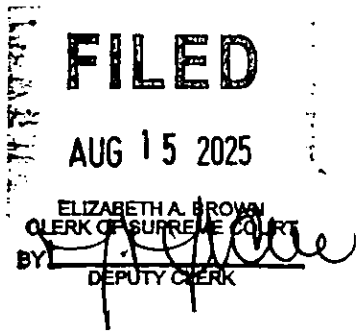
IN THE SUPREME COURT OF THE STATE OF NEVADA

HAROLD MARIN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 89063



ORDER OF AFFIRMANCE

This is an appeal from a district court order denying appellant's postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Tierra Danielle Jones, Judge.

Appellant Harold Marin argues the district court erred in denying the postconviction habeas petition. We disagree and affirm.

Marin was convicted of first-degree murder, and this court affirmed the judgment of conviction. *Marin v. State (Marin I)*, No. 67860, 2017 WL 2334518 (Nev. May 26, 2017) (Order of Affirmance). Marin filed the petition six years after issuance of the remittitur on direct appeal, and, thus, Marin's petition was untimely. *See* NRS 34.726(1). Moreover, Marin's petition was successive because Marin previously filed a postconviction habeas petition that was decided on the merits. *See Marin v. State (Marin II)*, No. 82926-COA, 2022 WL 1090333 (Nev. Ct. App. Apr. 11, 2022) (Order of Affirmance) (upholding the district court's denial of the petition); *see also* NRS 34.810(3). Accordingly, the 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 Marin 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). Marin makes arguments on both good cause and actual innocence.

First, Marin argues there is good cause because the expert-witness claim was not adequately addressed in the first post-conviction proceeding. 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). "An impediment external to the defense may be demonstrated by a showing that the factual or legal basis for a claim was not reasonably available to counsel, or that some interference by officials, made compliance impracticable." *Id.* (internal quotation marks omitted). Given that Marin previously raised the expert-witness claim, Marin has not demonstrated an impediment external to the defense that prevented compliance with the procedural rules. *See McCleskey v. Zant*, 499 U.S. 467, 497-98 (1991) ("[C]ause . . . requires a showing of some external impediment *preventing* counsel from constructing or raising the claim." (internal quotation marks omitted)), *superseded on other grounds by statute as stated in Banister v. Davis*, 590 U.S. 504 (2020). And to the extent Marin's good-cause argument focuses on the depth of the analysis on this issue in the prior proceedings, that argument does not demonstrate good cause. The Court of Appeals addressed the expert-witness issue, and the first petition was resolved on the merits. *See Marin II*, 2022 WL 1090333, at *1. Thus, Marin has not demonstrated good cause to excuse the procedural bars.

Second, Marin contends he can overcome the procedural bars through a showing of actual innocence. "[A] petitioner must make a

colorable showing of actual innocence—factual innocence, not legal innocence" to demonstrate a fundamental miscarriage of justice sufficient to overcome the procedural bars. *Brown v. McDaniel*, 130 Nev. 565, 576, 331 P.3d 867, 875 (2014). "This means that the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of . . . new evidence." *Berry*, 131 Nev. at 966, 363 P.3d at 1154 (internal quotation marks omitted).

Here, Marin does not present any new evidence demonstrating he is actually innocent. Marin argues the new expert disputes the medical examiner's conclusion that the victim died of asphyxiation. Thus, Marin argues he is actually innocent of first-degree murder, either because the victim did not die as a result of strangulation or because the strangulation was too brief to demonstrate the required elements of premeditation and deliberation. Marin, however, admitted to strangling the victim. And the new expert did not "fundamentally disagree" with the medical examiner's trial testimony, stating the medical examiner's opinion was "one of two reasonable probabilities." The new expert further agreed there was evidence of pressure on the victim's neck and concluded that the victim died as a result of "the drugs and alcohol in her system in the setting of the interpersonal violence including the neck pressure."

Such evidence does not amount to a colorable showing of actual innocence. *Rozzelle v. Sec'y, Fla. Dep't of Corr.*, 672 F.3d 1000, 1015-16 (11th Cir. 2012) (explaining that the actual innocence exception contemplates the "extremely rare" cases where the State convicted an innocent defendant, not "run of the mill" cases where the petitioner argues that he or she is guilty of a lesser offense than that for which he or she was convicted). Further, the role drugs and alcohol may have played in reducing

the time required to strangle the victim was brought up at trial. Thus, even crediting the new expert testimony, *see 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"), Marin has not shown that no reasonable juror would have convicted him if the new expert had testified, given the other evidence supporting the verdict.

Because "[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 Marin failed to demonstrate any grounds to excuse those procedural bars, the district court should have dismissed the petition pursuant to NRS 34.810(3). Although the district court thus erred in deciding the petition on the merits, we conclude the district court reached the correct result in denying Marin's petition. *See Wyatt v. State*, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970) (explaining that a correct result will not be reversed simply because it is based on the wrong reason). Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Herndon

_____, J.
Bell

_____, J.
Stiglich

cc: Hon. Tierra Danielle Jones, District Judge
Federal Public Defender/Las Vegas
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk