

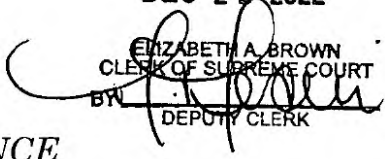
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

THOMAS BRANAGAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 85126-COA

FILED

DEC 22 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Thomas Branagan appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on February 24, 2022. Eighth Judicial District Court, Clark County; Monica Trujillo, Judge.

Branagan filed his petition more than 10 years after issuance of the remittitur on direct appeal on December 16, 2011. *See Branagan v. State*, No. 57523, 2011 WL 5846907 (Nev. Nov. 18, 2011) (Order of Affirmance). Thus, Branagan's petition was untimely filed. *See* NRS 34.726(1). Moreover, Branagan's petition was successive as he had previously filed a postconviction petition 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 petition.¹ *See* NRS 34.810(1)(b)(2); NRS 34.810(2). Branagan'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

¹*See Branagan v. State*, No. 65782, 2015 WL 3669934 (Nev. June 10, 2015) (Order of Affirmance).

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). Moreover, because the State specifically pleaded laches, Branagan was required to overcome the rebuttable presumption of prejudice to the State. *See* NRS 34.800(2).

Branagan did not claim he had good cause to overcome the procedural bars. Rather, he claimed that the procedural bars should not be applied because he is actually innocent. Branagan alleged that he was under the influence of medications that rendered his confession involuntary and affected his capacity during trial. He also alleged his medication regimen had sexual side effects. To demonstrate actual innocence, 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). 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).


Branagan’s claims did not implicate his factual innocence, and he failed to demonstrate that no reasonable juror would have convicted him in light of all of the evidence. Thus, the district court did not err by denying Branagan’s claim that he was actually innocent. In addition, Branagan failed to overcome the presumption of prejudice to the State. Therefore, we conclude the district court did not err by denying the petition as procedurally barred.

Branagan appears to contend on appeal that the district court erred by denying his request for the appointment of postconviction counsel. NRS 34.750(1) provides for the discretionary appointment of postconviction counsel if the petitioner is indigent and the petition is not summarily dismissed. Here, the district court found the petition was procedurally barred pursuant to NRS 34.810(2) and declined to appoint counsel. Because the petition was subject to summary dismissal, *see* NRS 34.745(4), we conclude the district court did not abuse its discretion by declining to appoint counsel.

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.²


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

²In his informal brief on appeal, Branagan argues that the district court erred in its disposition of a May 23, 2022, petition to establish factual innocence. Branagan's notice of appeal specifies that he is appealing the district court's order of June 24, 2022, and that order does not address the May 2022 petition. Because the disposition of that petition is not before this court, we do not reach the merits of any decision regarding that petition.

cc: Hon. Monica Trujillo, District Judge
Thomas Branagan
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk