

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MARCUS SHEREEF MCNEAL,  
Appellant,  
vs.  
JERRY HOWELL, WARDEN,  
Respondent.

No. 78173-COA

FILED

JAN 14 2020

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

ORDER OF AFFIRMANCE

Marcus Shereef McNeal appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on October 15, 2018. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

McNeal filed his petition more than four years after issuance of the remittitur on direct appeal on June 6, 2014. *See McNeal v. State*, Docket No. 64076 (Order of Affirmance, May 13, 2014). Thus, McNeal's petition was untimely filed. *See* NRS 34.726(1). Moreover, McNeal's petition was successive because he had previously filed a postconviction petition for a writ of habeas corpus, and it constituted an abuse of the writ as he raised claims new and different from those raised in his previous petition. *See* NRS 34.810(1)(b)(2); NRS 34.810(2).<sup>1</sup> McNeal'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(3).

---

<sup>1</sup>*McNeal v. State*, Docket No. 74502-COA (Order of Affirmance, December 4, 2018); *McNeal v. State*, Docket No. 71446-COA (Order of Affirmance, June 14, 2017); *McNeal v. State*, Docket No. 68765-COA (Order of Affirmance, March 16, 2016).

In his petition, McNeal argued he could overcome the procedural bars because he was actually innocent. McNeal claimed he was actually innocent because the prosecutor tainted the jury by answering jury questions, he was denied the right to represent himself, he was not given an evidentiary hearing on his first postconviction petition, the State presented insufficient evidence to convict him, and the State withheld police reports.

A district court may excuse a procedural bar if the petitioner demonstrates that failure to consider the petition would result in a fundamental miscarriage of justice. *Berry v. State*, 131 Nev. 957, 966, 363 P.3d 1148, 1154 (2015). A colorable showing of actual innocence may overcome a procedural bar under the fundamental miscarriage of justice standard. *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001), *abrogated on other grounds by Rippo v. State*, 134 Nev. 411, 423 n.12, 923 P.3d 1089, 1097-98 n.12 (2018). To demonstrate actual innocence a “petitioner must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence.” *Berry*, 131 Nev. at 966, 363 P.3d at 1154 (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). “[A]ctual innocence means factual innocence, not mere legal insufficiency.” *Bousley v. United States*, 523 U.S. 614, 623 (1998) (internal quotation marks omitted). “[A]n evidentiary hearing regarding actual innocence is required where the new evidence, if credited, would show that it is more likely than not that no reasonable jury would find the petitioner guilty beyond a reasonable doubt.” *Berry*, 131 Nev. at 968, 363 P.3d at 1155 (internal quotation marks omitted).


The majority of McNeal’s claims do not demonstrate factual innocence nor are they based on new evidence. As to McNeal’s claim that

police reports were withheld, McNeal failed to demonstrate that there were police reports that were never provided to the defense. This claim is mere speculation. Therefore, we conclude the district court did not err by denying McNeal's actual innocence claims without first holding an evidentiary hearing.

Next, McNeal claimed that he had good cause because the State withheld *Brady*<sup>2</sup> material from him. McNeal raised this good cause claim in a previous postconviction petition and it was rejected by the district court. This court affirmed the district court's denial of this claim. *See McNeal v. State*, Docket No. 71446-COA (Order of Affirmance, June 14, 2017). Therefore, this claim was barred by the doctrine of law of the case. *See Hall v. State*, 91 Nev. 314, 315-316, 535 P.2d 797, 798-99 (1975). Accordingly, we conclude the district court did not err by denying this claim, and we

ORDER the judgment of the district court AFFIRMED.

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

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

  
\_\_\_\_\_, J.  
Bulla

---

<sup>2</sup>*Brady v. Maryland*, 373 U.S. 83 (1963).

cc: Hon. Michael Villani, District Judge  
Marcus Shereef McNeal  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk