

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DENNIS MARC GRIGSBY,
Appellant,
vs.
CALVIN JOHNSON, WARDEN,
Respondent.

No. 88602-COA

FILED

OCT 31 2024

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Dennis Marc Grigsby appeals from a district court order denying a postconviction petition for a writ of habeas corpus filed on January 18, 2024. Eighth Judicial District Court, Clark County; Kathleen E. Delaney, Judge.

Grigsby filed his petition more than 12 years after issuance of the remittitur on direct appeal on October 10, 2011. *See Grigsby v. State*, No. 53627, 2011 WL 4337042 (Nev. Sept. 14, 2011) (Order of Affirmance). Thus, Grigsby's petition was untimely filed. *See NRS 34.726(1)*. Moreover, Grigsby'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.¹ See NRS 34.810(1)(b)(2); NRS 34.810(3).² Grigsby'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(4), or a showing that he was actually innocent such that a fundamental miscarriage of justice would occur 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 must raise claims supported by specific factual allegations that are not belied by the record and, if true, would entitle the petitioner to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

First, Grigsby claimed a fundamental miscarriage of justice would result if his claims were not heard on the merits because two jurors were not polled regarding their verdict. A petitioner satisfies the fundamental-miscarriage-of-justice standard by "mak[ing] a colorable showing he is actually innocent of the crime." *Berry*, 131 Nev. at 966, 363 P.3d at 1154 (quotation marks omitted). Further, actual innocence means "factual innocence, not legal innocence." *Brown v. McDaniel*, 130 Nev. 565, 576, 331 P.3d 867, 875 (2014). Grigsby's claim that two of the jurors were

¹*Grigsby v. Johnson*, No. 83152-COA, 2022 WL 1537166 (Nev. Ct. App. May 13, 2022) (Order of Affirmance); *Grigsby v. State*, No. 68783, 2016 WL 3406625 (Nev. June 17, 2016) (Order of Affirmance).

²The subsections within NRS 34.810 were recently renumbered. We note the substance of the subsections cited herein was not altered. See A.B. 49, 82d Leg. (Nev. 2023).


not polled following their guilty verdict did not demonstrate he was actually innocent. Therefore, he failed to demonstrate a fundamental miscarriage of justice to overcome the procedural bars, and we conclude that the district court did not err by denying this claim without first conducting an evidentiary hearing.

Second, Grigsby claimed he had good cause to overcome the procedural bar because prior postconviction counsel was ineffective for failing to raise the jury-poll claim in Grigsby's first postconviction petition. Ineffective assistance of postconviction counsel is not good cause to overcome the procedural bars in the instant case because the appointment of postconviction counsel was not statutorily or constitutionally required. *See id.* at 569, 331 P.3d at 870; *see also Crump v. Warden*, 113 Nev. 293, 303, 934 P.2d 247, 253 (1997); *McKague v. Warden*, 112 Nev. 159, 164, 912 P.2d 255, 258 (1996). Therefore, we conclude that the district court did not err by denying this good-cause claim without first conducting an evidentiary hearing.

Third, Grigsby claimed that he had good cause to overcome the procedural bars because trial and appellate counsel failed to preserve the record regarding the polling of the jury. "[I]n order to constitute adequate cause, the ineffective assistance of counsel claim itself must not be procedurally defaulted." *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). Grigsby's ineffective-assistance-of-counsel claims were themselves procedurally barred because he raised them in an untimely

manner, and he did not demonstrate an impediment external to the defense prevented him from raising them at an earlier time. *See id.* at 252-53, 71 P.3d at 506. Therefore, we conclude that the district court did not err by denying this good-cause claim without first conducting an evidentiary hearing. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

cc: Hon. Kathleen E. Delaney, District Judge
Dennis Marc Grigsby
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk