IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RICHARD EARL NICHOLSON,
Appellant,
vs.
ISIDRO BACA, WARDEN,
Respondent.

No. 80778-COA

ORDER OF AFFIRMANCE

Richard Earl Nicholson appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on September 13, 2019. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

Nicholson filed his petition nearly 8 years after issuance of the remittitur on direct appeal on October 24, 2011. *See Nicholson v. State*, Docket No. 57221 (Order of Affirmance, September 29, 2011). Thus, Nicholson's petition was untimely filed. *See* NRS 34.726(1). Moreover, Nicholson's petition was successive because he had previously filed a postconviction petition for a writ of habeas corpus that was decided on the merits, 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). Nicholson'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), or that he was actually

[1]*Nicholson v. State*, Docket No. 66309-COA (Order of Affirmance, August 25, 2015).

innocent such that it would result in a fundamental miscarriage of justice were his claims not decided on the merits, *see Berry v. State*, 131 Nev. 957, 966, 363 P.3d 1148, 1154 (2015). Further, because the State specifically pleaded laches, Nicholson was required to overcome the rebuttable presumption of prejudice to the State. *See* NRS 34.800(2).

Nicholson claims the district court erred by denying his petition as procedurally barred and barred by laches, without first conducting an evidentiary hearing, because he demonstrated he was actually innocent. Nicholson claimed he was actually innocent because he suffers from schizophrenia and other mental health issues, he was probably insane at the time he committed the crimes, a witness to the crimes testified he was just swinging like a madman out of control, and the crimes were not logical. In support of his insanity claim, Nicholson provided his mental health records from when he was incarcerated in jail after being arrested in this case.

To demonstrate actual innocence, a petitioner must demonstrate that, considering all of the evidence, "it is more likely than not that no reasonable juror would have convicted him in light of . . . new evidence." *Calderon v. Thompson*, 523 U.S. 538, 559 (1998) (quotation marks omitted); *accord Schlup v. Delo*, 513 U.S. 298, 327 (1995); *see also 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). "[A]ctual innocence means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623 (1998) (quotation marks omitted). To warrant an evidentiary hearing, a petitioner must "present specific factual allegations that, if true, and not belied by the record, would show that it is more likely than not that no reasonable juror

would have convicted him beyond a reasonable doubt given the new evidence." *Berry*, 131 Nev. at 968, 363 P.3d at 1155.

Even assuming insanity could be considered factual innocence rather than legal innocence, Nicholson failed to allege specific facts indicating that he was insane at the time of the crimes. "To be legally insane, a defendant must be in a delusional state preventing him from knowing or understanding the nature of his act or from appreciating the wrongfulness of his act." *Blake v. State*, 121 Nev. 779, 793, 121 P.3d 567, 576 (2005) (citing *Finger v. State*, 117 Nev. 548, 576, 27 P.3d 66, 84-85 (2001)); *see also Estes v. State*, 122 Nev. 1123, 1136, 146 P.3d 1114, 1123 (2006) (reaffirming the rule from *Finger* that "[t]he ability to understand right from wrong under *M'Naghten* is directly linked to the nature of the defendant's delusional state"), *overruled on other grounds by Pundyk v. State*, 136 Nev., Adv. Op. 43, 467 P.3d 605 (2020).

Nicholson did not allege what his state of mind was at the time he committed his crimes or that he was acting under a delusion.[2] Alleging that he was "probably" insane is not enough to demonstrate that it is more likely than not that no reasonable juror would have convicted him beyond a reasonable doubt. Therefore, we conclude the district court did not err by

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[2]Nicholson requested that this court overrule *Finger* insofar as it requires that a person be acting under a delusion at the time of the crime in order to demonstrate insanity. Even were we so inclined, this court cannot overrule Nevada Supreme Court precedent. *See People v. Solorzano*, 63 Cal. Rptr. 3d 659, 664 (2007), *as modified* (Aug. 15, 2007) ("The Court of Appeal must follow, and has no authority to overrule, the decisions of the California Supreme Court." (quotation marks and internal punctuation omitted)); *see also Hubbard v. United States*, 514 U.S. 695, 720 (1995) (Rehnquist, C.J., dissenting) (observing stare decisis "applies *a fortiori* to enjoin lower courts to follow the decision of a higher court").

denying Nicholson's petition as procedurally barred and barred by laches without first conducting an evidentiary hearing. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Hon. Douglas W. Herndon, District Judge
Federal Public Defender/Las Vegas
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk