

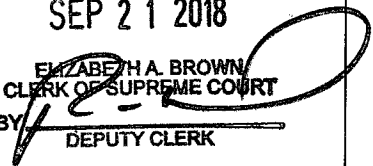
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ANTONIO TONY MCKIBBINS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 74701

FILED

SEP 21 2018

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Antonio Tony McKibbins appeals from a district court order denying a postconviction petition for a writ of habeas corpus filed on August 14, 2017.<sup>1</sup> Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

McKibbins' petition was untimely because it was filed more than ten years after the remittitur on direct appeal was issued on April 3, 2007,<sup>2</sup> and it was successive because he had previously filed two postconviction petitions for writs of habeas corpus.<sup>3</sup> See NRS 34.726(1); NRS 34.810(2). Consequently, McKibbins' petition was procedurally barred absent a demonstration of good cause and actual prejudice. See NRS

---

<sup>1</sup>This appeal has been submitted for decision without oral argument. NRAP 34(f)(3).

<sup>2</sup>See *McKibbins v. State*, Docket No. 46098 (Order of Affirmance, March 7, 2007).

<sup>3</sup>See *McKibbins v. State*, Docket No. 67010 (Order of Affirmance, April 14, 2015); *McKibbins v. State*, Docket Nos. 51899, 52340 (Order of Affirmance, January 23, 2009).

34.726(1); NRS 34.810(3). Moreover, because the State affirmatively pleaded laches, McKibbins was required to overcome the rebuttable presumption of prejudice to the State. *See* NRS 34.800(2).

McKibbins claimed the procedural bars did not apply to his petition because “[t]his is an ‘actual innocence’ claim based on newly discovered evidence and misidentification.”<sup>4</sup> A colorable showing of actual innocence may overcome procedural bars under the fundamental miscarriage of justice standard. *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). “‘To be credible,’ a claim of actual innocence must be based on reliable evidence not presented at trial.” *Calderon v. Thompson*, 523 U.S. 538, 559 (1998) (quoting *Schulp v. Delo*, 513 U.S. 298, 324 (1995)). And, to demonstrate actual innocence of the underlying crime, the petitioner “must show ‘it is more likely than not that no reasonable juror would have convicted him in light of the new evidence’ presented in his habeas petition.” *Id.* (quoting *Schulp*, 513 U.S. at 327).

The district court made the following findings. McKibbins’ claim that Jennifer McKibbins’ phone records were newly discovered evidence was misleading. Jennifer testified about her phone records at trial and said they proved that McKibbins had an alibi. The phone records were available during the trial and did not constitute newly discovered evidence. And the phone records did not demonstrate factual innocence that would be sufficient to reach the merits of McKibbins’ claims. The district court’s findings are supported by the record, and we conclude the district court did not err by denying McKibbins’ procedurally-barred petition. *See State v. Eighth Judicial Dist. Court (Riker)*, 121 Nev. 225, 231, 112 P.3d 1070, 1074


---

<sup>4</sup>McKibbins appears to argue that he has an alibi and therefore he was misidentified as the perpetrator of the crimes.

(2005) (“Application of the statutory procedural default rules to post-conviction habeas petitions is mandatory.”). Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, C.J.  
Silver

  
\_\_\_\_\_, J.  
Tao

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

cc: Hon. Valerie Adair, District Judge  
Antonio Tony McKibbins  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk