

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ROBERT JAMES WALSH,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 80794-COA

FILED

APR 12 2021

ELIZABETH L. BROWN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Robert James Walsh appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Fifth Judicial District Court, Nye County; Kimberly A. Wanker, Judge.

Walsh filed his petition on July 3, 2019, more than three years after issuance of the remittitur on direct appeal on March 16, 2016. *Walsh v. State*, Docket No. 66107 (Order of Affirmance, October 16, 2015). Thus, Walsh's petition was untimely filed. *See* NRS 34.726(1). Moreover, Walsh's petition was successive because he had previously filed a postconviction petition for a writ of habeas corpus that was decided on the merits, and it constituted an abuse of the writ as he raised a claim new and different from those raised in his previous petition.<sup>1</sup> *See* NRS 34.810(1)(b)(2); NRS 34.810(2). Walsh'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).

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<sup>1</sup>*Walsh v. Director*, Docket No. 73540-COA (Order of Affirmance, July 17, 2018).

21-10461

In his petition, Walsh claimed the trial court improperly instructed the jury that methamphetamine is a schedule I controlled substance. This claim was reasonably available to be raised in a timely-filed petition, but Walsh did not attempt to demonstrate good cause to overcome the procedural bars. *See Hathaway v. State*, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003). Therefore, the district court did not err by denying the petition as procedurally barred.

Walsh argues on appeal that he can overcome the procedural bars because *Figueroa-Beltran v. United States*, 136 Nev., Adv. Op. 45, 467 P.3d 615 (2020), provides good cause and also demonstrates he was actually innocent. *See Berry v. State*, 131 Nev. 957, 966, 363 P.3d 1148, 1154 (2015). Because these issues were not raised in Walsh's petition, this court will only consider this new argument if Walsh demonstrates "good cause and prejudice for failing to include these issues in his petition." *See McNelton v. State*, 115 Nev. 396, 415-16, 990 P.2d 1263, 1275-76 (1999). *Figueroa-Beltran* was not decided until after Walsh filed the notice of appeal in the instant case and, thus, provides good cause for this court to consider whether the opinion provides a basis to overcome the procedural bars to deciding Walsh's underlying substantive claims.

Walsh concedes in his opening brief that *Figueroa-Beltran* did not announce new law. Rather, the case recognized that a 2018 opinion<sup>2</sup> "indicate[s] that the particular identity of a substance is an element that must be proven to sustain a conviction." *Figueroa-Beltran*, 136 Nev., Adv. Op. 45, at \*16, 467 P.3d at 624. Because the case merely applied law that existed at the time Walsh filed his petition, *Figueroa-Beltran* could not


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<sup>2</sup>*See Andrews v. State*, 134 Nev. 95, 101, 412 P.3d 37, 42 (2018).

constitute good cause to overcome the procedural bars. *See Hathaway*, 119 Nev. at 252-53, 71 P.3d at 506. Further, nothing in *Figueroa-Beltran* suggests that the identity of a substance includes the provenance of the substance. Finally, even if it did, Walsh's actual-innocence argument is of mere legal insufficiency and not of factual innocence. *See Bousley v. United States*, 523 U.S. 614, 623 (1998). Accordingly, we

ORDER the judgment of the district court AFFIRMED.

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

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

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

cc: Hon. Kimberly A. Wanker, District Judge  
Michael Lasher LLC  
Attorney General/Carson City  
Nye County District Attorney  
Nye County Clerk