

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

THOMAS MORALES,
Appellant,
vs.
CHARLES DANIELS, DIRECTOR,
Respondent.

No. 81893-COA

FILED

MAY 14 2021

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

ORDER OF AFFIRMANCE

Thomas Morales appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Morales filed his petition on May 27, 2020, almost ten years after issuance of the remittitur on direct appeal on August 10, 2010. *Morales v. State*, Docket No. 54180 (Order of Affirmance, July 15, 2010). Thus, Morales's petition was untimely filed. *See* NRS 34.726(1). Moreover, Morales's petition was successive because he had previously filed two 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.¹ *See* NRS 34.810(1)(b)(2); NRS 34.810(2). Morales'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 innocent such that it would result in a fundamental

¹*Morales v. Warden*, Docket No. 73821 (Order of Affirmance, April 10, 2018); *Morales v. State*, Docket No. 66432 (Order of Affirmance, December 11, 2014).

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).

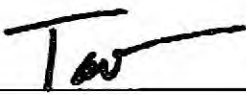
First, Morales asserted he had good cause because postconviction counsel was not appointed to assist him with his first petition. The appointment of postconviction counsel in this matter was not statutorily or constitutionally required. *See Brown v. McDaniel*, 130 Nev. 565, 571, 331 P.3d 867, 871-72 (2014). Thus, the failure to appoint postconviction counsel did not provide good cause to overcome the procedural bars in this matter. Moreover, claims stemming from the proceedings concerning Morales's first petition were reasonably available to be raised within one year after the Nevada Supreme Court issued the remittitur on appeal from the order denying that petition, and Morales did not explain why he waited more than five years to raise such claims. *See Rippo v. State*, 134 Nev. 411, 422, 423 P.3d 1084, 1097 (2018) (holding a good-cause claim must be raised within one year of its becoming available). Therefore, Morales was not entitled to relief based upon this claim.

Second, Morales argued the application of the procedural bars would result in a fundamental miscarriage of justice because he is actually innocent. Morales based his actual-innocence claim upon an assertion that the evidence produced at trial was not sufficient to prove he committed first-degree murder. "Actual innocence means factual innocence, not mere legal insufficiency." *Mitchell v. State*, 122 Nev. 1269, 1273-74, 149 P.3d 33, 36 (2006) (internal brackets and quotation marks omitted). Morales's claim was based upon mere legal insufficiency. He 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 Ripppo*, 134 Nev. at 423 n.12, 423 P.3d at 1097 n.12. We therefore conclude the district court did not err by denying Morales's petition as procedurally barred. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Michelle Leavitt, District Judge
Thomas Morales
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk