

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

PABLO RAMON GUERRERO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 78247-COA

FILED

MAR 12 2020

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

ORDER OF AFFIRMANCE

Pablo Ramon Guerrero appeals from an order of the district court denying his postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; James M. Bixler, Senior Judge.

Guerrero argues the district court erred by denying his September 7, 2018, petition and later-filed supplement as procedurally barred. Guerrero filed his petition more than 13 years after issuance of the remittitur on direct appeal on July 12, 2005. *Guerrero v. State*, Docket No. 43115 (Order Affirming in Part, Reversing in Part, and Remanding, June 15, 2005). Thus, Guerrero's petition was untimely filed. *See* NRS 34.726(1). Moreover, Guerrero's petition was successive because he had previously filed two postconviction petitions 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 petitions.¹ *See* NRS 34.810(1)(b)(2); NRS 34.810(2). Guerrero's petition was procedurally barred absent a demonstration of good cause and actual prejudice. *See* NRS 34.726(1); NRS

¹*Guerrero v. State*, 69678 (Order of Affirmance, June 15, 2017); *Guerrero v. State*, Docket No. 59697 (Order of Affirmance, January 16, 2013).

34.810(1)(b); NRS 34.810(3). Moreover, because the State specifically pleaded laches, Guerrero was required to overcome the rebuttable presumption of prejudice to the State. See NRS 34.800(2). To warrant an evidentiary hearing, petitioner must raise claims supported by specific factual allegations that are not belied by the record and, if true, would entitle him to relief. See *Berry v. State*, 131 Nev. 957, 967, 363 P.3d 1148, 1155 (2015).

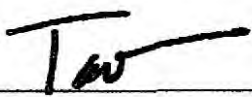
First, Guerrero claimed he had good cause to assert that his trial counsel violated *Batson v. Kentucky*, 476 U.S. 79 (1986), by issuing peremptory strikes against male jurors. Guerrero acknowledged he raised this issue during the litigation of his first petition and the claim was denied by the district court, but he contended he should be permitted to again raise this issue in light of the Nevada Supreme Court's decision in *Bradford v. State*, Docket No. 62108 (Order of Reversal and Remand, October 24, 2017). However, *Bradford* discussed and applied an earlier opinion, *Brass v. State*, 128 Nev. 748, 291 P.3d 145 (2012). Guerrero provided no explanation for his delay from the issuance of the *Brass* decision. See *Hathaway v. State*, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003). Moreover, Guerrero did not overcome the rebuttable presumption of prejudice to the State. See NRS 34.800(2). Therefore, Guerrero failed to demonstrate the district court erred by denying this good-cause claim without conducting an evidentiary hearing.

Second, Guerrero claimed he would suffer from a fundamental miscarriage of justice if his claims were not considered on their merits because he is actually innocent. Guerrero based his actual-innocence claim upon assertions that he was not criminally liable for the actions of his codefendant and the trial court improperly instructed the jury. A petitioner

may overcome the procedural bars and “secure review of the merits of defaulted claims by showing that the failure to consider the petition on its merits would amount to a fundamental miscarriage of justice.” *Berry*, 131 Nev. at 966, 363 P.3d at 1154. In order to demonstrate a fundamental miscarriage of justice, a petitioner must make a colorable showing of actual innocence—factual innocence, not legal innocence. *Bousley v. United States*, 523 U.S. 614, 623 (1998); *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001), *abrogated on other grounds by Ripppo v. State*, 134 Nev. 411, 423 n.12, 423 P.3d 1084, 1097 n.12 (2018). Guerrero’s claims involve legal, not factual innocence. In addition, the record demonstrates that Guerrero’s actual-innocence claim was not based upon new evidence and, therefore, his claim failed. *See Schlup v. Delo*, 513 U.S. 298, 324 (1995) (“To be credible, [an actual-innocence claim] requires petitioner to support his allegations of constitutional error with new reliable evidence.”). Accordingly, we conclude the district court did not err by denying Guerrero’s petition without conducting an evidentiary hearing, and we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Chief Judge, Eighth Judicial District Court
Hon. James M. Bixler, Senior Judge
Pablo Ramon Guerrero
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk