

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RENE GATO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 88531-COA

FILED

JAN 16 2025

ELIZABETH A. BROY
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Rene Gato appeals from a district court order denying a “motion for a new trial or vacate a judgment of conviction” filed on March 7, 2024. Eighth Judicial District Court, Clark County; Tierra Danielle Jones, Judge.

In his pleading, Gato contended that (1) he was actually and factually innocent, (2) he was entitled to a jury instruction, (3) witnesses were unavailable or refused to testify, (4) there was insufficient evidence to support the jury’s verdict, (5) postconviction counsel filed a habeas petition late, (6) he needs to exhaust his claims, and (7) cumulative error deprived him of his right to a fair trial.

“[A] motion for a new trial based on the ground of newly discovered evidence may be made only within 2 years after the verdict or finding of guilt.” NRS 176.515(3). In contrast, “[a] motion for a new trial based on any other grounds must be made within 7 days after the verdict or finding of guilt or within such further time as the court may fix during the 7-day period.” NRS 176.515(4). Gato did not allege that the motion was based upon newly discovered evidence, and the motion was filed more than 19 years after the jury entered its verdict on February 11, 2005. Therefore, Gato’s motion was untimely filed.

Although Gato's claims challenged the validity of his judgment of conviction or sentence, we conclude the district court did not err by declining to construe Gato's motion as a postconviction petition for a writ of habeas corpus because the motion did not substantially comply with the statutory form for such a petition.¹ See NRS 34.735; see also NRS 34.724(2)(b) (stating a postconviction habeas petition "[c]omprehends and takes the place of all other common-law, statutory or other remedies which have been available for challenging the validity of the judgment of conviction or sentence, and must be used exclusively in place of them").

Even were Gato's pleading to be construed as a postconviction habeas petition, the petition would be subject to several procedural bars,² see NRS 34.726(1); NRS 34.810(1)(b)(2); NRS 34.810(3), and Gato neither alleged good cause to excuse the procedural bars,³ see *Hathaway v. State*, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003), nor demonstrated a fundamental miscarriage of justice sufficient to overcome the procedural bars, see *Berry v. State*, 131 Nev. 957, 966, 363 P.3d 1148, 1154 (2015).

¹In light of the foregoing, we conclude the district court did not err by declining to appoint Gato counsel. See NRS 34.750 (stating a district court may appoint counsel to represent a petitioner in postconviction habeas proceedings if it determines the petitioner is indigent and the petition is not summarily dismissed).

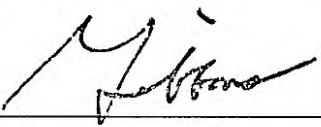
²Gato filed his motion more than 16 years after issuance of the remittitur on direct appeal, see *Gato v. State*, Docket No. 45166 (Order of Affirmance, May 30, 2007), and Gato raised new and different claims from those raised in a previous postconviction habeas petition, see *Gato v. State*, No. 53887, 2010 WL 3342026 (Nev. May 10, 2010) (Order of Affirmance).

³To the extent Gato alleged cause for the delay and prejudice in a "reply brief" filed on April 3, 2024, Gato did not obtain permission from the court to file this pleading. See NRS 34.750(5).

Therefore, we conclude the district court did not err by denying Gato's motion,⁴ and we

ORDER the judgment of the district court AFFIRMED.⁵


_____, C.J.
Bulla


_____, J.
Gibbons


_____, J.
Westbrook

cc: Hon. Tierra Danielle Jones, District Judge
Rene Gato
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

⁴Although Gato claimed he was factually innocent and referenced some of the statutory provisions applicable to a petition to establish factual innocence, after review, it is not clear Gato intended to file such a petition, and the district court did not construe the pleading as a petition to establish factual innocence. *See* NRS 34.900-990. We note that the pleading requirements for such a petition are outlined in NRS 34.960. *See Sanchez v. State*, 140 Nev., Adv. Op. 78, ___ P.3d ___, ___ (2024).

⁵In light of this disposition, Gato's motion to dismiss this appeal filed October 17, 2024, is denied as moot.