

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ROBERT BERMAN,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 81941-COA

FILED

MAY 07 2021

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

ORDER OF AFFIRMANCE

Robert Berman appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Mary Kay Holthus, Judge.

Berman argues the district court erred by denying his petition as procedurally barred without conducting an evidentiary hearing. Berman filed his petition on June 8, 2020, two years after entry of the judgment of conviction on June 8, 2018.<sup>1</sup> Thus, Berman's petition was untimely filed. *See* NRS 34.726(1). Berman's petition was procedurally barred absent a demonstration of good cause—cause for the delay and undue prejudice, *see id.*, or that he was actually 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). To warrant an evidentiary hearing, a petitioner must raise claims supported by specific factual allegations that are not belied by the record and, if true, would entitle him to relief. *Id.* at 967, 363 P.3d at 1154-55.

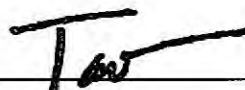
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<sup>1</sup>Berman did not pursue a direct appeal.

Berman contended the procedural time bar should not apply because he was actually innocent because the firearm he had in his possession was not operable when he was discovered with it. However, Berman's claim was not based upon new evidence. Therefore, Berman did not demonstrate actual innocence because he failed to show that "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) (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), *abrogated on other grounds by Rippo v. State*, 134 Nev. 411, 423 n.12, 423 P.3d 1084, 1097 n.12 (2018). We therefore conclude the district court did not err by denying Berman's petition without conducting an evidentiary hearing. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

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

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

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

cc: Hon. Mary Kay Holthus, District Judge  
Robert Berman  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk