

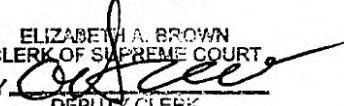
IN THE SUPREME COURT OF THE STATE OF NEVADA

DESHAWN LAMONT THOMAS,
Appellant,
vs.
CALVIN JOHNSON; JAMES
DZURENDA; AND AARON D. FORD,
Respondents.

No. 85365

FILED

DEC 14 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY: 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Appellant Deshawn Lamont Thomas appeals from a district court order dismissing a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Mary Kay Holthus, Judge.

Thomas filed the instant postconviction petition, his third, on May 13, 2022, over ten years after issuance of the remittitur on direct appeal. *Thomas v. State*, No. 56419, 2011 WL 4378773 (Nev. Sept. 19, 2011) (Order of Affirmance). Thus, Thomas's petition was untimely filed; successive; and to the extent that he raised claims that could have been litigated in a prior petition, constituted an abuse of the writ. See NRS 34.726(1); NRS 34.810(1)(b)(2), (3)¹; *Thomas v. State*, No. 71547, 2017 WL 6541462 (Nev. Dec. 14, 2017) (Order of Affirmance); *Thomas v. State*, No. 79087-COA, 2020 WL 3969898 (Nev. Ct. App. July 13, 2020) (Order of Affirmance). Thomas's petition was procedurally barred absent a

¹The subsections within NRS 34.810 were recently renumbered but not substantively amended. See A.B. 49, 82d Leg. (Nev. 2023). Here, we use the numbering in effect when the district court dismissed the postconviction petition.

demonstration of good cause and actual prejudice. See NRS 34.726(1); NRS 34.810(1)(b), (4). Good cause “may be demonstrated by a showing that the factual or legal basis for a claim was not reasonably available” to be raised in a timely petition. *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (internal quotation marks omitted). Prejudice requires a showing that errors caused actual and substantial disadvantage to the petitioner. *State v. Huebler*, 128 Nev. 192, 197, 275 P.3d 91, 95 (2012). Further, because the State specifically pleaded laches, Thomas was required to overcome the rebuttable presumption of prejudice to the State. See NRS 34.800(2). A petitioner’s claims to overcome the procedural bars must be 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, 1154-55 (2015).

Thomas argues that a recent declaration by Arfat Fadel, in which Fadel recanted his trial testimony and pointed to other suspects, provided good cause to excuse the procedural bars. He asserts that he filed the petition within a reasonable time of obtaining the declaration, and the district court therefore erred in concluding that he did not show reasonable diligence in discovering new evidence. Thomas contends that the declaration, which also described off-the-record conversations during which Fadel tried to provide exculpatory evidence to the prosecutors and further reflects his allegation that the district court judge promised Fadel a certain sentence for his cooperation with the State, gave him the means to prove his claims. Namely, Thomas asserts that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), in failing to turn over evidence that it learned during Fadel’s plea proffer, and that he was convicted by the use of false evidence in violation of *Napue v. Illinois*, 360 U.S. 264 (1959), and *Riley v.*

State, 93 Nev. 461, 567 P.2d 475 (1977). He also contends that he can demonstrate prejudice as his claims have merit.

Brady obliges the State to disclose favorable evidence to the accused. 373 U.S. at 87. “[T]here are three components to a *Brady* violation: the evidence at issue is favorable to the accused; the evidence was withheld by the state, either intentionally or inadvertently; and prejudice ensued, i.e., the evidence was material.” *Mazzan v. Warden*, 116 Nev. 48, 67, 993 P.2d 25, 37 (2000). *Napue* prohibits the knowing use of false evidence and requires the State to correct false evidence when it is apparent. 360 U.S. at 269. Lastly, in *Riley*, this court recognized that “the truth seeking function of the trial is corrupted” by pervasive and apparent perjury even when not encouraged or known by the State. 93 Nev. at 462, 567 P.2d at 476.

