

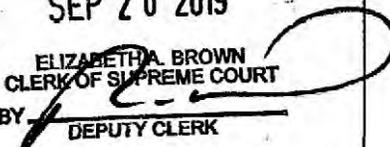
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JAMES EDWARD CROSS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 77223-COA

FILED

SEP 20 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

James Edward Cross appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on April 7, 2017, and supplemental petition filed on June 5, 2018. Eighth Judicial District Court, Clark County; Ronald J. Israel, Judge.

Cross filed his petition more than 17 years after issuance of the remittitur on direct appeal on September 6, 2000. *See Cross v State*, Docket No. 32533 (Order Dismissing Appeal, August 11, 2000). Cross' petition was therefore untimely filed. *See* NRS 34.726(1). Cross' petition was also successive and an abuse of the writ.¹ *See* NRS 34.810(1)(b)(2); NRS 34.810(2). Cross' 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), or that he was actually innocent such that it

¹*See Cross v. State*, Docket No. 59712 (Order of Affirmance, June 14, 2012); *Cross v. State*, Docket No. 58153 (Order of Affirmance, September 15, 2011); *Cross v. State*, Docket No. 45194 (Order of Affirmance, December 21, 2005).

would result in a fundamental miscarriage of justice were his claims not decided on the merits, *see Berry v. State*, 131 Nev. 957, 966, 363 P.3d 1148, 1154 (2015). Further, because the State specifically pleaded laches, Cross was required to overcome the presumption of prejudice to the State. *See* NRS 34.800(2).

Cross contends the district court erred by denying his petition as procedurally barred. “In order to demonstrate good cause, a petitioner must show that an impediment external to the defense prevented him or her from complying with the state procedural default rules.” *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). A good-cause claim must be raised within one year of its becoming available. *See Rippo v. State*, 134 Nev. 411, 422, 423 P.3d 1084, 1097 (2018).

First, Cross claimed the district court in his first postconviction proceedings impeded development of his claims and this constituted official interference that, in turn, provided good cause to excuse Cross’ procedural defaults. Specifically, Cross points to that court’s denial of his motion to appoint postconviction counsel, as well as issues that occurred at the evidentiary hearing. Official interference may constitute an impediment external to the defense. *See Hathaway*, 119 Nev. at 252, 71 P.3d at 506. However, the law of the case is that the lack of court-appointed counsel during Cross’ first postconviction proceedings do not constitute good cause to overcome any procedural bars, *see Cross v. State*, Docket No. 58153 (Order of Affirmance, September 15, 2011), and Cross cannot avoid it by refocusing his argument, *see Hall v. State*, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975). Further, Cross failed to adequately explain why it took

him more than 14 years to challenge the events he now claimed rendered his evidentiary hearing unfair.² *See Cross v. State*, Docket No. 45194 (Order of Affirmance, December 21, 2005).

Second, Cross claimed he had good cause because he was relying on new case law: *Getz v. Palmer*, 700 F. App'x 571 (9th Cir. 2017) and *Riley v. McDaniel*, 786 F.3d 719 (9th Cir. 2015). Cross did not explain how *Getz*, which reversed the granting of relief to a petitioner who was similarly situated to Cross, would be good cause. And Cross filed his petition more than a year after *Riley* was decided. His claim was therefore untimely from that decision and could not constitute good cause. Moreover, the Nevada Supreme Court has disagreed with *Riley*. *See Leavitt v. State*, 132 Nev. 829, 830, 386 P.3d 620, 620 (2016).

Third, Cross claimed new facts not previously available constituted good cause to overcome the procedural bars. Cross retained an expert, a toxicologist, to provide a report on the role marijuana may have played in Cross' actions. A petitioner may demonstrate good cause by showing that the factual basis for a claim was not reasonably available to counsel. *Hathaway*, 119 Nev. at 252, 71 P.3d at 506. Cross' underlying claim was that counsel was ineffective for failing to obtain an expert such as the toxicologist to testify as to marijuana's effect on Cross. However, the

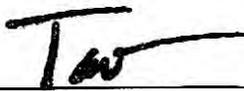
²To the extent Cross claimed he could not have raised the argument until postconviction counsel was appointed, Cross' claim failed. Cross did not have the right to postconviction counsel, and accordingly, the lack of counsel cannot be good cause. *See Rippo*, 134 Nev. at 418 n.9, 423 P.3d at 1094 n.9.

report containing the “new facts” states the defense’s expert opinions admitted at trial “were consistent with the body of knowledge at that time” and the report’s conclusion was based on studies conducted since that time. Because the basis for the toxicologist’s opinion did not exist at the time of trial, counsel could not have been deficient for failing to obtain similar testimony, and Cross thus could not demonstrate prejudice to overcome the procedural bars based on the new toxicology “facts.”

Cross also claimed the procedural defaults should be excused because he is actually innocent such that denying consideration of his substantive claims would result in a fundamental miscarriage of justice. To demonstrate actual innocence, a petitioner must show “it is more likely than not that no reasonable juror would have convicted him in light of the new evidence.” *Calderon v. Thompson*, 523 U.S. 538, 559 (1998) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)); accord *Berry*, 131 Nev. at 966, 363 P.3d at 1154. Cross points to the toxicologist’s report as new evidence of his actual innocence. The report states that marijuana usage “clearly causes acute psychotic symptoms” and opines “that marijuana use contributed to Mr. Cross’ progressive psychosis” at the time of the crimes. Cross presented evidence at trial of his psychosis and argued that evidence in closing argument. He has failed to indicate how identifying a contributing cause to his psychosis would have resulted in no reasonable juror convicting him. And because he failed to demonstrate a fundamental miscarriage of justice, Cross failed to overcome the presumption of prejudice to the State. See NRS 34.800.

For the foregoing reasons, we conclude the district court did not err by denying Cross' petition as procedurally barred, and we ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Ronald J. Israel, District Judge
Resch Law, PLLC d/b/a Conviction Solutions
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk