

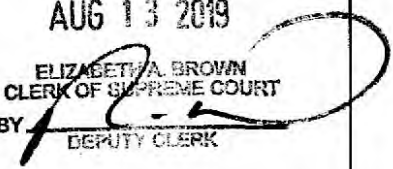
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JUSTIN ODELL LANGFORD,
Appellant,
vs.
RENEE BAKER, WARDEN,
Respondent.

No. 78144-COA

FILED

AUG 13 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Justin Odell Langford appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus.¹ Eighth Judicial District Court, Clark County; Joseph Hardy, Jr., Judge.

Langford filed his petition on November 19, 2019, more than two years after issuance of the remittitur on direct appeal on July 24, 2017. *Langford v. State*, Docket No. 70536 (Order of Affirmance, June 27, 2017). Thus, Langford's petition was untimely filed. *See* NRS 34.726(1). Moreover, Langford'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.² *See* NRS 34.810(1)(b)(2); NRS 34.810(2). Langford's

¹This appeal has been submitted for decision without oral argument. NRAP 34(f)(3).

²*Langford v. State*, Docket Nos. 75825 and 76075 (Order of Affirmance, March 29, 2019).

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).

In his petition, Langford did not attempt to demonstrate good cause to overcome the procedural bars, but rather asserted the procedural bars should not apply because he was actually innocent.³ Langford based his actual-innocence claim upon an assertion that the victim's trial testimony did not conform to the allegations contained in the State's information.


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 v. State*, 131 Nev. 957, 966, 363 P.3d 1148, 1154 (2015). In order to demonstrate a fundamental miscarriage of justice, a petitioner must make a colorable showing of actual innocence—factual innocence, not legal innocence. *Calderon v. Thompson*, 523 U.S. 538, 559 (1998); *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). A petitioner can demonstrate actual innocence by demonstrating "it is more likely than not that no reasonable juror would have convicted him in the light of . . . new evidence." *Berry*, 131 Nev. at 966, 363 P.3d at 1154 (quotation marks omitted). Langford's claim was based upon evidence produced at trial and, therefore, his claim failed because it was not based upon new evidence. Accordingly, the district court did not err by denying Langford's petition as procedurally barred.

³On appeal, Langford argues that the procedural bars should have been tolled during the proceedings for his prior appeals. However, Langford did not raise this good-cause claim before the district court and we decline to consider it in the first instance on appeal. See *McNelson v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999).

Next, Langford argues the State filed an untimely response to his petition and therefore admitted all of the allegations contained within the petition were true. However, “[a]pplication of the statutory procedural default rules to post-conviction habeas petitions is mandatory,” *State v. Eighth Judicial Dist. Court (Riker)*, 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005), and Langford had the burden of pleading and proving facts to overcome the procedural bars, *cf. State v. Haberstroh*, 119 Nev. 173, 181, 69 P.3d 676, 681 (2003). Because Langford failed to meet his burden to overcome the procedural bars, the district court properly denied the petition as procedurally barred even though the State filed an untimely response to Langford’s petition.⁴ Accordingly, we

ORDER the judgment of the district court AFFIRMED.⁵


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

⁴The district court denied the petition without prejudice. However, NRS chapter 34 does not allow for a district court to dispose of a postconviction petition for a writ of habeas corpus by denying it without prejudice. *See* NRS 34.830(2). As discussed previously, the district court properly denied relief due to application of the procedural bars, but should not have done so without prejudice. Because the district court properly denied relief, we affirm. *See Wyatt v. State*, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970).

⁵We have reviewed Langford’s February 28, 2019, and June 3, 2019, documents entitled “Judicial Notice,” and we conclude no relief based upon those documents is warranted.

cc: Hon. Joseph Hardy, Jr., District Judge
Justin Odell Langford
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk