

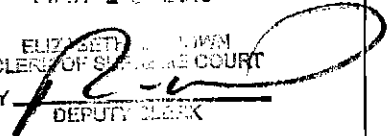
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

FRANK J. MATYLINSKY, JR.,
Appellant,
vs.
ISIDRO BACA, WARDEN,
Respondent.

No. 74090-COA

FILED

MAR 25 2019

ELIZABETH L. LAMM
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Frank J. Matylinsky, Jr., appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on April 14, 2017.¹ Second Judicial District Court, Washoe County; Patrick Flanagan, Judge.

Matylinsky filed his petition 28 years after issuance of the remittitur on direct appeal on December 13, 1988, *see Matylinsky v. State*, Docket Nos. 16222, 18547 (Order Dismissing Appeals, November 22, 1988), and 24 years after the effective date of NRS 34.726, *see* 1991 Nev. Stat., ch. 44, § 5, at 75-76, § 33, at 92; *Pellegrini v. State*, 117 Nev. 860, 874-75, 34 P.3d 519, 529 (2001), *abrogated on other grounds by Rippo v. State*, 134 Nev. ___, ___ n.12, 423 P.3d 1084, 1097 n.12 (2018). Matylinsky's petition was therefore untimely filed. *See* NRS 34.726(1). Matylinsky's petition was also

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

successive.² See NRS 34.810(1)(b)(2); NRS 34.810(2). Matylinsky's petition was therefore procedurally barred absent a demonstration of good cause and actual prejudice. See NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3).

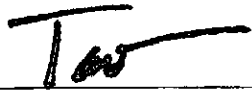
Matylinsky claimed the decisions in *Welch v. United States*, 578 U.S. ___, 136 S. Ct. 1257 (2016), and *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718 (2016), provided good cause to excuse the procedural bars to his claim that he is entitled to the retroactive application of *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000). We conclude the district court did not err by concluding the cases did not provide good cause to overcome the procedural bars. See *Branham v. Warden*, 134 Nev. ___, ___, 434 P.3d 313, 316 (Ct. App. 2018).


Matylinsky also claimed he could demonstrate a fundamental miscarriage of justice to overcome the procedural bars. A petitioner may overcome procedural bars by demonstrating he is actually innocent such that the failure to consider his petition would result in a fundamental miscarriage of justice. *Pellegrini*, 117 Nev. at 887, 34 P.3d at 537. Matylinsky claimed that “[t]he facts in this case established that [he] only committed a second-degree murder.” This is not actual innocence, and Matylinsky thus failed to overcome the procedural bars. See *Bousley v.*


²See *Matylinsky v. Warden*, Docket No. 72235 (Order of Affirmance, December 13, 2017); *Matylinsky v. State*, Docket No. 63116 (Order of Affirmance, July 23, 2014); *Matylinsky v. State*, Docket No. 38746 (Order of Affirmance, September 12, 2002); *Matylinsky v. Warden*, Docket No. 20228 (Order Dismissing Appeal, November 2, 1989); *Matylinsky v. State*, Docket Nos. 16222, 18547 (Order Dismissing Appeals, November 22, 1988).

United States, 523 U.S. 614, 623 (1998) (“[A]ctual innocence’ means factual innocence, not mere legal insufficiency.”). Accordingly, we

ORDER the judgment of the district court AFFIRMED.³


_____, J.
Tao


_____, J.
Gibbons


_____, J.
Bulla

cc: Chief Judge, Second Judicial District
Frank J. Matylinsky, Jr.
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

³To the extent Matylinsky argues claims he attempted to raise in his supplemental petition filed on September 6, 2017, those claims are not properly before this court and we do not consider them. The district court declined to consider the supplement, and Matylinsky has failed to demonstrate this was an abuse of discretion. *See* NRS 34.750(5).