

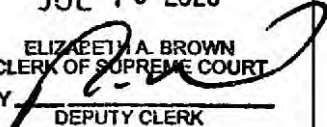
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MARCUS WASHINGTON,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 79839-COA

**FILED**

JUL 13 2020

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Marcus Washington appeals from a district court order denying a postconviction petition for a writ of habeas corpus filed on June 17, 2019. Eighth Judicial District Court, Clark County; Michael A. Cherry, Senior Justice.

Washington's petition was untimely because it was filed more than three years after the remittitur on direct appeal was issued on July 13, 2015,<sup>1</sup> *see* NRS 34.726(1), and it was successive because he had previously filed a postconviction petition for a writ of habeas corpus that was decided on the merits,<sup>2</sup> *see* NRS 34.810(2). Consequently, his petition was procedurally barred absent a demonstration of good cause and actual prejudice. *See* NRS 34.726(1); NRS 34.810(3). Moreover, because the State specifically pleaded laches, his petition was not justiciable unless he successfully rebutted the presumption of prejudice to the State. *See* NRS 34.800(2).

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<sup>1</sup>*See Washington v. State*, Docket No. 61139 (Order of Affirmance, February 26, 2015).

<sup>2</sup>*See Washington v. State*, Docket No. 76045 (Order of Affirmance, April 12, 2019).

Washington claimed that he had good cause because he was deprived of effective assistance of counsel during the pendency of his first postconviction habeas petition. He cited to *Martinez v. Ryan* for the proposition that “ineffective assistance in an initial-review collateral proceeding on a claim of ineffective assistance at trial may provide cause for a procedural default in a federal habeas proceeding.” 566 U.S. 1, 9 (2012). However, he was not entitled to the effective assistance of postconviction counsel because the appointment of counsel in his postconviction proceeding was not statutorily or constitutionally required. See *McKague v. Warden*, 112 Nev. 159, 164, 912 P.2d 255, 258 (1996). And the United States Supreme Court’s holding in *Martinez* does not apply to habeas petitions filed in state courts. *Brown v. McDaniel*, 130 Nev. 565, 571, 331 P.3d 867, 871-72 (2014). Accordingly, this good cause claim lacked merit.

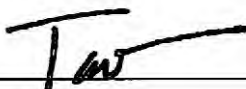
Washington also claimed that the district court’s failure to consider his petition would result in a fundamental miscarriage of justice. He argued that trial counsel’s ineffectiveness resulted in the conviction of a person who is actually innocent. A colorable showing of actual innocence may overcome 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 P.3d 411, 423 n.12, 423 P.3d 1084, 1097 n.12 (2018). However, “[a]ctual innocence means factual innocence, not mere legal insufficiency.” *Mitchell v. State*, 122 Nev. 1269, 1273-74, 149 P.3d 33, 36 (2006) (internal quotation marks and brackets omitted). “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 *Schlup 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 *Schlup*, 513 U.S. at 327). Washington did not make a colorable showing of actual innocence under this standard and therefore he did not demonstrate a fundamental miscarriage of justice sufficient to excuse the petition’s procedural defects.

We note that Washington made no attempt to respond to the State’s specific plea of laches. We conclude the district court did not abuse its discretion by denying his procedurally barred habeas petition without appointing counsel or conducting an evidentiary hearing. *See* NRS 34.750(1) (providing for the discretionary appointment of counsel if the petitioner is indigent and the petition is not summarily dismissed); *Renteria-Novoa v. State*, 133 Nev. 75, 76, 391 P.3d 760, 760-61 (2017); *Rubio v. State*, 124 Nev. 1032, 1046 & n.53, 194 P.3d 1224, 1233-34 & n.53 (2008). Accordingly, we

ORDER the judgment of the district court AFFIRMED.

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

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

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

cc: Chief Judge, Eighth Judicial District Court  
Hon. Michael A. Cherry, Senior Justice  
Marcus Washington  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk