


IN THE SUPREME COURT OF THE STATE OF NEVADA

DERRELL LEE CHRISTY, JR.,  
Appellant,  
vs.  
WILLIAM HUTCHINGS, WARDEN;  
AND THE STATE OF NEVADA,  
Respondents.

No. 86366

FILED

MAY 15 2024

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

This is an appeal from a district court order denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Joseph Hardy, Jr., Judge.

Appellant Derrell Lee Christy, Jr., was convicted of attempted murder with the use of a deadly weapon, attempted home invasion with the use of a deadly weapon, attempted burglary while in possession of a firearm, battery with the use of a deadly weapon, discharging a firearm at or into an occupied structure or vehicle, and prohibited person in possession of firearm. The Court of Appeals affirmed the judgment of conviction on direct appeal. *Christy v. State (Christy I)*, No. 72486-COA, 2018 WL 2494942 (Nev. Ct. App. May 15, 2018) (Order of Affirmance). In 2018, Christy filed a postconviction petition for a writ of habeas corpus, and the Court of Appeals affirmed the district court's denial of that petition. *Christy v. State (Christy II)*, No. 79523-COA, 2020 WL 2461433 (Nev. Ct. App. May 11, 2020) (Order of Affirmance). On June 2, 2022, Christy filed a second petition raising collateral challenges to the conviction and sentence. The

district court denied the petition as procedurally barred. Christy appeals, and we affirm.

The “[a]pplication of the statutory procedural default rules to post-conviction habeas petitions is mandatory.” *State v. Eighth Jud. Dist. Ct. (Riker)*, 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). And Christy concedes that his current petition is subject to multiple procedural bars. The petition was untimely, because it was filed nearly 4 years after the remittitur issued from Christy’s direct appeal. *See* NRS 34.726(1). The petition was also successive because Christy had previously filed a postconviction petition, and it constituted an abuse of the writ because Christy raised claims new and different from those raised in the previous petition, which were therefore also subject to waiver. *See* NRS 34.810(1)(b), (2).<sup>1</sup> Petitions that are untimely, successive, or an abuse of the writ are subject to dismissal absent a showing of good cause and actual prejudice. NRS 34.726(1); NRS 34.810(1)(b), (3). To establish good cause, “a petitioner must show that an impediment external to the defense prevented him or her from complying with the state procedural default rules.” *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). To warrant an evidentiary hearing, the petitioner’s claims of good cause must be supported by specific factual allegations that are not belied by the record and, if true, would entitle him to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

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<sup>1</sup>The Legislature recently made a technical amendment to NRS 34.810, which renumbered the subsections. A.B. 49, 82d Leg. (Nev. 2023). We use the numbering in effect when the district court denied Christy’s postconviction petition.

As good cause, Christy first argues that the State violated *Brady*<sup>2</sup> by failing to disclose Officer George Saab's observations from watching surveillance video. A valid *Brady* claim can constitute good cause and prejudice to excuse the procedural bars. *See State v. Bennett*, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003) (“[P]roving that the State withheld the evidence generally establishes cause, and proving that the withheld evidence was material establishes prejudice.”). Christy has not demonstrated that the State violated *Brady*, and consequently he has not shown good cause or prejudice. Officer Saab testified at Christy's trial that he watched the surveillance video, and Christy had the opportunity to cross-examine Officer Saab about any observations regarding the video. The allegation that Officer Saab testified about his observations at the accomplice's trial, which occurred after Christy's trial, does not demonstrate that the State withheld that evidence. Because the State did not withhold this allegedly exculpatory evidence, Christy did not establish a *Brady* violation. *See Mazzan v. Warden*, 116 Nev. 48, 67, 993 P.2d 25, 37 (2000) (stating that three components comprise a *Brady* violation: “the evidence at issue is favorable to the accused; the evidence was withheld by the state, either intentionally or inadvertently; and prejudice ensued, i.e., the evidence was material”). Accordingly, we conclude that the district court did not err in denying this claim without conducting an evidentiary hearing.

Next, Christy asserts that he can overcome the procedural bars because he is actually innocent. To demonstrate a fundamental miscarriage of justice sufficient to overcome the procedural bars, a petitioner must make a colorable showing of actual innocence. *Pellegrini v. State*, 117 Nev. 860,

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<sup>2</sup>*Brady v. Maryland*, 373 U.S. 83 (1963).

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); *see Bousley v. United States*, 523 U.S. 614, 623 (1998). Actual innocence requires a showing that “it is more likely than not that no reasonable juror would have convicted [the petitioner] 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*, 117 Nev. at 887, 34 P.3d at 537. This “standard is demanding and permits review only in the extraordinary case.” *Berry v. State*, 131 Nev. 957, 969, 363 P.3d 1148, 1156 (2015) (quoting *House v. Bell*, 547 U.S. 518, 538 (2006)).

Christy contends that he is actually innocent based on a new expert report questioning the reliability of the victim’s identification of Christy.<sup>3</sup> Expert testimony about issues with eyewitness identification would have, at most, given the jurors another factor to assess the victim’s credibility. *See McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (“[I]t is the jury’s function, not that of the [reviewing] court, to assess the weight of the evidence and determine the credibility of witnesses.”); *Clark v. State*, 95 Nev. 24, 28, 588 P.2d 1027, 1029 (1979) (stating that expert “testimony is not binding on the trier of fact, and the jury [is] entitled to believe or disbelieve the expert witnesses”). But such evidence does not amount to a colorable showing of actual innocence. *See Mitchell v. State*, 122 Nev. 1269, 1273-74, 149 P.3d 33, 36 (2006) (“Actual innocence means

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<sup>3</sup>To the extent that Christy identifies evidence that he and the codefendant drove similar vehicles as establishing actual innocence, we disagree because the jury heard this evidence at trial. *See Christy II*, 2020 WL 2461433, at \*1 (“[T]he jury heard testimony that Deon Smalley owned a silver or gray Dodge Charger, Christy owned a gray Dodge Charger, and the victim recorded the license plate number for Christy’s Charger.”).

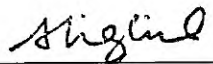
factual innocence, not mere legal insufficiency.” (internal quotation marks omitted)). Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

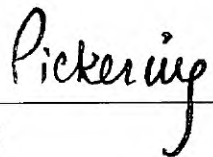
Finally, Christy argues he has good cause to overcome the procedural bars because he was not represented by counsel during the first postconviction proceedings. This argument is precluded by our decision in *Brown v. McDaniel*, 130 Nev. 565, 331 P.3d 867 (2014). As a noncapital petitioner, Christy was not entitled to the appointment of postconviction counsel. *See id.* at 571, 331 P.3d at 871-72 (explaining that NRS 34.750(1) “provides for the discretionary appointment of counsel to represent noncapital habeas petitioners”). Because appointment of postconviction counsel was not mandated, Christy had no constitutional or statutory right to the effective assistance of that counsel. *See id.* at 569, 331 P.3d at 870. As we explained in *Brown*, “[w]here there is no right to counsel there can be no deprivation of effective assistance of counsel.” *Id.* (quoting *McKague v. Whitley*, 112 Nev. 159, 164-65, 912 P.2d 255, 258 (1996)). And, to the extent that Christy urges us to reconsider *Brown*, we decline the invitation. *See State v. Lloyd*, 129 Nev. 739, 750, 312 P.3d 467, 474 (2013) (“[W]hen governing decisions prove to be unworkable or are badly reasoned, they should be overruled.” (internal quotation marks omitted)).

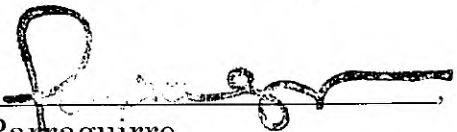
Furthermore, even were we to reconsider *Brown*, Christy would not be entitled to relief. Christy filed the petition over two years after remittitur issued in the first postconviction appeal. Thus, Christy’s claims of ineffective assistance of first postconviction counsel would be untimely under NRS 34.726(1), as they were not raised within one year after the remittitur issued in the first postconviction appeal. *Rippo v. State*, 134 Nev. 411, 419-22, 423 P.3d 1084, 1095-97 (2018). Christy does not address or

explain the delay in raising the postconviction-counsel claims. Thus, even crediting Christy's arguments that *Brown* should be reconsidered, Christy has not shown that relief is warranted. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Stiglich

  
\_\_\_\_\_, J.  
Pickering

  
\_\_\_\_\_, J.  
Parraguirre

cc: Hon. Joseph Hardy, Jr., District Judge  
Federal Public Defender/Las Vegas  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk