

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ROBERT L. WHITESELL,  
Appellant,  
vs.  
BRIAN WILLIAMS, WARDEN; AND  
THE STATE OF NEVADA,  
Respondents.

No. 88473-COA

**FILED**

FEB 28 2025

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Robert L. Whitesell appeals from a district court order denying “a petition for writ of habeas corpus (postconviction), petition to establish factual innocence (NRS 34.960) and genetic marker analysis (pursuant to NRS 176.0918)” filed on January 3, 2024. Eighth Judicial District Court, Clark County; Mary Kay Holthus, Judge.

*Postconviction habeas petition*

Whitesell filed his petition nearly 20 years after issuance of the remittitur on direct appeal on March 9, 2004. *See Whitesell v. State*, Docket No. 39650 (Order of Affirmance, February 11, 2004). Thus, Whitesell’s petition was untimely filed. *See* NRS 34.726(1). Moreover, Whitesell’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 petition.<sup>1</sup> *See* NRS 34.810(1)(b)(2); NRS 34.810(3). Whitesell’s petition was procedurally barred absent a

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<sup>1</sup>*Whitesell v. State*, No. 49286, 2009 WL 3711966 (Nev. November 3, 2009) (Order of Affirmance).

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 “the failure to consider the petition on its merits would amount to a fundamental miscarriage of justice,” *Berry v. State*, 131 Nev. 957, 966, 363 P.3d 1148, 1154 (2015). Further, because the State specifically pleaded laches, Whitesell was required to overcome the rebuttable presumption of prejudice to the State. *See* NRS 34.800(2).

In his petition, Whitesell appeared to claim he could overcome the procedural bars because he is factually innocent. Whitesell’s claim of innocence was not a gateway claim of actual innocence where he argued he was innocent and his other claims raised in his petition should be considered on the merits. *See Berry*, 131 Nev. at 966, 363 P.3d at 1154. Rather, his claim was a freestanding claim of factual innocence. Neither this court nor the Nevada Supreme Court has ever determined “whether and, if so, when a free-standing actual innocence claim exists” within the scope of a postconviction petition for a writ of habeas corpus. *See id.* at 967 n.3, 363 P.3d at 1154 n.3. The Legislature filled this gap in Nevada law by creating a new postconviction remedy—a petition to establish factual innocence. *See Sanchez v. State*, 140 Nev., Adv. Op. 78, 561 P.3d 35, 38 (2024). Thus, Whitesell’s freestanding claim of factual innocence should be raised and considered in a petition to establish factual innocence and not in a postconviction petition for a writ of habeas corpus. Therefore, we conclude that the district court did not err by denying this portion of Whitesell’s

petition as procedurally barred. Further, we conclude that the district court properly denied the petition as barred by laches.<sup>2</sup>

*Petition to establish factual innocence*

In this portion of the petition, Whitesell argued he was factually innocent because, if the murder victim's shirt and fingernail clippings were tested for DNA, he would be excluded as a contributor. He also alleged that his codefendant "recanted" and stated that Whitesell was not involved or present during the crimes.<sup>3</sup>

A person who has been convicted of a felony may petition the district court for a hearing to establish their factual innocence. NRS 34.960(1). The petition must contain supporting affidavits or other credible documents indicating that newly discovered evidence exists which, if credible, establishes a bona fide issue of factual innocence. NRS 34.960(2)(a). The petition must also assert that neither the petitioner nor the petitioner's counsel knew of the newly discovered evidence at the time of trial. NRS 34.960(3)(a). "Newly discovered evidence" means evidence "which is material to the determination of the issue of factual innocence" and that was not available to a petitioner at trial. NRS 34.930. "Factual innocence" means the person did not engage in the conduct for which they were convicted, engage in conduct constituting lesser included or inchoate offense of the crime for which they were convicted, commit any other crimes

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<sup>2</sup>Whitesell requested the appointment of counsel for this portion of his petition. Because Whitesell's petition was subject to summary dismissal, the district court did not abuse its discretion by declining to appoint counsel. See NRS 34.745(3); NRS 34.750(1).

