

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JERRY SANTISTEVAN,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 83823-COA

**FILED**

**JUN 02 2022**

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

*ORDER OF AFFIRMANCE*

Jerry Santistevan appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Erika D. Ballou, Judge.

Santistevan argues the district court erred by denying his August 11, 2021, petition. Santistevan filed his petition more than six years after entry of the judgment of conviction on March 19, 2015.<sup>1</sup> Thus, Santistevan's petition was untimely filed. *See* NRS 34.726(1). Moreover, Santistevan'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 petitions.<sup>2</sup> *See* NRS 34.810(2). Santistevan's petition was procedurally barred absent a demonstration of good cause and actual prejudice, *see* NRS 34.726(1); NRS 34.810(3), or that

---

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

<sup>2</sup>*See Santistevan v. State*, No. 76729-COA, 2019 WL 1530155 (Nev. Ct. App. Apr. 5, 2019) (Order of Affirmance). Santistevan also filed postconviction petitions for a writ of habeas corpus in the district court on February 23, 2016, and June 21, 2021, but he did not appeal from the denial of those petitions.

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).

Santistevan argued that the procedural bars should not preclude review of his claims on the merits because he is actually innocent of battery with the use of a deadly weapon resulting in substantial bodily harm. Santistevan contended he was actually innocent because he did not participate in the shooting committed by his codefendant and did not have the intent to commit the crime.

To prove actual innocence as a gateway to reach procedurally barred constitutional claims of error, a petitioner must 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). Santistevan’s claim was not based on new evidence. Accordingly, Santistevan failed to demonstrate he was entitled to relief. Therefore, we conclude that the district court did not err by denying Santistevan’s petition as procedural barred, and we

ORDER the judgment of the district court AFFIRMED.

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

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

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

cc: Hon. Erika D. Ballou, District Judge  
Jerry Santistevan  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk