

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT A. HAYS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 40712

FILED

NOV 05 2003

ORDER OF AFFIRMANCE

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *Richard*  
CHIEF DEPUTY CLERK

This is a proper person appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus.

A jury found appellant guilty of four counts of sexual assault on a minor and four counts of lewdness on a minor. Prior to sentencing, appellant filed a motion for a new trial, citing newly discovered evidence in the form of the victim's recantation. The district court denied the motion, and on June 2, 1993, the district court sentenced appellant to serve four consecutive terms of life in the Nevada State Prison with the possibility of parole. The remaining terms were imposed to run concurrently. This court dismissed appellant's appeal from his judgment of conviction.<sup>1</sup> The remittitur issued on June 14, 1994.

On September 19, 1994, appellant filed a second motion for a new trial, in proper person, in the district court. On October 18, 1994, the district court denied appellant's motion. No appeal was taken.

On May 10, 1995, appellant filed a third motion for a new trial, in proper person, in the district court. The State opposed the motion.

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<sup>1</sup>Hays v. State, Docket No. 24734 (Order Dismissing Appeal, May 24, 1994).

On June 22, 1995, the district court denied appellant's motion. No appeal was taken.

On May 25, 1995, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. On August 10, 1995, the district court dismissed appellant's petition. This court dismissed appellant's subsequent appeal.<sup>2</sup>

On October 1, 2002, appellant filed a second proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition arguing that it was untimely and successive. Moreover, the State specifically pleaded laches. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On February 4, 2003, the district court denied appellant's petition. This appeal followed.

Appellant filed his petition more than eight years after this court issued the remittitur from his direct appeal. Thus, appellant's petition was untimely filed.<sup>3</sup> Moreover, appellant's petition was successive because he had previously filed several motions for a new trial and a post-conviction petition for a writ of habeas corpus.<sup>4</sup> Appellant's petition was procedurally barred absent a demonstration of good cause and prejudice.<sup>5</sup> Further, because the State specifically pleaded laches, appellant was required to overcome the presumption of prejudice to the State.<sup>6</sup> A

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<sup>2</sup>Hays v. State, Docket No. 27586 (Order Dismissing Appeal, May 13, 1999).

<sup>3</sup>See NRS 34.726(1).

<sup>4</sup>See NRS 34.810(1)(b)(2); (2).

<sup>5</sup>See NRS 34.726(1); NRS 34.810(1)(b); (3).

<sup>6</sup>See NRS 34.800(2).

petitioner may be entitled to review of defaulted claims if failure to review the claims would result in a fundamental miscarriage of justice.<sup>7</sup> A colorable showing of actual innocence may excuse a failure to demonstrate cause to excuse procedural bars under the fundamental miscarriage of justice standard.<sup>8</sup>

In an attempt to excuse his procedural defects, appellant argued that he was required to raise his claims in state court in order to exhaust state remedies for the purpose of federal review. Appellant further argued that the procedural bars should not apply to his petition because he was filing this petition pursuant to the insistence of the attorney general that he had not exhausted his state court remedies. Finally, appellant claimed that he was actually innocent of the offenses.

Based upon our review of the record on appeal, we conclude that the district court did not err in denying appellant's petition. A failure to exhaust state court remedies does not excuse the procedural bars that apply to all petitions challenging a judgment of conviction pursuant to NRS chapter 34.<sup>9</sup> Appellant further failed to overcome the presumption of prejudice to the State. Finally, appellant failed to demonstrate that a fundamental miscarriage of justice would result by the application of the procedural bars to the instant petition. Appellant failed to present a colorable showing of actual innocence. The victim's recantation has previously been determined to lack merit because the victim reaffirmed her trial testimony after initially recanting her trial testimony. There is nothing in the record regarding the recantation and the prior proceedings

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<sup>7</sup>Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).


<sup>8</sup>Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001).

<sup>9</sup>See NRS 34.720; see also Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).

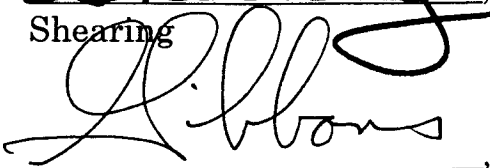
that would alter the determination that the victim's original recantation was not credible, and thus, would not have altered the outcome of the trial. Therefore, we conclude that the district court properly denied appellant's petition as procedurally barred.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.<sup>10</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>11</sup>

  
\_\_\_\_\_, J.  
Becker

  
\_\_\_\_\_, J.  
Shearing

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

cc: Hon. Donald M. Mosley, District Judge  
Robert A. Hays  
Attorney General Brian Sandoval/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk

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<sup>10</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

<sup>11</sup>We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.