<sup>3</sup>Other than Whitesell's statement that his codefendant recanted, Whitesell failed to provide any supporting documents or evidence to support this claim.

reasonably arising from the facts alleged in the charging document upon which they were convicted, and commit the conduct alleged in the charging document under any theory of criminal liability. NRS 34.920.

The district court found that Whitesell failed to support his claim with any newly discovered evidence. Specifically, the district court found that Whitesell merely asserted his factual innocence based on testing that has not been done. Further, the district court concluded that, even if the testing was done and excluded Whitesell as a contributor of DNA on the victim's t-shirt and fingernail clippings, it would not demonstrate his factual innocence in light of the evidence presented at trial. Based on that evidence, the district court found that: Whitesell committed the crime with two other codefendants; on the morning of the crimes, his codefendant asked another codefendant whether it was a good day to rob a bank; Whitesell was identified by a neighbor leaving the residence after the crime; he was seen just prior to the crime wearing extra clothing and after the crime without the extra clothing; one of his codefendants had not taken off the extra clothing after the incident and was seen with blood on that clothing; Whitesell had in his possession two of the items taken during the robbery (a fake bomb and a gun); Whitesell and his codefendants were seen drinking out of a liquor bottle that was the same type of liquor stolen during the robbery; the murder weapon was determined to likely be a box-cutter knife, which Whitesell was known to carry; and Whitesell's cellmate testified that Whitesell admitted to a robbery gone bad and provided details of the crime that were not released to the public. The district court's findings are supported by substantial evidence. *See Whitesell*, Docket No. 39650. Further, Whitesell's petition was not supported by affidavits or other credible documents supporting his claim of factual innocence. Therefore,

we conclude that Whitesell failed to demonstrate a bona fide issue of factual innocence, and the district court did not err by denying the petition for factual innocence.<sup>4</sup>

*Petition for genetic marker analysis*

In his petition for genetic marker analysis, Whitesell requested that the victim's t-shirt and fingernail clippings be tested for his DNA. Whitesell stated that DNA testing would exclude him as a contributor of DNA, which would demonstrate he was innocent of the charges. "[W]e review an order denying a petition for genetic marker analysis for an abuse of discretion." *See Anselmo v. State*, 138 Nev. 94, 98, 505 P.3d 846, 850 (2022). A court must order a genetic marker analysis if it finds, among other things, that "[a] reasonable possibility exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through a genetic marker analysis of the evidence identified in the petition." NRS 176.09183(1)(c)(1). "The plain language of the statute requires the district court first to assume that the genetic marker evidence would be exculpatory and then ask whether there is a 'reasonable possibility' that the petitioner would not have been convicted or prosecuted in light of the exculpatory genetic marker evidence." *Anselmo*, 138 Nev. at 99, 505 P.3d at 850.


The district court found that, even assuming the genetic marker evidence would exclude Whitesell as a contributor to any DNA found on the victim's t-shirt and fingernail clippings, Whitesell failed to demonstrate a reasonable possibility that he would not have been convicted or prosecuted.

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<sup>4</sup>Whitesell also requested the appointment of counsel for this portion of his petition. Whitesell was not entitled to the appointment of counsel because he was not granted a hearing on his petition. *See* NRS 34.980.

Given the evidence presented at trial, outlined above, we conclude substantial evidence supports the decision of the district court. Therefore, we conclude that the district court did not abuse its discretion by denying Whitesell's petition for genetic marker analysis.<sup>5</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.

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

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

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

cc: Hon. Mary Kay Holthus, District Judge  
Robert L. Whitesell  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk

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<sup>5</sup>Whitesell also requested counsel as to this portion of the petition. Given the district court's finding that Whitesell was not entitled to genetic marker analysis and this court's affirmance of that finding, we conclude that the district court did not abuse its discretion by denying Whitesell's request. See NRS 176.0918(4)(b).