

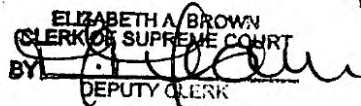
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RAFAEL BERNARDO ALVAREZ,
Appellant,
vs.
CALVIN JOHNSON, WARDEN,
Respondent.

No. 85209-COA

FILED

FEB 21 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Rafael Bernardo Alvarez appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on May 26, 2022. Eighth Judicial District Court, Clark County; Mary Kay Holthus, Judge.

Alvarez contends the district court erred by denying his petition without first conducting an evidentiary hearing. Alvarez filed his petition more than three years after entry of the judgment of conviction on November 6, 2018. Thus, Alvarez's petition was untimely filed. *See* NRS 34.726(1). Alvarez'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's good-cause and actual-innocence claims must be supported by specific factual allegations not belied by the record that, if true, would entitle him or her to relief. *See id.* at 967, 363 P.3d at 1154-55.

First, Alvarez claimed he had good cause for the delay because he is “law illiterate” and conducting research was difficult for him. Alvarez further claimed he had no money to hire counsel or “jailhouse attorneys” and an inmate was too busy to look into his case. Alvarez failed to allege facts that, if true, would demonstrate an impediment external to the defense prevented him from timely filing his petition. *See Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003); *Phelps v. Dir., Nev. Dep’t of Prisons*, 104 Nev. 656, 660, 764 P.2d 1303, 1306 (1988) (recognizing that mental disability, illiteracy, and reliance on an inmate law clerk do not constitute good cause to excuse the procedural bars), *superseded by statute on other grounds as stated in State v. Haberstroh*, 119 Nev. 173, 180-81, 69 P.3d 676, 681 (2003). Therefore, we conclude the district court did not err by rejecting these good-cause claims without conducting an evidentiary hearing.

Second, Alvarez claimed he had good cause for the delay because lockdowns due to COVID-19 made researching his case difficult and slow. Alvarez had until November 6, 2019, to timely file his petition, and Alvarez did not allege the lockdowns were imposed prior to this statutory deadline. Alvarez failed to allege facts that, if true, would demonstrate any official interference prevented him from timely filing his petition. *See Hathaway*, 119 Nev. at 252, 71 P.3d at 506. Therefore, we conclude the district court did not err by rejecting this good-cause claim without conducting an evidentiary hearing.

Third, Alvarez appeared to claim he had good cause for the delay because the State “suppressed” evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Although a valid *Brady* claim can constitute good cause to excuse the procedural bars, *see State v. Bennett*, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003), a good-cause claim based on an alleged *Brady*

violation must be raised “within a reasonable time after the withheld evidence was disclosed to or discovered by the defense,” *State v. Huebler*, 128 Nev. 192, 198 n.3, 275 P.3d 91, 95 n.3 (2012).

Alvarez did not specify when he discovered the evidence or when this evidence was disclosed to him. Alvarez failed to allege facts that, if true, would demonstrate he raised this claim within a reasonable time after discovering the evidence. Therefore, we conclude Alvarez was not entitled to an evidentiary hearing on this good-cause claim. *See Lisle v. State*, 131 Nev. 356, 360, 351 P.3d 725, 729 (2015) (holding an alleged *Brady* violation did not constitute good cause where the petitioner admitted he had received some of the evidence years before filing his petition and failed to specify when he received the remaining evidence).

Fourth, Alvarez appeared to claim he was actually innocent of the crimes charged because documents disclosed in discovery and the allegedly suppressed evidence demonstrated the victim and other individuals lied and/or provided inconsistent accounts of the underlying offenses. Alvarez contended that this evidence could be used as impeachment or character evidence.

To prevail on a claim of actual innocence, a petitioner must demonstrate 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 mere legal insufficiency. *Bousley v. United States*, 523 U.S. 614, 623 (1998). A petitioner fails to

make a showing of actual innocence if he “does not identify any new evidence of his innocence.” *Brown v. McDaniel*, 130 Nev. 565, 576, 331 P.3d 867, 875 (2014).

Alvarez’s claim that documents disclosed in discovery showed various individuals lied and/or provided inconsistent statements did not identify new evidence of his innocence. Moreover, the allegedly suppressed evidence challenged the legal sufficiency of the evidence against him, not his factual innocence. Alvarez failed to allege facts that, if true, would demonstrate no reasonable juror would have convicted him in light of new evidence. Therefore, we conclude Alvarez was not entitled to an evidentiary hearing on his actual-innocence claims and that the district court did not err by denying the petition as procedurally barred without conducting an evidentiary hearing.

Alvarez also contends the district court erred by denying his motion to appoint counsel. Because nothing in the record suggests Alvarez was not granted leave to proceed in forma pauperis and his petition was a first petition not subject to summary dismissal, *see* NRS 34.745(1), (4), Alvarez met the threshold requirements for the appointment of counsel. *See* NRS 34.750(1); *Renteria-Novoa v. State*, 133 Nev. 75, 76, 391 P.3d 760, 761 (2017). However, the district court found that Alvarez did not need counsel to present his claims, Alvarez was able to comprehend the proceedings, and discovery with the aid of counsel was not necessary. For these reasons, the district court denied the motion to appoint counsel. The record supports the decision of the district court, and we conclude the district court did not abuse its discretion by denying the motion to appoint counsel.

Alvarez also appears to contend that the district court erred by failing to address his reply to the State’s opposition to his habeas petition

and motion to appoint counsel. Alvarez's reply was not timely filed, and thus, Alvarez was not entitled to file this pleading. See NRS 34.750(4)-(5). Therefore, we conclude the district court did not err by declining to consider this pleading.

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

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