

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARIO ESPINOZA,

Appellant,

vs.

CALVIN JOHNSON, WARDEN, HIGH  
DESERT STATE PRISON; JAMES

DZURENDA, DIRECTOR, NEVADA  
DEPARTMENT OF CORRECTIONS;

AND AARON D. FORD, NEVADA


ATTORNEY GENERAL,

Respondents.

No. 89152

**FILED**

**AUG 15 2025**

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

This is an appeal from a district court order denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Carli Lynn Kierny, Judge. Appellant Mario Espinoza argues that the district court erred in denying the petition as procedurally barred because he is actually innocent. We disagree and affirm.

Espinoza's postconviction habeas petition was untimely because it was filed more than six years after entry of the judgment of conviction. *See* NRS 34.726(1). The petition was also successive because Espinoza previously filed a postconviction petition for a writ of habeas corpus, and it constituted an abuse of the writ as the petition raised claims new and different from those raised in the previous petition. *See* NRS 34.810(3); *Espinoza v. State*, No. 79181, 2020 WL 4035479 (Nev. July 16, 2020) (Order of Affirmance). Thus, the petition was procedurally barred.

Espinoza argues that the procedural bars should be excused because he is actually innocent. *See Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001) (holding that a petitioner may overcome the

procedural bars by showing that failure to consider his claims would amount to a fundamental miscarriage of justice because petitioner is actually innocent), *abrogated on other grounds by Rippo v. State*, 134 Nev. 411, 423 n.12, 423 P.3d 1084, 1097 n.12 (2018). “A prototypical example of ‘actual innocence’ in a colloquial sense is the case where the State has convicted the wrong person of the crime.” *Sawyer v. Whitley*, 505 U.S. 333, 340 (1992). The actual innocence gateway to reach the merits of a procedurally barred claim requires Espinoza to show that “it is more likely than not that no reasonable juror would have convicted him in the light of . . . new evidence.” *Schlup v. Delo*, 513 U.S. 298, 327 (1995); *see also Pellegrini*, 117 Nev. at 887, 34 P.3d at 537. In other words, Espinoza must show factual innocence. *See Bousley v. United States*, 523 U.S. 614, 623 (1998).

Espinoza proffers a neuropharmacologist report to contend that he could not form the requisite specific intent to commit first-degree murder or first-degree kidnapping due to methamphetamine-induced psychosis. He thus argues diminished capacity by voluntary intoxication. Even if a juror were to credit Espinoza’s expert, Espinoza could have been found guilty of a lesser offense. *Hancock v. State*, 80 Nev. 581, 583, 397 P.2d 181, 182 (1964) (observing that second-degree murder does not require specific intent). Espinoza thus has not shown factual innocence, given that the evidence does not support exoneration. *See Black v. Workman*, 682 F.3d 880, 915 (10th Cir. 2012) (rejecting claim of actual innocence where the appellant “could have been convicted of the lesser offense of manslaughter”); *Rozzelle v. Sec’y, Fla. Dep’t of Corr.*, 672 F.3d 1000, 1015-16 (11th Cir. 2012) (explaining that actual innocence applies to “extremely rare” instances where the State convicted an innocent defendant, not “[r]un-of-the-mill”

cases where the petitioner argues guilt of a lesser degree of the offense); see also *Fink v. Banks*, 996 N.E.2d 169, 174 (Ill. App. Ct. 2013) (“[T]he hallmark of actual innocence is ‘total vindication’ or ‘exoneration.’”).

Moreover, the record belies the premise of Espinoza’s actual-innocence claim—that Espinoza could not form specific intent. The district court correctly found that Espinoza repeatedly stated his intent to kill the victim. And the new expert report posited that the killing arose from a mistaken belief that the victim posed a threat, not that Espinoza did not intend to kill the victim. The expert report thus would not likely prevent a reasonable juror from finding that Espinoza had the specific intent to kill. We therefore conclude that the district court did not err in rejecting Espinoza’s claim of actual innocence.<sup>1</sup>


Espinoza next argues that the procedural bars should be excused because doing otherwise would violate due process. In this regard, Espinoza argues that first postconviction counsel provided ineffective assistance. Espinoza was not entitled to the effective assistance of postconviction counsel in this noncapital case and thus the procedural bars may not be excused on this basis. See *Brown v. McDaniel*, 130 Nev. 565, 569, 331 P.3d 867, 870 (2014) (concluding that claims of ineffective assistance of postconviction counsel in noncapital cases do not constitute good cause for a successive petition because there is no entitlement to appointed counsel). Espinoza may not evade the procedural bars by styling the ineffective-assistance claim as a due process claim.

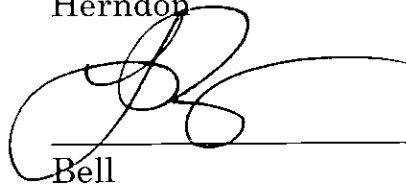
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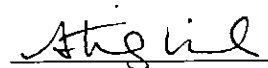
<sup>1</sup>In light of our disposition, we need not address whether the expert report constituted new evidence within the meaning of *Schlup*.

We conclude that the district court correctly applied the mandatory procedural bars. *See State v. Eighth Jud. Dist. Ct. (Riker)*, 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, C.J.  
Herndon

  
\_\_\_\_\_, J.  
Bell

  
\_\_\_\_\_, J.  
Stiglich

cc: Hon. Carli Lynn Kierny, District Judge  
Federal Public Defender/Las Vegas  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk