

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ROSEMARY VANDECAR,
Appellant,

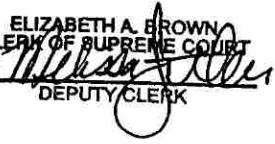
vs.

WILLIAM REUBART, WARDEN;
FLORENCE MCCLURE WOMEN'S
CORRECTIONAL CENTER; JAMES
DZURENDA, DIRECTOR; NEVADA
DEPARTMENT OF CORRECTIONS;
AARON D. FORD, NEVADA
ATTORNEY GENERAL AND THE
STATE OF NEVADA,
Respondents.

No. 89725-COA

FILED

MAR 09 2026

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Rosemary Vandecar appeals from a district court order denying a postconviction petition for a writ of habeas corpus filed on February 26, 2024. Eighth Judicial District Court, Clark County; Jacqueline M. Bluth, Judge.

Vandecar filed her petition more than eight years after the issuance of the remittitur on direct appeal on March 27, 2015. *See Vandecar v. State*, No. 61649, 2015 WL 918764 (Nev. Mar. 2, 2015) (Order of Affirmance). Thus, Vandecar's petition was untimely filed. *See* NRS 34.726(1). Further, Vandecar's petition was successive because she 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 she raised claims new and different from those raised in her previous petition.¹

¹*See Vandecar v. State*, No. 78057-COA, 2021 WL 855753 (Nev. Ct. App. Mar. 5, 2021) (Order of Affirmance).

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See NRS 34.810(1)(b)(2); NRS 34.810(3). Vandecar'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 she is 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). To warrant an evidentiary hearing, a petitioner's good-cause claims must be supported by specific factual allegations that are not belied by the record and, if true, would entitle the petitioner to relief. *Id.* at 967, 363 P.3d at 1154-55.

Additionally, the State specifically pleaded laches in its motion to dismiss Vandecar's petition. Where, as here, more than five years have elapsed since the decision on direct appeal, a petitioner must overcome the rebuttable presumption of prejudice to the State. *See* NRS 34.800(2). To overcome that presumption, Vandecar was required to demonstrate both that her "petition is based upon grounds of which [she] could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the State occurred," NRS 34.800(1)(a), and that "a fundamental miscarriage of justice has occurred in the proceedings resulting in the judgment of conviction," NRS 34.800(1)(b); *see also Mitchell v. State*, 122 Nev. 1269, 1273-74, 149 P.3d 33, 36 (2006) (indicating that a fundamental miscarriage of justice to overcome the procedural bars to an untimely or successive petition and to satisfy NRS 34.800(1)(b) can both be satisfied with a showing of actual innocence). Demonstrating a fundamental miscarriage of justice requires a petitioner to make a colorable showing of actual innocence—factual innocence, not legal innocence. *Bousley v. United States*, 523 U.S. 614, 623 (1998); *Brown v. McDaniel*, 130

Nev. 565, 576, 331 P.3d 867, 875 (2014); *see also House v. Bell*, 547 U.S. 518, 537 (2006) (“[A] gateway claim [of actual innocence] requires new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial.” (internal quotation marks omitted)).

First, Vandekar asserts she can overcome the procedural bars because she received ineffective assistance of postconviction habeas counsel. Although Vandekar acknowledges that Nevada law does not recognize a right to postconviction habeas counsel in noncapital cases, *see Brown*, 130 Nev. at 573-74, 331 P.3d at 873, she argues she had a right to the effective assistance of postconviction habeas counsel once the district court granted her an evidentiary hearing. In making this argument, Vandekar cites California caselaw. However, Vandekar fails to allege California’s statutory postconviction scheme is similar to Nevada’s scheme. *Cf. id.* at 576, 331 P.3d at 875 (holding that “[p]ost-conviction relief is a statutory remedy and it is up to Legislature to define its contours” and declining to extend federal habeas corpus law to state postconviction proceedings). Furthermore, the cases Vandekar cites appear to indicate that the right to postconviction counsel in California is conditioned on the petitioner meeting a certain pleading standard. *See, e.g., People v. Fryhaat*, 248 Cal. Rptr. 3d 39, 47 (Ct. App. 2019) (holding that “neither the federal nor the state Constitution mandates an unconditional right to counsel to pursue a collateral attack on a judgment of conviction” and that appointment of postconviction counsel is conditioned on the petitioner making a prima facie showing of entitlement to relief). Nevada law does not recognize such a conditional right to counsel in noncapital postconviction habeas cases.

Moreover, Vandecar's argument elides the fact that Nevada law provides that the appointment of postconviction counsel in noncapital cases is a matter of judicial discretion. *See* NRS 34.750(1); *see also Brown*, 130 Nev. at 571, 331 P.3d at 871 (recognizing that the appointment of counsel to represent noncapital postconviction habeas petitioners is discretionary). We therefore reject Vandecar's claim that she can overcome the procedural bars to the instant petition due to the alleged ineffective assistance of postconviction counsel.

Next, Vandecar asserts she can overcome the procedural bars because she is actually innocent and identifies several pieces of new evidence to support her contention. Vandecar's primary evidence in support of her actual innocence claim consists of two expert reports regarding the victim's cause of death. Vandecar alleges these new expert reports demonstrate the victim did not die as a result of strangulation as alleged by the State. At best, however, the expert reports suggest the victim died due to blunt force trauma to the neck, a combination of blunt force trauma to the neck and strangulation, or a combination of blunt force trauma to the neck and asphyxia. Neither of the reports definitively conclude that the victim was not strangled, nor do they definitively conclude Vandecar could not have inflicted the trauma to the victim's neck. And crucially, neither report rebuts the conclusion that the victim's manner of death was a homicide.

Vandecar also points to other evidence she alleges demonstrates her actual innocence, which includes: (1) a report and testimony from a forensic expert in support of her first postconviction habeas petition; (2) a letter from a counselor opining that he "believe[s] that Ms. Vandecar suffers from Post-Traumatic Stress [Disorder]"; (3) the "full

context” of her son’s statement to law enforcement following the victim’s death; (4) her son’s arrest for domestic assault in another state four months prior to the victim’s death that did not involve either the victim or Vandecar; (5) a 2009 police report from another state indicating Vandecar had been storing her son’s weapons at a friend’s house; and (6) a declaration from a friend alleging that Vandecar told the friend that she requested an attorney prior to her interrogation. Having considered all the new evidence identified by Vandecar, we conclude she has not demonstrated that it is more likely than not that no reasonable juror would have convicted her in light of the new evidence. *See Berry*, 131 Nev. at 966, 363 P.3d at 1154. Thus, she has not demonstrated actual innocence to overcome application of the procedural bars.

We further conclude that Vandecar did not overcome the presumption of prejudice to the State pursuant to NRS 34.800. As outlined above, Vandecar failed to demonstrate a fundamental miscarriage of justice. *See* NRS 34.800(1)(b). Furthermore, Vandecar failed to allege specific facts demonstrating that she could not have had knowledge of the grounds in her petition by the exercise of reasonable diligence before the presumption of prejudice to the State arose.² *See* NRS 34.800(1)(a). Accordingly, we

²To the extent Vandecar argues she can rebut the presumption of prejudice under NRS 34.800(1)(a) or (b) because of the ineffective assistance of postconviction counsel, we conclude such a claim is without merit. The sole case Vandecar cites to support this argument is *Thomas v. State*, 138 Nev. 359, 510 P.3d 754 (2022). *Thomas*, however, is inapplicable because the petitioner there was convicted of capital murder and was thus entitled to the effective assistance of postconviction counsel. 138 Nev. at 362-63, 510 P.3d at 762 (noting that Thomas had a statutory right to postconviction counsel because he was sentenced to death).

conclude the district court did not err by denying Vandecar's petition without conducting an evidentiary hearing and therefore

ORDER the judgment of the district court AFFIRMED.³


_____, C.J.
Bulla


_____, J.
Gibbons


_____, J.
Westbrook

cc: Hon. Jacqueline M. Bluth, District Judge
Federal Public Defender/Las Vegas
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

³To the extent Vandecar raises other arguments not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.