

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

FREDERIC GREEN,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 80203-COA

**FILED**

JUL 30 2020

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

*ORDER OF AFFIRMANCE*

Frederic Green appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on March 27, 2019. Second Judicial District Court, Washoe County; Kathleen M. Drakulich, Judge.

Green filed his petition more than 15 years after issuance of the remittitur on direct appeal on January 6, 2004. *See Green v. State*, 119 Nev. 542, 80 P.3d 93 (2003). Thus, Green's petition was untimely filed. *See NRS 34.726(1)*. Moreover, Green's petition was successive because he had previously filed six 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>1</sup> *See NRS 34.810(1)(b)(2); NRS 34.810(2)*. Green's petition was procedurally barred absent a demonstration

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<sup>1</sup>*Green v. State*, Docket No. 76160 (Order of Affirmance, May 15, 2019); *Green v. State*, Docket No. 73479-COA (Order of Affirmance, April 11, 2018); *Green v. State*, Docket No. 71209 (Order of Affirmance, June 15, 2017); *Green v. State*, Docket No. 68271-COA (Order of Affirmance, March 16, 2016); *Green v. State*, Docket No. 59153 (Order of Affirmance, June 13, 2012); *Green v. State*, Docket No. 47318 (Order of Affirmance, June 4, 2007).

of good cause and actual prejudice. See NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3).

Green argues the district erred by denying his petition as procedurally barred because he demonstrated good cause and prejudice to overcome the bars. Specifically, he claimed he had good cause because he was raising a constitutional claim that his double jeopardy rights were violated. The district court found Green could have raised this claim in an earlier petition and he failed to demonstrate why he was unable to do so. Therefore, the district court concluded Green failed to good cause to overcome the procedural bar. See *Hathaway v. State*, 119 Nev. 248, 253, 71 P.3d 503, 506 (2003) (“a claim or allegation that was reasonably available to the petitioner during the statutory time period would not constitute good cause to excuse the delay”). The record supports the decision of the district court, and we conclude the district court did not err by denying this claim.

Green also argues the district court erred by denying his petition as procedurally barred because he would suffer a fundamental miscarriage of justice if his claims were not heard on the merits. Specifically, he claimed he was actually innocent of the sexual assault because the conviction was a double jeopardy violation.

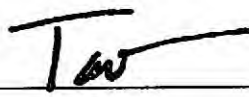
A petitioner may overcome the procedural bars and “secure review of the merits of defaulted claims by showing that the failure to consider the petition on its merits would amount to a fundamental miscarriage of justice.” *Berry v. State*, 131 Nev. 957, 966, 363 P.3d 1148, 1154 (2015). In order to demonstrate a fundamental miscarriage of justice, a petitioner must make a colorable showing of actual innocence—factual innocence, not legal innocence. *Bousley v. United States*, 523 U.S. 614, 623 (1998); *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001),

*abrogated on other grounds by Ripppo v. State*, 134 Nev. 411, 423 n.12, 423 P.3d 1084, 1097 n.12 (2018).

Green's claim involved legal, not factual innocence. Therefore, we conclude the district court did not err by denying this claim. Accordingly, we conclude the district court did not err by denying the petition as procedurally barred, and we

ORDER the judgment of the district court AFFIRMED.

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

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Bulla

cc: Hon. Kathleen M. Drakulich, District Judge  
Frederic Green  
Attorney General/Carson City  
Washoe County District Attorney  
Washoe District Court Clerk