

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ROBERT STEPHEN JACKSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 79938-COA

FILED

AUG 12 2020

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

ORDER OF AFFIRMANCE

Robert Stephen Jackson appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Ronald J. Israel, Judge.

Jackson filed his petition on June 19, 2019, more than two years after issuance of the remittitur on direct appeal on July 20, 2016, *State v. Jackson*, Docket Nos. 66573-COA, 67707-COA (Order Affirming in Part, Reversing in Part and Remanding, March 16, 2016). Thus, Jackson's petition was untimely filed.¹ See NRS 34.726(1). Jackson's petition was procedurally barred absent a demonstration of good cause—cause for the delay and undue prejudice. See *id.*.

Jackson did not attempt to demonstrate he had good cause, but rather contended he was actually innocent. Jackson claimed he was actually innocent because the State failed to sufficiently prove its theory of transferred intent. At trial, the State argued Jackson intended to shoot a rival gang member, but when Jackson's shots missed the gang member and

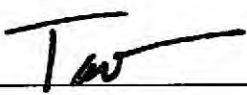
¹The district court filed an amended judgment of conviction on October 14, 2016, but entry of the amended judgment of conviction did not provide cause for Jackson's delay because all of the claims he raised in the instant petition arose out of the proceedings involving his initial judgment of conviction or the initial direct appeal, and could have been raised before his judgment of conviction was amended. See *Sullivan v. State*, 120 Nev. 537, 541, 96 P.3d 761, 764 (2004).

struck bystanders, his intent to kill transferred to those bystanders. Jackson argued in his petition that the State did not prove that the rival gang member was actually at the scene of the crime and thus the State's theory of transferred intent was also not proven.

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 Rippo v. State*, 134 Nev. 411, 423 n.12, 423 P.3d 1084, 1097 n.12 (2018). Jackson's claim involved legal, not factual innocence. In addition, Jackson did not demonstrate "that it is more likely than not that no reasonable juror would have convicted him in the light of . . . new evidence." *Berry*, 131 Nev. at 966, 363 P.3d at 1154 (internal quotation marks omitted). Accordingly, we conclude the district court did not err by denying Jackson's petition, and we

ORDER the judgment of the district court AFFIRMED.²


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

²To the extent the district court addressed Jackson's claims on the merits, *see Hargrove v. State*, 100 Nev. 498, 501, 686 P.2d 222, 224 (1984), this was error. "Application of the statutory procedural default rules to post-conviction habeas petitions is mandatory." *State v. Eighth Judicial Dist. Court*, 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). Nevertheless, because the district court properly denied relief, we affirm. *See Wyatt v. State*, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970).

cc: Hon. Ronald J. Israel, District Judge
Robert Stephen Jackson
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk