is warranted when a petitioner supports his claims with specific facts not belied by the record that, if true, would entitle him to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).


Villaverde failed to demonstrate his codefendant's plea was material. His codefendant did not testify at Villaverde's trial and Villaverde failed to demonstrate how his codefendant's plea would have been admissible at trial. Further, his codefendant did not plead guilty until after Villaverde's trial. Therefore, Villaverde failed to demonstrate a good cause or prejudice to excuse the procedural bars. Accordingly, we conclude the

²*North Carolina v. Alford*, 400 U.S. 25 (1970).

district court did not err by denying this claim without first holding an evidentiary hearing.

Having concluded Villaverde was not entitled to relief, we ORDER the judgment of the district court AFFIRMED.³


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Douglas W. Herndon, District Judge
Sally Dorian Villaverde
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

³Because the district court did not give Villaverde an adequate time to respond to the State's laches argument, we conclude the district court erred by denying the petition based on laches. See NRS 34.800(2). However, because the district court otherwise correctly denied the petition as procedurally barred under NRS 34.810, we conclude the district court did not err by denying the petition.