

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

FRANCISCO A. CRUZ,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 88162-COA

**FILED**

OCT 16 2024

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Francisco A. Cruz appeals from a district court order dismissing a petition to establish factual innocence filed on December 21, 2023.<sup>1</sup> Eighth Judicial District Court, Clark County; Carli Lynn Kierny, Judge.

In his petition, Cruz claimed that he was factually innocent because the DNA analyst who presented forensic evidence during his trial had admitted to violating testing standards and protocols in other cases. Cruz also asserted that the analyst's errors were newly discovered evidence because he did not become aware of them until 2023, and had he known about them at the time of his trial, he could have used that information to impeach the analyst's credibility.

"[A] person who has been convicted of a felony may petition the district court . . . for a hearing to establish the factual innocence of the person based on newly discovered evidence." NRS 34.960(1). The petition

---

<sup>1</sup>Although the order was titled as one denying Cruz's petition to establish factual innocence, it dismissed Cruz's petition without prejudice. See NRS 34.960(4)(a).

must allege that “[n]ewly discovered evidence exists that is specifically identified and, if credible, establishes a bona fide issue of factual innocence.” NRS 34.960(2)(a); *see also* NRS 34.920 (defining “factual innocence” as a person who did not engage in the conduct for which he was convicted, engage in conduct constituting a lesser included offense, commit another crime reasonably connected to the facts supporting the criminal charge upon which he was convicted, or commit the charged conduct under any theory of criminal liability alleged in the charging documents). The newly discovered evidence also must “[e]stablish[ ] innocence and [be] material to the case and the determination of factual innocence” and not be “merely impeachment evidence.” NRS 34.960(2)(b). Finally, the petition must assert that the evidence identified by the petitioner as newly discovered was not known and could not have been discovered through the exercise of reasonable diligence “at the time of trial or sentencing or in time to include the evidence in any previously filed post-trial motion or postconviction petition.” NRS 34.960(3)(a).

First, Cruz failed to demonstrate that the DNA analyst’s errors constituted newly discovered evidence that could not have been discovered previously through the exercise of reasonable diligence. In support of his petition, Cruz attached a transcript of the analyst’s testimony from a 2008 trial, a 2011 newspaper article describing the forensic laboratory errors, and a transcript of the analyst’s testimony from a 2014 trial that referenced the analyst’s errors in other cases occurring from 2006 to 2008. However, aside from a conclusory statement that Cruz did not know about the analyst’s errors until 2023, he did not establish why this information could not have been discovered through the exercise of reasonable diligence at the time of

his trial in 2010, or at the latest, at the time of his first postconviction petition for a writ of habeas corpus filed in 2013.

Second, Cruz failed to demonstrate that evidence of the DNA analyst's errors established a bona fide issue of factual innocence.<sup>2</sup> Cruz asserts that, assuming the analyst's findings were excluded, the only remaining evidence—Cruz's confession—would not sufficiently establish corpus delicti, thereby precluding the State from proving his guilt. However, Cruz did not claim that he did not actually engage in the conduct for which he was convicted. See NRS 34.920. Thus, even taking Cruz's evidence of the DNA analyst's errors as credible, he has not established a bona fide issue of factual innocence.<sup>3</sup> Therefore, the district court did not err by dismissing Cruz's petition without an evidentiary hearing, NRS

---

<sup>2</sup>We note that this court previously rejected a gateway claim of actual innocence after concluding Cruz still would have been convicted had this DNA not been presented at trial. See *Cruz v. Williams*, 87810-COA, 2024 WL 3632608 (Nev. Ct. App. Aug. 1, 2024) (Order of Affirmance).

<sup>3</sup>To the extent Cruz argues that evidence of the analyst's errors in other cases could be used to undermine the analyst's results and credibility at his trial, this was merely impeachment evidence, see *Bennett v. State*, 138 Nev. 268, 272, 508 P.3d 410, 414 (2022) (discussing impeachment evidence in the context of a factual innocence petition), and did not demonstrate the analyst made mistakes in Cruz's case or otherwise exculpate Cruz, see *State v. Huebler*, 128 Nev. 192, 201-02, 275 P.3d 91, 98 (2012) (describing exculpatory evidence as evidence that could establish the factual innocence of the defendant).

34.970(3), or by denying Cruz's motion to appoint counsel, NRS 34.980.<sup>4</sup>  
Accordingly, we

ORDER the judgment of the district court AFFIRMED.

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

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

  
\_\_\_\_\_, J.  
Westbrook

cc: Hon. Carli Lynn Kierny, District Judge  
Francisco A. Cruz  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk

---

<sup>4</sup>Cruz contends the district court erred in finding that he failed to allege that he was factually innocent under oath as required by NRS 34.960(2). Even assuming the district court erred, we nevertheless affirm the district court's decision to dismiss Cruz's petition without prejudice for the reasons discussed above. See NRS 34.960(4)(a).