Thomas’s claims and good cause arguments rest on Fadel’s recantation. However, “[r]ecanting testimony is easy to find but difficult to confirm or refute: witnesses forget, witnesses disappear, witnesses with personal motives change their stories many times, before and after trial.” *Jones v. Taylor*, 763 F.3d 1242 (9th Cir. 2014) (quoting *Carriger v. Stewart*, 132 F.3d 463, 483 (9th Cir. 1997) (Kozinski, J., dissenting)). Understandably, courts view recantations with suspicion. See *Callier v. Warden*, 111 Nev. 976, 989-90, 901 P.2d 619, 627 (1995) (collecting cases). When a witness recantation is the basis for a postconviction petition, this court will not grant relief unless:

- (1) the court is satisfied that the trial testimony of material witnesses was false; (2) the evidence showing that false testimony was introduced at trial is newly discovered; (3) the evidence could not have been discovered and produced for trial even with the exercise of reasonable diligence; and (4) it is probable that had the false testimony not been

admitted, a different result would have occurred at trial.

Callier, 111 Nev. at 990, 901 P.2d at 627-28. Courts consider the timing, context, original trial testimony, and other trial evidence to evaluate the potential evidentiary weight to afford a recantation. *See Gable v. Williams*, 49 F.4th 1315, 1323 (9th Cir. 2022) (evaluating recantation for actual innocence gateway claim).

Generally, showing that the State withheld evidence in violation of *Brady* parallels the good cause showing required to overcome procedural bars, *Mazzan v. Warden*, 116 Nev. at 67, 993 P.2d at 37, and establishing that the evidence was material under *Brady* and *Napue* can demonstrate prejudice necessary to overcome the procedural bars, *id.*; *see Giglio v. United States*, 405 U.S. 150, 154 (1972) (applying *Brady* materiality test to a *Napue* claim). In a similar vein, a showing under *Callier* that the recantation was newly discovered, parallels the good cause showing. Moreover, a showing that the trial testimony subject to the recantation was false and the petitioner would not have been convicted if that trial testimony had not been admitted, parallels the prejudice showing. *See Callier*, 111 Nev. at 990, 901 P.2d at 627-28.

We agree with the district court that Fadel's declaration, to the extent that it points to other suspects, does not provide good cause to excuse the procedurally barred claims. While Thomas's petition was filed shortly after Fadel executed the declaration, Thomas does not allege what circumstances external to the defense prevented him from seeking the declaration sooner or investigating the other alleged suspects that Fadel described he and Thomas observed batter the victim. *See Lisle v. State*, 131 Nev. 356, 360, 351 P.3d 725, 729 (2015) (requiring petitioner's allegations of good cause to contain specific facts regarding the timing of the discovery

of new evidence relative to filing the procedurally barred claim); *see also Hathaway*, 119 Nev. at 252-53, 71 P.3d at 506 (holding that procedurally barred claims cannot constitute good cause). And contrary to his assertion, the district court did not err in considering Thomas's diligence in pursuing this evidence as courts consider a petitioner's diligence as a factor in *Brady* claims, recantation claims, and claims that are barred by laches. *See Rippo v. State*, 113 Nev. 1239, 1257, 946 P.2d 1017, 1028 (1997); *Callier*, 111 Nev. at 990, 901 P.2d at 627-28; *see also* NRS 34.800(1)(a). As Thomas did not allege sufficient facts to demonstrate good cause to excuse the procedural default, NRS 34.726(1); NRS 34.810(1)(b)(2), (3), or demonstrate that the claim "is based upon grounds of which [Thomas] could not have had knowledge by the exercise of reasonable diligence," NRS 34.800(1)(a), the district court did not err in denying this claim as procedurally barred and barred by laches without conducting an evidentiary hearing. However, to the extent that Fadel's declaration asserts that he told prosecutors about other suspects or was promised a sentence by the district court, the declaration arguably provides good cause as it alleges facts of which Thomas could not have known before Fadel's declaration.

Nevertheless, Thomas failed to allege sufficient facts to demonstrate prejudice. First, Thomas did not allege sufficient facts to demonstrate that Fadel's trial testimony was false. *See Callier*, 111 Nev. at 990, 901 P.2d at 627-28. The evidence at trial showed that the victim left the Bellagio valet area with Fadel and Thomas. The victim was found injured and unconscious in a parking lot. His credit cards, identification, jewelry, watch, and several thousand-dollar casino chips were missing. Later, Fadel's girlfriend cashed in two one-thousand-dollar chips at the Hard Rock Casino. Fadel's testimony about following the victim, inveigling

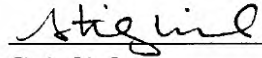
him into his vehicle, and participating in robbing him was consistent with his guilty plea to charges related to that crime as well as surveillance video, cell phone call and location data, and the victim's testimony. *Thomas*, No. 71547, 2017 WL 6541462, at *2. The victim testified consistently with Fadel's trial testimony that the robbery commenced when the man seated behind him, who another witness identified as Thomas when they left the casino valet area, grabbed him, and tried to remove his jewelry. Fadel's trial testimony was further supported by evidence showing his girlfriend cashing in chips from the same casino and in the same denomination as the evidence established the victim possessing. Fadel's declaration offers a competing narrative to explain the victim's injuries, Fadel's possession of the casino chips, and his own decision to plead guilty and testify, but it contradicts Fadel's repeated sworn testimony asserting he was not made any sentencing promises and the victim's testimony concerning how the robbery occurred and does not contain sufficient substantiation to compel a conclusion that Fadel's trial testimony was false in either regard. Additionally, considering the aforementioned evidence of guilt, Thomas did not plead sufficient facts to demonstrate that he would not have been convicted at trial even if Fadel's testimony was not introduced. *See Callier*, 111 Nev. at 990, 901 P.2d at 627-28. Accordingly, the district court did not err in denying this claim without conducting an evidentiary hearing.


Thomas also contends that the failure to consider his petition would result in a fundamental miscarriage of justice. He contends that the district court's conclusion that substantial other evidence supported the verdict overlooks that Fadel's testimony was the primary evidence against him. We disagree.

To demonstrate a fundamental miscarriage of justice sufficient to overcome the procedural bars, a petitioner must make a colorable showing of actual innocence. *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, 423 P.3d 1084, 1097 n.12 (2018); *see Bousley v. United States*, 523 U.S. 614, 623 (1998). Actual innocence requires a showing that “it is more likely than not that no reasonable juror would have convicted [the petitioner] 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)); *see also Pellegrini*, 117 Nev. at 887, 34 P.3d at 537. This “standard is demanding and permits review only in the extraordinary case.” *Berry*, 131 Nev. at 969, 363 P.3d at 1156 (quoting *House v. Bell*, 547 U.S. 518, 538 (2006)). The aforementioned evidence showed that the victim was in Fadel and Thomas’s company before being found beaten and robbed, Fadel’s girlfriend cashed in casino chips consistent with chips taken from the victim, and Fadel pleaded guilty and testified to Thomas’s involvement in the robbery. Thomas did not allege sufficient facts to demonstrate that “it is more likely than not that no reasonable juror” would have convicted him in light of this evidence. *Calderon*, 523 U.S. at 559 (quoting *Schlup*, 513 U.S. at 327). Apart from the convincing evidence corroborating Fadel’s trial testimony, his postconviction declaration was inconsistent with the victim’s testimony and Fadel’s guilty plea canvass and did not suggest the existence of any evidence or testimony that could corroborate his declaration. *See Berry*, 131 Nev. at 968-69, 363 P.3d at 1156 (recognizing that “the district court may make some credibility determinations based on the new evidence in determining whether to conduct an evidentiary hearing”). Therefore, the district court

did not err in dismissing this claim without conducting an evidentiary hearing. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 _____, C. J.
Stiglich

 _____, J.
Lee

 _____, J.
Bell

cc: Hon. Mary Kay Holthus, District Judge
Federal Public Defender/Las Vegas
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk