

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MARK R. ZANA,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 80571-COA

**FILED**

**DEC 08 2020**

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

*ORDER OF AFFIRMANCE*

Mark R. Zana appeals from a district court order denying a postconviction petition for a writ of habeas corpus filed on October 22, 2019. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

Zana's petition was untimely because it was filed more than ten years after the remittitur on direct appeal was issued on October 20, 2009,<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 or that the failure to consider his claims would result in a fundamental miscarriage of justice. *See* NRS 34.726(1); NRS 34.810(3); *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). Moreover, because the State specifically pleaded laches, Zana was required to overcome the rebuttable presumption of prejudice to the State. *See* NRS 34.800(2).

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<sup>1</sup>*See Zana v. State*, 125 Nev. 541, 216 P.3d 244 (2009).

<sup>2</sup>*See Zana v. State*, Docket No. 58978 (Order of Affirmance, May 9, 2012).

First, Zana claimed he had good cause because he only recently became aware of the Nevada Supreme Court's clarification of NRS 200.730 in *Castaneda v. State*, 132 Nev. 434, 373 P.3d 108 (2016). Good cause may be demonstrated by "showing that a factual or legal basis for a claim was not reasonably available" during the statutory period for filing the petition. *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). However, a petition that raises such a claim must be filed within one year after the claim became available. *Rippo*, 134 Nev. at 422, 423 P.3d at 1097. Zana filed the instant petition more than three years after his *Castaneda* claim became available. Accordingly, we conclude this claim failed to demonstrate good cause to overcome the procedural defects to Zana's petition.

Second, Zana claimed he had good cause because he was not trained in the law, he did not have access to someone who was trained in the law, and he only had access to a paging system. However, Zana's lack of legal training does not provide good cause, he has not demonstrated that the prison lacked inmate law clerks, and he has not shown that the prison failed to provide adequate means of accessing legal research materials. See generally *Phelps v. Dir., Nev. Dep't. of Prisons*, 104 Nev. 656, 660, 764 P.2d 1303, 1306 (1988); see also *Lewis v. Casey*, 518 U.S. 343, 351-353 (1996). Accordingly, we conclude this claim failed to demonstrate good cause to overcome the procedural defects to Zana's petition.

Third, Zana claimed he had good cause related to his jury misconduct claim because the Nevada Supreme Court misapprehended material facts in the record, the State misrepresented facts in the record, and his counsel facilitated the misapprehension of facts and worked against his interests. However, Zana filed the instant petition more than ten years after the Nevada Supreme Court ruled on his jury misconduct claim, see *Zana*, 125 Nev. at 546-48, 216 P.3d at 248-49, and he has not explained why this claim could not have been raised in a timely postconviction habeas petition, see *Hathaway*, 119 Nev. at 252-53, 71 P.3d at 506. Accordingly, we

conclude this claim failed to demonstrate good cause to overcome the procedural defects to Zana's petition.

Fourth, Zana claimed he had good cause because he received ineffective assistance of counsel during the pendency of his first postconviction habeas petition and attendant appeal. However, Zana did not have a constitutional or statutory right to postconviction counsel, and therefore, ineffective assistance of postconviction counsel did not provide good cause to excuse the procedural bars to his petition. See *Brown v. McDaniel*, 130 Nev. 565, 571, 331 P.3d 867, 871-72 (2014). Accordingly, we conclude this claim failed to demonstrate good cause to overcome the procedural defects to Zana's petition.

Fifth, Zana claimed the district court's failure to consider his petition would result in a fundamental miscarriage of justice because he was actually innocent. To this end, he argued the application of *Castaneda* would have prevented the State from charging him with more than one count of possession of a visual representation depicting sexual conduct of a person under the age of 16, he would have been acquitted of that one count of possession of a visual representation, and, without any counts of possession of a visual representation, the State could not have proven the lewdness counts. Although a colorable showing of actual innocence may overcome procedural bars under the fundamental miscarriage of justice standard, *Pellegrini*, 117 Nev. at 887, 34 P.3d at 537, "actual innocence means factual innocence, not mere legal insufficiency," *Bousley v. United States*, 523 U.S. 614, 623 (1998). As Zana's claim is one of "mere legal insufficiency," he has failed to make a colorable showing of actual innocence, and therefore, he has not demonstrated a fundamental miscarriage of justice sufficient to excuse the procedural bars to his petition.

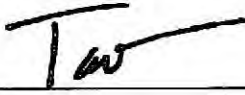
Sixth, Zana claimed that "the State's laches argument [was] bare, naked, and meritless." However, Zana had the burden to overcome the presumption of prejudice to the State that arose when he filed his petition more than five years after the Nevada Supreme Court decided his

direct appeal from the judgment of conviction. See NRS 34.800(2). We conclude Zana failed to demonstrate a fundamental miscarriage of justice sufficient to overcome the State's specific plea of laches. See NRS 34.800(1).

Finally, Zana claims the district court erred by denying his request for counsel in the instant postconviction proceeding. We conclude the district court properly considered Zana's request and did not abuse its discretion by declining to appoint postconviction counsel. See NRS 34.750(1); *Renteria-Novoa v. State*, 133 Nev. 75, 76, 391 P.3d 760, 760-61 (2017).

Having concluded Zana is not entitled to relief, we  
ORDER the judgment of the district court AFFIRMED.<sup>3</sup>

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

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

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

cc: Hon. Michael Villani, District Judge  
Mark R. Zana  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk

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<sup>3</sup>To the extent that Zana claims the district court erred by denying his petition without an evidentiary hearing, we conclude that he was not entitled to an evidentiary hearing. See *Rubio v. State*, 124 Nev. 1032, 1046 n.53, 194 P.3d 1224, 1234 n.53 (2008).